

NO. 2010-KA-00243-COA

In the Court of Appeals of the State of Mississippi

JASON BENARD FOXWORTH,

Appellant,

versus

STATE OF MISSISSIPPI,

Appellee,

**A Direct Criminal Appeal From the Circuit Court of
Harrison County, Mississippi, Second Judicial District,**

BRIEF FOR APPELLANT

"ORAL ARGUMENT REQUESTED"

**Keith Pisarich, Esquire, MSB# [REDACTED]
Attorney for Appellant Foxworth
175-A Lameuse Street
P. O. Box 936
Biloxi, MS 39533
Tel. # (228) 374-4391
Fax. # (228) 374-4399
pisarichkeith@bellsouth.net**

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APPELLANT

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STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

That I, Keith Pisarich, Esquire, the undersigned counsel of record for the appellant **JASON BENARD FOXWORTH**, do hereby certify that the following listed persons, parties and/or entities, have an interest in the outcome of this case. These representations are made in order that the justices of the Court of Appeals for the State of Mississippi may evaluate possible disqualification or recusal.

The Honorable Stephen B. Simpson , Former Circuit Court Judge (trial judge)

The Honorable Lawrence P. Bourgeois, Jr., Circuit Court Judge

The Honorable Jim Hood, Attorney General for the State of Mississippi

Cono Caranna, District Attorney

Mark Ward, Assistant District Attorney (trial prosecutor)

Beth McFayden, Assistant District Attorney (trial prosecutor)

Jason Benard Foxworth, Appellant (Defendant below)

Keith Pisarich, Esquire, trial co-counsel and appellate attorney for the Appellant

Alvin Chase, Esquire, former trial co-counsel for Appellant

State of Mississippi, Appellee

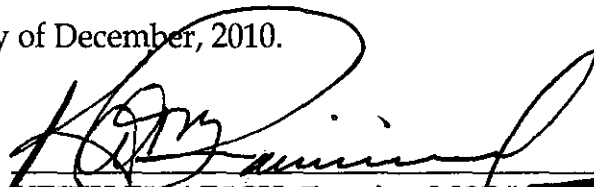
Harrison County Sheriff's Department (investigating agency)

Relatives or next of kin of Larry Darnell Turner, deceased.

Steven Lamar Fairley, co-defendant, co-indictee, & state's trial witness

Mark Kee Brown, co-defendant & co-indictee

SO CERTIFIED, this, the 20th day of December, 2010.



KEITH PISARICH, Esquire, MSB# [REDACTED]
Attorney for the Appellant FOXWORTH

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STATEMENT OF THE ISSUES

1. Whether the state's prosecutor committed reversal error informing the jury, over defense objection, during his opening statement that state's witness Steven Lamar Fairley, a co-defendant and co-indictee of Foxworth in this case, had been charged with this crime, and who had pled to an armed robbery charge, and was serving a sentence in the penitentiary.

Whether the trial judge erred in overruling the defense's contemporaneous and renewed objections and motions for a mistrial.

Whether the state's prosecutor further compounded this error in the second or final part of the state's closing argument in referring to state's witness Steven Lamar Fairley, as saying the witness says he's "guilty" on the witness stand.

Whether the state's prosecutor's comments and remarks regarding co-defendant and co-indictee Steven Lamar Fairley were violative of this state's longstanding and general rule "that where two or more persons are jointly indicted for the same offense, but are separately tried, a judgment of conviction or a plea of guilty against one of them is not competent evidence on the trial of the other because such plea of guilty or conviction is no evidence of the guilt of the party being tried". *Pickens v. State*, 91 So. 906 (Miss. 1920); *Randall v. State*, 806 So.2d 185 (Miss. 2001).

2. Whether the trial judge committed reversal error in failing to grant Foxworth a continuance of the trial date upon the Foxworth's trial counsel's first or second motion

for a continuance of the trial date.

Whether the trial judge followed the proper procedure and criteria announced in *Box* in assessing the Foxworth's need and right to a continuance of the trial date.

Box v. State, 437 So.2d 19 (Miss. 1983).

STATEMENT OF THE CASE

This is a direct criminal appeal of a capital murder case and conviction of Jason Benard Foxworth from the Circuit Court of Harrison County, Mississippi, Second Judicial District, Biloxi, MS. (R.E. pp. 12-13)(Rec. pp. 150-151). Your appellant Jason Benard Foxworth (hereinafter "Foxworth") along with Mark Kee Brown (hereinafter "Brown") and Steven Lamar Fairley (hereinafter "Fairley") were indicted for the capital murder of Larry Darnell Turner (hereinafter "Turner"), by the 2006 February Term of the Harrison County Grand Jury, Second Judicial District, in an indictment filed on May 8, 2006, being Cause No. B2402-2006-00167 in the circuit court below. (R.E. pg. 20) (T.R. pp. 14).

The indictment did specifically allege that on or about July 6, 2005, Foxworth, Brown, and Fairley did wilfully, unlawfully, feloniously and with or without design to effect death, kill and murder Turner, a human being, while in the commission of the crime and felony of Robbery, to-wit: Robbery, as defined by Section 97-3-73 of the Mississippi Code of 1972, contrary to and in violation of Section 97-3-19(2)(e), Mississippi Code of 1972, as amended, and against the peace and dignity of the State of

Mississippi. (R.E. pg. 20)(T.R. pg. 14).

