IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEROME PATTERSON — APPELLANT

V. — NO. 2010-KA-0466-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEROME PATTERSON	**APPELLANT**
V.	**NO. 2010-KA-0466-COA**
STATE OF MISSISSIPPI	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Jerome Patterson, Appellant
3. Honorable Doug Evans, District Attorney
4. Honorable Clarence E. Morgan, III, Circuit Court Judge

This the 25th day of June, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

MISSISSIPPI COURT RULES

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STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT'S MOTION FOR A CONTINUANCE WHERE THE STATE FAILED TO TIMELY DISCLOSE THE NAME AND ADDRESS OF A WITNESS AND CONFIDENTIAL INFORMANT UNTIL THE DAY BEFORE THE TRIAL.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Choctaw County, Mississippi, and a judgement of conviction for the crime of delivery of a controlled substance, to wit; twelve dosage units of Hydrocodone, a schedule III controlled substance against Jerome Patterson following a jury trial on February 18, 2010, Honorable C.E. Morgan, III, Circuit Judge, presiding. Jerome Patterson was subsequently sentenced to a term of fifteen years, with seven years suspended after having served eight. Jerome Patterson is currently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

An indictment dated January 26, 2010 charged that Jerome Patterson did "sell, transfer, distribute, or deliver to another twelve (12) dosage units containing Hydrocodone..." (C.P. 3; R.E.

3) This indictment was served upon Jerome Patterson at arraignment on January 26, 2010. (C.P. 1, 21; R.E.1,10) Promptly thereafter, on January 28, 2010, the defense filed its Motion For Discovery, and pursuant to URCCC 9.04 (A) (1) requested the State provide the defendant with the names, addresses and any written statements and/or the substance of any oral statements of its intended witnesses. (C.P. 15-16, R.E. 4,5) The "State's Response To Request For Discovery"was served on the defense on February 5, 2010. (C.P. 17; R.E. 6) That response informed the defense of its intended witnesses and their addresses along with their intended testimony as follows:

> 1. WITNESSES IN CHIEF FOR STATE TOGETHER WITH STATEMENT'S OF EACH SUCH WITNESS:
> All witnesses mentioned or listed in the file, including but not limited to:
> (No witnesses, addresses or statements were listed)

(C. P. 17, R.E. 6) A disc with "still photographs from the alleged sale video was then served on the defense on February 11, 2010. (C.P. 18, R.E. 7)

With the matter set for trial on February 18, 2010, the Defense then filed it's "Motion For Continuance" on February 17, 2010, premised, inter alia, upon the State's failure to initially provide the confidential informant's name and then the failure to provide the informant's address as required under the rules of discovery, even as late as the date of the motion.

III

> On February 16, 2010, the undersigned filed a motion to compel and requested a continuance from the trial setting of February 18, 2010. As of the date of this Motion, the undersigned still has not received the address of the confidential informant as required by [] Rule 9.04. Furthermore, the undersigned has not received th NCIC report of the confidential informant. (C.P. 30-31, R.E. 19,20_)

On that same date the State, filed a (Amended) "State's Response To Request For Discovery" in which it named the confidential informant, giving his address as in care of Steven Woodruff, whose

address was not given. That document asserted that Sander's phone number had been "made available", but did not claim the necessary address had ever been provided.

That day, the day before trial, the court heard defendant's motion. In said hearing, the State conceded that the confidential informant's name was not given in the discovery it provided, but that they orally informed defense counsel of the name, on a subsequent date. (T. 5) Two nights before this hearing, the State gave counsel a phone number. (T. 6) The State offered to let the defense meet the sole eye witness at 11:00 a.m. that morning, less than twenty-four hours before the trial was set to commence. The defense counsel pointed out pursuant to a recent Mississippi Supreme Court decision, a mere "recess" opportunity to interview a previously un-discovered witness is wholly inadequate to prevent prejudice to a criminal defendant. However, the trial court ruled that all that the rules and case law require in discovery is that the State give the defense the name of a witness, apparently at any time before trial.

> BY THE COURT: But there is no Box violation here. I mean there is no discovery violation to even have a Box procedure. **They have given you the name of the informant, which is what the rules require. (T. 6)**

The protestations by defense counsel that he needed an NCIC and time to investigate the witness, the trial court still ruled that the trial would proceed, unless, after the interview, counsel could show "some new stuff." (T. 8) The trial court reiterated its understanding of the law on discovery that the State's burden ended at providing a name, "you are entitled to know his name..." and that anything beyond that would be more than required by the rules. (T. 9) The State also agreed to provide an NCIC on the eve of the trial. The morning of trial, the court overruled the motion to continue, the defense apparently not having uncovered any evidence in the less than 24 hour window allotted for it's "investigation."

The issue of the trial court's denial of a continuance for failure of timely and complete discovery was again raised in Appellant's Motion For A New Trial Or In The Alternative JNOV. (C.P. 60-64, R. E. 25-29) The motion was again perfunctorily denied. (C.P. 67, R.E. 30).