Prior to Foxworth's trial, co-defendant and co-defendant Fairley entered a plea of guilty to the reduced charge of armed robbery and received a sentence of 20 years from the same judge that was Foxworth's trial judge. (T.T. Vol. I, pp. 40, 46,47).

Foxworth proceeded to trial and was found guilty of capital murder. (R.E. pp. 12-13)(T.R. Vol. 1, pg. 150 & Vol. II pg. 151). At the end of the sentencing phase, the jury returned a verdict sentencing Foxworth to life imprisonment without the possibility of parole. (R.E. pp. 14,15,16-19)(T.R. Vol. I, pg. 150 & Vol. II, pg. 151)(T.T. Vol. VI. pp. 779-782).

In a later and separate trial, Brown was also convicted of capital murder and received a sentence of life imprisonment without the possibility of parole. Foxworth believes that Brown's conviction and sentence is presently on appeal to this Court or will be on appeal shortly.

Foxworth, feeling aggrieved by several events and rulings occurring during his trial, prosecutes this appeal seeking reversal of his conviction and sentence in the trial court below. (R.E. pp. 37-38)(T.R. Vol. II, pp. 189-190).

Foxworth has been continuously incarcerated on this capital murder charge since the date of his arrest in July of 2005. Foxworth remains incarcerated and is presently in the custody of the Mississippi Department of Corrections.

STATEMENT OF THE FACTS

On or about July 6, 2005, Tavares Turner (hereinafter "Tavares", not Turner, so as not to be confused with Larry Darnell Turner, the victim and decedent in this case, who will be referred to as "Turner"), his uncle Larry Darnell Turner ("Turner", the decedent herein), cousin Lenny Jackson (hereinafter "Jackson"), and roommate Michael Williams (hereinafter "Williams") all lived at 366 Barkwood Circle, in D'Iberville, Mississippi. (T.T. Vol III, pg. 387) This residence is sometimes referred to as the Turner residence.

The prosecution presented Tavares and Fairley as fact or occurrence witnesses at the trial. These two state witnesses gave the following accounts of what transpired on July 6, 2005, at the Turner residence.

A short while before July 6, 2005, Tavares began holding a large sum of cash money (approximately \$10,000.00) which belonged to his roommate Williams. (T.T. Vol. III, pg. 394). Williams had received this money as a result of a pension payment. (T.T. Vol. III, pg. 394). Sometimes, Tavares would carry a large portion of this money on his person and showed it to some people. Tavares showed some of this cash money to Fairley, who had been a co-worker of Tavares for about a year, both working for the City of Gulfport. (T.T. Vol. IV, pp. 556-558).

Fairley knew Foxworth and told him about Tavares having this large sum of cash money. (T.T. Vol. IV, pp. 559). According to Fairley, Foxworth pressured him to show him where Tavares lived so Foxworth could rob Tavares of this cash money. (T.T. Vol.

IV, pp. 558)(T.T. Vol. IV, pg. 570). Prior to July 6, 2005, Fairley knew where Tavares lived, he had been over to Tavares's residence once before. (T.T. Vol. IV, pp. 557,563).

On July 6, 2005, Fairley called Tavares to let Tavares know that he was coming over. (TT. Vol. III, pp. 387)(T.T. Vol. IV, pp. 560-1). A few minutes later, Fairley called again and talked with Jackson. A few minutes later, Fairley arrived at the Turner residence around 5:00 p.m. and Jackson let him in. (TT. Vol. III, pp. 388). Fairley went in and sat down with the two others, Tavares and Jackson. They talked and watched television. (T.T. Vol. IV, pp. 562). At this time, Turner was in his back bedroom asleep. Roommate Williams was not at home.

Following Fairley in another vehicle was Foxworth, Brown, and another person, according to Fairley. (T.T. Vol. IV, pp. 561-2). Approximately 5-10 minutes later, Foxworth, Brown, both armed with pistols, and this other person came in the front door. They forced everyone to the floor and demanded the money. According to Fairley, there was another unidentified person with Foxworth and Brown. (T.T. Vol. IV, pp. 564). Later, they went to the back bedroom and brought Turner to the front and forced him to lie on the floor. (T.T. Vol. III, pp. 389)(T.T. Vol. IV, pp. 564). They continued to demand the money. Tavares had some of the money in a sock in his pocket and the remaining money was in a safe in the house. They got the money from Tavares and then tied him up. (T.T. Vol. III, pg. 397). Tavares told them where the safe was and they got the money out of the safe. (T.T. Vol. III, pg. 405).

Then one gunshot rang out. After the gunshot, one of them made a comment like

now, you know, we're not playing with you. (T.T. Vol. III, pg. 398, 405)(T.T. Vol. IV, pg. 567). According to Fairley, Brown as the closest to Turner when he heard the gunshot and Brown was the one that made the comment. (T.T. Vol. IV, pg. 567).

Dr. Paul McGarry testified that Turner was fatally shot with a single gunshot wound to the back area of his neck. (T.T. Vol. V, pg. 605).

Shortly thereafter, Foxworth and Brown ran from the residence. Upon leaving the residence, one of them told Fairley to get his license, ID, or cell phone and leave. (T.T. Vol. III, pp. 389). Fairley followed behind them. (T.T. Vol. IV, pg. 567).

The law enforcement authorities were called and responded in a matter of minutes. (T.T. Vol. III, pg.406).

A short time later, approximately 1 to 2 hours later after the shooting, Fairley returned to the Turner residence and turned himself in to authorities. (T.T. Vol. IV, pg. 569). Fairley bonded out of jail the next day.

Fairley gave a statement to authorities implicating Foxworth, Brown and another unidentified person as the people that were involved in the robbery and murder. (T.T. Vol. IV, pg. 569). Fairley testified at trial and implicated Foxworth. (T.T. Vol. IV, pg. 564).

In a photo lineup on the evening of July 6, 2007, Tavares only identified Foxworth to the extent that Foxworth looked like one of the two men. (T.T. Vol. III, pp. 445-447).

Thereafter, Foxworth and Brown were arrested, charged and later indicted along with Fairley for the capital murder of Larry Darnell Turner.

In a separate trial, Foxworth went to trial on November 13, 2007, in Harrison County Circuit, Second Judicial District, in Biloxi.

Even though on the evening of July 6, 2005, Tavares only identified Foxworth to the extent that Foxworth looked like one of the men, at Foxworth's trial during the week of November 13, 2007, Tavares gave an in-court positive identification of Foxworth. (T.T. Vol. III, pp. 445-447)(T.T. Vol. III, pg. 411).

Fairley testified for the state implicating Foxworth and Brown as the two men that were involved in the robbery and murder.

State's witness Nancy Kurowski, an evidence technician with the Harrison County Sheriff's Department, testified that there was no physical evidence such as fingerprints, trace evidence, etc., which would link Foxworth or any other person to the murder of Turner. (T.T. Vol. IV, pp. 532-536).

In the guilt phase, the defense presented Jackson as a fact or occurrence witness. Jackson testified that he could not make any identification following the incident. (T.T. Vol. V, pp. 621). Jackson also testified that he could not make any identification of Foxworth at trial. (T.T. Vol. V, pp. 616-621).

SUMMARY OF THE ARGUMENT

1. Foxworth asserts that the state's prosecutor committed reversal error informing the jury, over defense objection, during his opening statement that state's witness Steven Lamar Fairley, a co-defendant and co-indictee in this case, had been charged with this crime, and who had pled to an armed robbery charge, and was serving a sentence in the penitentiary. The trial judge erred in overruling the contemporaneous defense objections and defense motions for a mistrial. The state's prosecutor further compounded this error in the second or final part of the state's closing argument in referring to state's witness Steven Lamar Fairley, as the witness saying he's "guilty". The state's prosecutor's comments and remarks regarding co-defendant and co-indictee Steven Lamar Fairley were violative of this state's longstanding and general rule that where two or more persons are jointly indicted for the same offense, but are separately tried, a judgment of conviction or a plea of guilty against one of them is not competent evidence on the trial of the other because such plea of guilty or conviction is no evidence of the guilt of the party being tried, which warrants and mandates the reversal of Foxworth's conviction of capital murder and the remanding of Foxworth's case for a new trial.

2. The trial judge committed reversal error in failing to grant Foxworth a continuance of the trial date upon the Foxworth's trial counsel's first or second motion for a continuance of the trial date and that the trial judge did not follow the proper procedure and criteria set forth in *Box* in assessing the propriety of granting Foxworth's

motion for a continuance of the trial date. The trial judge's error in not granting Foxworth a reasonable continuance of the trial warrants and mandates in and of itself a reversal of Foxworth's conviction of capital murder and a remanding of Foxworth case for a new trial.

ARGUMENT

1. **That the state's prosecutor made prejudicial remarks in his opening statement to the jury when he told the jury that co-defendant and co-indictee Steven Lamar Fairley was charged with this crime and had pled to an armed robbery charge and that he was serving a sentence in the penitentiary for his action.**

In his opening statement to the jury, the state's prosecutor, made the following remark to the jury:

"Ladies and gentlemen, we'll also have testimony in this case that Mr. Fairley was charged with this crime, I want to tell you up front, and he pled to armed robbery charge". (T.T., Vol. III, pg. 369)(R.E. pg. 39).

The defense made a contemporaneous objection, which was overruled by the trial judge. Thereafter, the defense made a contemporaneous motion for a mistrial, which was also overruled by the trial judge. (T.T., Vol. III, pg. 369-370)(R.E. pp. 39-40).

On the following morning of the trial, defense counsel provided the trial judge with authorities and case law to substantiate the defense's objection and motion for a mistrial. (T.T. Vol, pp. 496-520)(R.E. pp. 41-65). During this lengthy colloquy with the

trial judge, defense trial counsels had provided the following Mississippi cases: *Pickens v. State*, 91 So. 906 (Miss. 1990); *McCray v. State*, 293 So.2d 807 (Miss. 1974); *Ivy v. State*, 301 So.2d 292 (Miss. 1974) and *Henderson v. State*, 403 So.2d 139 (Miss. 1981) and *Randall v. State*, 806 So.2d 185 (Miss. 2001). (T.T. pp. 497-498)(R.E. pp. 42-43).

These Mississippi cases along with others will be discussed in detail below.

At the beginning of this hearing outside of the presence of the jury, Foxworth's trial counsel again renewed his objections and motion for a mistrial, which were again overruled by the trial judge. (T.T. Vol. IV, pp. 497, 517). The trial judge commented that if it was error, it was harmless error. (T.T. Vol. IV, pp. 518).

At the end of the discussion of the present defense objections and motions for a mistrial, the trial judge stated:

"All right. It is a very close question based on the cases that I have read, but I think taken in the totality of the circumstances and the evidence that is going to be presented in the state's case in chief, that hopefully it is harmless error. All right. Bring the jury in, please." (T.T. Vol. IV, pg. 520)(R.E. pg. 65).

By not changing his ruling on the defense objection, the trial judge failed to give admonition to the jury to disregard the state's prosecutor's remarks about Fairley's plea and sentence.

By at least not sustaining the defense objection, Foxworth's defense counsel where not required to seek a request for an admonition from the trial judge. If the trial judge still thought that the defense was still mistaken in its objection and still overruled it at this point, there was no legal basis for defense counsel to ask for an admonition to

the jury or cautionary instruction to the jury from the trial judge.

The state's prosecutor added further prejudice by making a comment in his closing remarks to the jury that Fairley testified "I'm guilty" on the witness stand. The defense made a contemporaneous objection and motion for a mistrial. The trial judge sustained the defense's objection this time but overruled the defense motion for a mistrial. (T.T. pg. 672)(R.E. pg. 66). Regardless of the judge's ruling, more damage and prejudice were done to Foxworth. It is totally inconsistent for the trial judge to sustain this defense objection but not to have sustained the earlier defense objection following the state's prosecutor's comments as to Fairley's plea and sentence.

In the present case, Foxworth, Brown, and Fairley were jointly indicted. (T.R. Vol. I, pg. 14)(R.E. pg. 20). Before Foxworth's trial, Fairley had pleaded guilty to the reduced charge of armed robbery. He received a 25 year sentence. The armed robbery in question being the underlying predicate armed robbery felony charge to this capital murder charge in this case. The jury would have been put on notice of this even more by the State's prosecutor informing them that he (Fairley) "was charged with this crime". See *supra*.

As early as 1920, in *Pickens v. State*, the Mississippi Supreme Court approved the general rule announced in 16 C.J. 670: "Where two persons have been jointly indicted for the same offense, but are separately tried, a judgment of conviction against one of them is not competent on the trial of the other inasmuch as his conviction is no evidence either of joint action or of the guilt of the accused. 91 So. 906 (Miss. 1920). The

Court added, "It seems needless for us to say that the court committed grave and fatal error in permitting this testimony to be introduced by the state. The plea of guilty of Buck Kennard, and the conviction of Gerrard White, and his confession implicating appellant, were all incompetent to establish the guilt of appellant, and especially so since the confession was made after the commission of the crime, and not in the presence of appellant. *Pickens v. State*, 91 So. 906 (Miss. 1920).

In *Pieper v. State*, the State offered Rucker, a co-indictee, as a witness against the accused Pieper. After pleading surprise and being allowed to cross-examine him, the district attorney brought out that Rucker had entered a plea of guilty to the crime. *Pieper v. State*, 134 So.2d 157 (Miss. 1961). In *Pieper*, the Mississippi Supreme Court held that where two or more persons were jointly indicted for the same offense, but separately tried, judgment of conviction against one of them was not competent on the trial of the other, since his plea of guilty was not evidence of the guilt of the accused. *Pieper v. State*, 134 So.2d 157 (Miss. 1961).

In *Buckley v. State*, Travis Buckley and Billy Roy Pitts were jointly indicted for kidnaping. *Buckley v. State*, 223 So.2d 524 (Miss. 1969). Buckley was granted a severance. Testimony was presented to the jury in Buckley's trial that Pitts, the co-indictee, pled guilty, and that as a result of his plea of guilty he had been sentenced to serve a term of five years in the state penitentiary. Buckley had made an objection to this testimony. Again, the Mississippi Supreme Court cited the well settled law in this state that where two or more persons were jointly indicted for the same offense, but

separately tried, judgment of conviction against one of them was not competent on the trial of the other, since his plea of guilty was not evidence of the guilt of the accused.

Buckley v. State, 223 So.2d 524, 528 (Miss. 1969). Citing *State v. Thornhill*, 171 So.2d 308 (Miss. 1965); *Pieper v. State*, 134 So.2d 157 (Miss. 1961); and *Pickens v. State*, 91 So. 906 (Miss. 1922).

In *Buckley*, the Court went on to note "Not only was this testimony designed to lead the jury to believe that since Pitts had plead guilty to the charge, that his co-indictee, Buckley, was also guilty, but it was also designed to bolster the testimony of Pitts. *Buckley v. State*, 223 So.2d 524, 528 (Miss. 1969).

In *Ivy v. State*, Mike Ivy and Clinton Smith were jointly indicted for the sale of a controlled substance. *Ivy v. State*, 301 So.2d 292 (Miss. 1974). The cases were severed. The pertinent portions of Smith's testimony was claimed by Ivy to be prejudicial:

BY MR. LOCKARD: (Continuing)

Q. Now, Mr. Smith, I believe you were jointly indictee in this matter, were you not?

A. Yes, sir, I was.

Q. And you have been convicted-

BY MR. WRIGHT: If the Court please, we now object and move for a mistrial.

BY THE COURT: Objection will be overruled.

BY MR. LOCKARD: (Continuing)

Q. Mr. Smith, you have been sentenced, have you not?

A. Yes, sir, I have.

BY MR. WRIGHT: We renew our objection and make the same objection. *-Ivy v. State*, 301 So.2d 292, 293 (Miss. 1974).

The Court went on to state that “the jury thus had before it evidence of the co-indictee’s conviction and sentence from which it could likely conclude that Ivy was guilty because his associate and co-indictee was convicted and sentenced, or more modernly put, the jury could find he was guilty by association.” *Ivy v. State*, 301 So.2d 292, 293 (Miss. 1974).

The Court further stated, “We have consistently held evidence of this nature to be inimical to a fair trial.” *Ivy v. State*, 301 So.2d 292, 293 (Miss. 1974).

The Court noted that the rule in this state is in accord with those of many other states. Citing 48 A.L.R.2d 1016 (1956). The Court reversed Ivy’s conviction and remanded for a new trial. *Ivy v. State*, 301 So.2d 292, at 293 (Miss. 1974).

In *Henderson v. State*, the appellant Gable Henderson was charged along with his twin brother Michael Henderson, with armed robbery. *Henderson v. State*, 403 So.2d 139 (Miss. 1981). This appeal presented the question of whether the lower court should have declared a mistrial when the defendant’s witness was improperly asked on cross-examination by the district attorney whether he had been indicted for burglary. Also presented on this appeal was the impropriety of the district attorney inquiring on cross-examination, of co-indictee, Michael Henderson, if the jury had convicted him for the same offense of armed robbery for which the defendant was being tried. Before an objection could be interposed the witness answered, “Yea, because of you...”

Thereafter, objections and motions for a mistrial were immediately and timely made in both instances and the errors were properly preserved. *Henderson v. State*, 403 So.2d 139, 140 (Miss. 1981).

In the *Henderson* case, the trial judge very properly sustained the objection but overruled the motions for a mistrial, and in lengthy statements admonished the jury to disregard the improper questions asked by the district attorney and the answers thereto. *Henderson v. State*, 403 So.2d 139, 140 (Miss. 1981).

The Court stated, "In most cases, when an objection is made to improper questions by a district attorney and the court sustains the motion and admonishes the jury to disregard the improper questions and evidence, we have held that any prejudice created by the questions was cured and the trial court properly overruled the motion for a mistrial. *Henderson v. State*, 403 So.2d 139, 140 (Miss. 1981); Citing *Reid v. State*, 266 So.2d 21 (Miss. 1972); *Thomas v. State*, 285 So.2d 148 (Miss. 1973).

The Court concluded as follows, "Under the circumstances, once the jury was apprised of the fact that Michael Henderson had previously been charged and convicted for his participation in the offense for which the appellant was being tried, the jury's verdict of guilty was such a certainty as to deny the appellant a fair trial. *Henderson v. State*, 403 So.2d 139, 141 (Miss. 1981). The Court reversed Henderson's conviction and remanded for a new trial. *Id.* at 141.

In *Randall v. State*, the appellant asserted that the trial court committed reversible error by allowing the prosecution to repeatedly inform the jury that his co-

indictree was convicted by a separate jury on the same capital murder charge. 806 So. 193, 194 (Miss. 2001).

The language that Randall complains of was spoken by Harry Thomas, one of Randall's co-defendants, during re-direct examination. It reads as follows:

Q. And as it was characterized during cross-examination, Mr. Stokes, when the State tried to convict Nomdray Stokes, when that was asked of you three times, you did appear and testify against him, didn't you?

A. Yes, sir.

Q. Did you testify as to the same thing you said today?

A. To the best of my knowledge, yes, sir.

Q. *And was Nomdray Stokes convicted of being present, participating in capital murder?*

A. Yes, sir.

MR. SIMPSON: That's all.

Id. at 194-5

Randall asserted that further injustice was done by the following statements made by the prosecution during closing arguments:

BY MR. SIMPSON:

It gets worse than that. Veronica Johnson, Tony Williams, and Harry Thomas, who all stood up here with their lawyers on the eve of trial and admitted their guilt and were going to the penitentiary, and then *Nomdray Stokes, who took his chances with 12 citizens like yourself and was found guilty of capital murder*, this grand conspiracy that we all contrive got those people to do that.

* * *

And then, but today, the defense said, it is our theory of the case that none of ... these people had a thing to do with this. Not Veronica,

Tony Williams, Harry Thomas, Nomdray Stokes or the defendant Armon Randall. Three of them just decided to take the blame, *and the other one has been convicted for his participation, for being present and participating in an armed robbery and murder of Eugene Daniels.* We came up here and told you in the beginning we are not going to be able to answer every question you have, but from the evidence you will be convinced, and I suspect are at this point, must be, beyond a reasonable doubt that there are, in fact, the five people. *And Armon Randall is the last of the five people to be accountable for his actions.* *Id.* at 195

The State acknowledged that the jury was informed that Nomdray Stokes was convicted on the same capital murder charge for which Randall was on trial, and that normally this would be error as a matter of law. *Id.* at 195

However, the State responded by asserting that Randall's trial counsel made no objection, and consequently waived this issue for appeal. Secondly, that comments by Randall's attorney opened the door for the testimony.

As to the waiver issue, the Court said, "It is incumbent on defense counsel to raise a proper objection when the offensive language is uttered or waive appellate review of the issue. This rule provides the trial court with the opportunity to sustain an objection and admonish the jury to disregard moments after the erroneous language it uttered. *Id.* at 195. Citing *Foster v. State*, 639 So.2d 1263, 1288-89 (Miss. 1994). "If no contemporaneous objection is made, the error, if any, is waived. Citing *Cole v. State*, 525 So.2d 365, 368 (Miss. 1988). "The defendant who fails to make a contemporaneous objection must rely on plain error to raise the assignment on appeal." *Foster*, 639 So.2d at 1288-89.

"This rule's applicability is not diminished in a capital case." *Cole*, 525 So.2d at

368.

Id. at 195.

In *Randall*, the State noted the following exchange in the trial court:

MR. SIMPSON: Your Honor, we approached the bench before we did redirect examination to advise the Court and to also put defense counsel on notice outside the presence of the jury that the State is of the opinion based on defense counsel's repeated comments on the State's attempt to convict Nomdray Stokes, and also reference to the Stokes' trial transcript, and the dates of the trial so forth, specifically his quote on three separate occasions in his cross-examination of the State trying to convict Nomdray, that an inference has been placed before the jury box that the State was unsuccessful. That door has been opened, and we are allowed not only to go to whether or not the witness testified at that trial, but as to the outcome.

THE COURT: Mr. Crosby.

MR. SIMPSON: Not as to any sentence, but as to verdict on guilt or innocence.

MR. CROSBY: *I agree to a stipulation if the State wants to read a stipulation that effect, that, number one, it is hereby stipulated and agreed by the parties that Nomdray was convicted of capital murder. Number two, that the State did not get the death penalty. Number Three, that Armon Randall was not-Armon Randall's attorney was not involved in that case. I would agree if we read a stipulation just like that.*

MR. SIMPSON: Your Honor, it would be improper as a matter of law, I believe to introduce to the jury what a sentence a prior jury deliberated upon and reached. As to the verdict, it would have also been improper until the defense unsuccessfully on three different occasions during his cross-examination failed to try and convict the defendant, Nomdray Stokes.

THE COURT: All right. Based upon the wording of the questions and questions that Mr. Crosby asked and any response given, I think at this time it-the door has been opened, it would be appropriate, and I am going to allow the State to ask Mr. Thomas if, in fact, he

testified in the trial of Nomdray Stokes, and if, in fact, Mr. Stokes was convicted of capital murder. That is as far as we are going. (emphasis added). *Id.* at 195

In *Randall*, the State asserted that not only did counsel for Randall fail to raise a contemporaneous objection, he offered to stipulate to it. When the State declined to accept the defendant's stipulation, counsel for Randall did not object to the admission of this evidence. *Randall v. State*, 806 So.2d 185, at 196 (Miss. 2001).

The Court further commented on the case of *House v. State*, where the Court said that "generally, this means that the matter must be presented to the trial judge in such a form that the trial judge has the opportunity to consider it with full knowledge of the respective contentions of the parties". *Id.* at 196. Citing *House v. State*, 445 So.2d 815 (Miss. 1984).

The Court further noted, "Assuming arguendo that Randall did not properly preserve this matter for appeal: This Court has recognized an exception to procedural bars where a fundamental constitutional right is involved. *Id.* at 196. Citing *Conerly v. State*, 760 So.2d 737, 740 (Miss. 2000).

"The right to a fair trial by an impartial jury is fundamental and essential to our form of government. It is a right guaranteed by both the federal and state constitutions." *Id.* at 196-7. Citing *Johnson v. State*, 476 So.2d 1195, 1209 (Miss. 1985).

In closing, the *Randall* court stated, "While this is admittedly a close call as to whether the questions by defense counsel actually suggested the outcome of the Stokes trial was unsuccessful, the rule in this State is clear: death is different. In capital cases,

all bona fide doubts are resolved in favor of the defendant. It was reversible error to allow Thomas to testify as to the outcome of the Stokes trial. This error was compounded by the egregious exploitation of the improperly admitted information during closing arguments. While the door may have been opened, the screen door was still closed. The State should not take the bait. This error alone warrants reversal. *Id.* at 200.

In *Johns v. State*, the trial counsel did not make a contemporaneous objection as to testimony that an accomplice had pled guilty and been sentenced. 592 So.2d 86, 89 (Miss. 1991). Trial counsel did not object at any time during this examination. *Id.* at 89. The Court noted that absent the denial of a fundamental fair trial, any error is waived. *Id.* at 90.

The Court in *Johns* went on to the basic and long standing rule against allowing a judgment of conviction of a co-defendant or co-indictee. 592 So.2d 86, 90 (Miss. 1991). Citing *State v. Thornhill*, *Pieper v. State*, and *Pickens v. State*, *supra*.

The Court went on to state that "The law is analogous with respect to a co-indictee as well as an accomplice in this respect. In the case sub justice, the jury became aware through the testimony of Smith and the agent that she had been tried and convicted of a felony. It was apparent from the testimony that the offense for which she was convicted occurred the same day as the offense for which Johns was on trial." Continuing the Court stated, "Although no contemporaneous objection was made, in these circumstances, as in *Henderson* and *Griffin v. State*, 293 So.2d 810 (Miss. 1974), the

testimony was error, and the defendant was, as a result, denied a fair trial. Therefore, the error can be addressed on appeal absent a contemporaneous objection. *Johns v. State*, 592 So.2d 86, 90 (Miss. 1991)(Citing *Griffin v. State*, 557 So.2d 542, 551-54 (Miss. 1990).

The Court in *Johns* went on to state that “the admission of the testimony regarding Smith’s conviction denied Johns a fair trial and is reversible error. *Johns v. State*, 592 So.2d 86, 90 (Miss. 1991).

In the instant case, Foxworth made a contemporaneous objection and motion for a new trial. The following morning outside presence of the jury, Foxworth’s trial counsel presented the trial judge with ample legal authority to show that the state’s prosecutor had erred and that such error was highly prejudicial.

At Foxworth’s trial, Fairley’s testimony was critical for a conviction. The prosecution did not have any physical evidence that linked Foxworth or anyone else to the murder of Turner. The prosecution’s case rested squarely on the in-court testimony of Fairley and Tavares. Although Tavares made an in-court identification of Foxworth at trial in November of 2007, Tavares’s initial photo identification in July of 2005 was far less than positive. Tavares’s out-of-court and in-court identification testimony was suspect on several points. This is why the improper bolstering of Fairley by the state’s prosecutor is so grave and prejudicial to Foxworth. If the jury believed Fairley had admitted his guilt to the extent of causing him to be serving time in the penitentiary at the time of Foxworth’s trial, the jury could only be led to believe if Fairley’s guilty then

the one he's accusing here today (Foxworth) in court must also be guilty.

2. That the trial court erred in refusing to grant defendant's motions for continuance.

The trial of Foxworth had been set for November 13, 2007.

On November 2, 2007, Foxworth's trial counsels filed a motion for a continuance of the trial date. (R.E. pp. 21-24)(Rec. Vol. I, pp. 72-75). Among other things, this defense motion for a continuance alleged Foxworth and his defense counsels needed additional time to prepare.

On November 5, 2007, Foxworth's defense counsels delivered a one-page letter to the state's prosecutors requesting delivery of audio tapes as to any written statements of any co-defendant and/or witness in the case. (R.E. pp. 25)(T.R. Vol. I, pg. 76). This letter also requested delivery of all video tapes and relevant photographs. The requested materials in this letter was basically cumulative to an earlier demand for discovery materials from the state's prosecutors. Prior thereto, on March 30, 2007, Foxworth's trial counsels had filed "Defendant Foxworth's Written Demand for Discovery". (T.R. Vol. I, pp. 62-64). This defense discovery demand basically tracked **Rule 9.04 "Discovery"** of the *Uniform Circuit and County Court Rules*.

The essential purpose of **Rule 9.04** is the elimination of trial by ambush or surprise. *Robinson v. State*, 508 So.2d 1067, 1070 (Miss. 1987). Disclosure is the hallmark of fairness and the quest for justice that should be the goal of the criminal

justice system. *Id.* at 1070.

On November 9, 2007, Foxworth's defense counsels filed "Defendant Foxworth's Second Motion for Continuance of Trial Date". (R.E. pp. 26-29)(T.R. Vol. 1, pp. 87-90).

Among other things, this second motion made a specific assertion that Foxworth's defense counsel had just recently received additional discovery including the autopsy report, audio tapes and photographs. Foxworth and his trial counsels stated that additional time was needed to further prepare for trial and to examine the newly provided evidence. (T.R. Vol. I, pp. 26-29).

Foxworth's trial counsel stated and referred to a receipt that he signed that morning acknowledging that the state's prosecutor had just turned over a list of photos as well as four audiotapes. (T.T. Vol. I. pg. 58). Some of the photos were duplicates of black and white photos previously provided, but there were probably an additional 20 new photographs. (T.T. Vol. I. pg. 61).

As stated in the record, Foxworth's trial counsels were not asking for any lengthy continuance. (T.T. Vol. I. pg. 58). Foxworth's trial counsels were only requesting a continuance until the month of January, 2008, as early as January 7 or 14, 2008, when this particular trial judge was scheduled to be back on the bench in Harrison County Circuit Court, Second Judicial District, in Biloxi. (T.T. Vol. I. pg. 58).

The trial judge denied Foxworth's motion for a continuance of the trial date. (T.T. Vol. I. pg. 64).

The trial court is vested with broad discretionary powers in granting or refusing

to grant trial continuance. *Pitts v. State*, 832 So.2d 1281 (Miss.App. 2002). The decision to grant or deny a continuance is left to the sound discretion of the trial court. *Gray v. State*, 799 So.2d 53 (Miss. 2001).

The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court and will not be grounds for reversal unless shown to have resulted in manifest injustice. *Smiley v. State*, 815 So.2d 1140 (Miss. 2002).

When faced with a discovery violation, technical or otherwise, the trial court should follow the following procedure, as in *Box*:

(1) Upon defense objection, the trial court should give the defendant a reasonable opportunity to become familiar with the undisclosed evidence by interviewing the witness, inspecting the physical evidence, etc.

(2) If, after this opportunity for familiarization, the defendant believes he may be prejudiced by lack of opportunity to prepare to meet the evidence, he must request a continuance. Failure to do so constitutes a waiver of the issue.

(3) If the defendant does request a continuance the State may choose to proceed with trial and forego using the undisclosed evidence.

Box v. State, 437 So.2d 19, 23-24 (Miss. 1983).

Failure to follow the *Box* guidelines is prejudicial error. *Darghty v. State*, 530 So.2d 27, 32 (Miss. 1988).

In *Inman v. State*, the Mississippi Supreme Court noted that there is no hard and fast rule determining how much time is reasonable time for the defense to assimilate unexpected and previously undisclosed evidence offered by the State. *Inman v. State*, 515 So.2d 1150, 1153 (Miss. 1987). Where the State is tardy in furnishing discovery

which it is obligated to disclose and after initial objection is made by the defense, the defendant is entitled upon request to a continuance postponement of the proceedings reasonable under the circumstances. *Inman*, 515 So.2d at 1153 (quoting *Foster v. State*, 484 So.2d 1009 (Miss. 1986)). Before this procedure can be followed, it is incumbent upon the defendant to make a timely objection. *Nixon v. State*, 533 So.2d 1078, 1090 (Miss. 1987).

Foxworth contends that his trial counsels did make a timely objection and motion for a continuance, as contemplated in *Box*. The defense believes that the trial court did not follow those procedures as outlined in *Box*, and therefore, Foxworth's conviction and sentence should be reversed and remanded for a new trial.

The defense's request for a continuance from the trial date of November 13, 2007, to the first part of January of 2008, the next term of court the then presiding judge would be back on the bench in the same courthouse and in the same courtroom would have been reasonable and should have been granted.

CONCLUSION

Foxworth asserts that the state's prosecutor committed reversal error informing the jury, over defense objection, during his opening statement that state's witness Steven Lamar Fairley, a co-defendant and co-indictee in this case, had been charged with this crime, and who had pled to an armed robbery charge, and was serving in the penitentiary. The trial judge erred in overruling the contemporaneous defense objections and defense motions for a mistrial. The state's prosecutor further compounded this error in the second or final part of the state's closing argument in referring to state's witness Steven Lamar Fairley, as being "guilty". The state's prosecutor's comments and remarks regarding co-defendant and co-indictee Steven Lamar Fairley were violative of this state's longstanding and general rule that where two or more persons are jointly indicted for the same offense, but are separately tried, a judgment of conviction or a plea of guilty against one of them is not competent evidence on the trial of the other because such plea of guilty or conviction is no evidence of the guilt of the party being tried, which warrants and mandates the reversal of Foxworth's conviction of capital murder and the remanding of Foxworth's case for a new trial.

Secondly, the trial judge committed reversal error in failing to grant Foxworth a continuance of the trial date upon the Foxworth's trial counsel's first or second motion for a continuance of the trial date and that the trial judge did not follow the proper procedure and criteria set forth in *Box* in assessing the propriety of granting Foxworth's

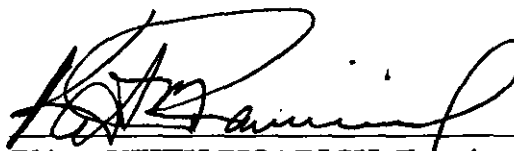
motion for a continuance of the trial date. The trial judge's error in not granting Foxworth a reasonable continuance of the trial warrants and mandates in and of itself a reversal of Foxworth's conviction of capital murder and a remanding of Foxworth case for a new trial.

ORAL ARGUMENT REQUESTED

Foxworth's appellate counsel respectfully requests the opportunity to address this Court in oral argument. For his conviction in this case, Foxworth received a life sentence without the possibility of parole. Foxworth has asserted grave errors at his trial which warrant a reversal of his conviction and the remand for a new trial. Foxworth believes that oral argument will give this Court the best opportunity to fully explore and then be completely informed as to the legal and factual issues of this case which should necessitate reversal.

RESPECTFULLY SUBMITTED, this, the 20th day of December, 2010.

JASON BENARD FOXWORTH - Appellant



BY: KEITH PISARICH, Esquire, MSE
Attorney for the Appellant
175-A Lameuse Street
P. O. Box 936
Biloxi, MS 39533
Tel. # (228) 374-4391
Tel. # (228) 374-4399
e-mail: pisarichkeith@bellsouth.net

CERTIFICATE OF SERVICE

That I, Keith Pisarich, attorney for the Appellant **JASON BENARD FOXWORTH**, do hereby certify that I have this hand-delivered (or mailed, *via* U.S. first-class mail, postage prepaid, where indicated below), a true and correct copy of the above and foregoing "**BRIEF FOR APPELLANT**" to the following named individuals at the addresses so stated herein, to-wit:

Court of Appeals of the State of Mississippi (the original and three copies)
c/o Kathy Gillis, Clerk
Gartin Justice Building
450 High Street
Jackson, MS 39201

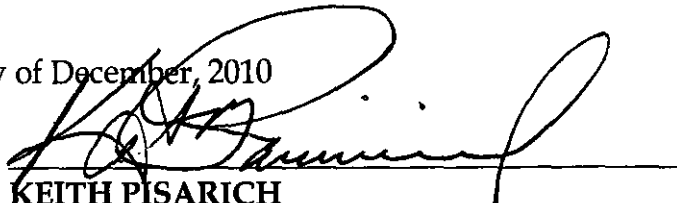
Hon. Lawrence P. Bourgeois, Jr.
Circuit Court Judge, Place Three
P. O. Box 1461
Gulfport, MS 39502

Hon. Jim Hood
Attorney General, State of Mississippi
P. O. Box 220
Jackson, MS 39205

Cono Caranna, District Attorney
Mark Ward, A. D.A.
Beth McFayden, A.D.A.
Harrison County Courthouse
Biloxi, MS 39530

Jason Benard Foxworth - Appellant
(mailed)

SO CERTIFIED, this, the 20th day of December, 2010



Handwritten signature of Keith Pisarich in black ink, written over a horizontal line.

KEITH PISARICH

Attorney for Appellant FOXWORTH

KEITH PISARICH, MSB
Attorney at Law
175-A Lameuse Street
P. O. Box 936
Biloxi, MS 39533
Tel. # (228) 374-4391
Fax. # (228) 374-4399
e-mail: pisarichkeith@bellsouth.net