The venire was examined by counsel by voir dire and a jury was selected without objection (T. 10-46)

After a stipulation as to qualifications, Jamie Johnson a forensic scientist with the Mississippi Crime Lab identified the 12 pills as Hydrocodone. (T. 56-62)

Steven Woodcraft, an agent with the Mississippi Bureau of Narcotics stated that Jerome Patterson was his "target". (T. 64-65) He paid a confidential informant $100.00 to assist him in getting Jerome. He claimed to have been able to observe the occurrence. His report of the incident contained statements that bore no relation to the facts; such as "extracting the liquid [drug evidence] from the prescription bottle and transferring it..." (T. 80) His report was admittedly inaccurate as to the time. (T. 84-85) He explained, he does 150 reports each year. (T. 82) Although he testified he visually observed the purported drug buy, his report reflected otherwise. (T. 80) A disk, primarily showing Sanders walking to the truck, talking with Patterson, getting in and out of the truck, and leaving, was admitted into evidence. (T. 72)

The confidential informant, Steven Sanders, sold his services to the Bureau of Narcotics for $100.00 per buy, money not reported as income. (T. 95-97) He walked to "Cagle's Corner" and met with Jerome Patterson. He claimed he had called Patterson and requested $60.00 worth of pills (T. 92) When he got there, Patterson was standing by his truck, the hood popped open. The confidential informant claims he was instructed to get inside the truck, and exchange $60.00 for a soapbox supposedly containing twelve pills. He then walked away. The defense was not allowed to cross

examine the confidential informant on his own drug use, (T.98-99) but the defense was later permitted to show his conviction for possession of precursor chemicals. 9T. 103)

SUMMARY OF THE ARGUMENT

The cavalier attitude of the State and the perfunctory and errant ruling of the trial court were converse to both the spirit and the letter of the law concerning discovery as articulated by the Supreme Court in *Densmore v. State,* 27 So. 3d 379 (Miss. 2009) and in *Fulks v. State,* 18 So. 2d 803 (Miss. 2009). This violation of the law concerning discovery and preventing trial by ambush resulted in a trial where discovery withheld until the eve of trial denied Jerome Patterson a fair trial by denying him a fundamental right, the right to develop a meaningful defense concerning the credibility of the paid informant witness.

ARGUMENT

ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT'S MOTION FOR A CONTINUANCE WHERE THE STATE FAILED TO TIMELY DISCLOSE THE NAME AND ADDRESS OF A WITNESS AND CONFIDENTIAL INFORMANT UNTIL THE DAY BEFORE THE TRIAL.

This case is one implicating the State's all too often repeated breach of its duty to disclose evidence in a timely fashion to criminal defendants under Rule 9.04 of the Uniform Rules of Circuit and County Court Practice. Pursuant to said rule, the State "must disclose" the name, address and substance of the anticipated testimony of any State's witness, and to do so far enough in advance of trial as to allow the counsel for a criminal defendant time to investigate the State's case and prepare a defense on behalf of the defendant. When the State abrogates this responsibility, it is the trial court's duty to protect the right's of the defendant. Failure of the trial court to so do not only denies a criminal defendant a fair trial, but it undermines our judicial system. The seminal case in examining the failure of the State to disclose evidence, and the egregious nature of trial by ambush,

Box v. State, 437 So. 2d 19 (Miss. 1983) recognized that the failure to enforce follow our laws is to eviscerate our legal system. "A rule which is not enforced is no rule." *Box, Id.*, at 571.

More recently, the Mississippi Supreme Court has observed that withholding discovery until the eve of trial is to deprive the defense of a reasonably sufficient time to investigate the State's case and witnesses and to prepare a defense. A fair trial requires time to develop a defense, and that requires knowledge of the case and witnesses known to the State well in advance of trial, not on the eve of trial. *Densmore v. State*, 27 So. 3d 379, 382-383 (Miss. 2009) The Supreme Court found that "Densmore was denied a fair and adequate opportunity to prepare for trial" where the State withheld the identity of a confidential informant until the morning of trial. Withholding the address of a confidential informant until the eve of trial, as was done to Patterson, accomplishes the same deprivation of a fundamental right. It effectively bars investigation of this witness, and the examination of the potential "dozen other ways to impeach, or discredit the witness..." *Densmore, Id.*, at 383. The lack of any significance between discovery withheld until the day of trial as opposed to the eve of trial is manifest in *Fulks v. State,* 18 So. 3d 803 (Miss. 2009) When the State withholds vital evidence to the eve of trial a "defense attorney is left with inadequate time and opportunity to investigate the newly arisen evidence, evaluate its trustworthiness, discuss its implications with his client allow time for due consideration thereof, and, if necessary, develop a new trial strategy." *Fulks, Id.*,at 805

Patterson's attorney filed his motion to continue the case, when the State withheld vital information until the eve of trial. However, the trial court, did not recognize that a witness's address is as required and as important as a name. The court believed that where the State disclosed the name only, they had fulfilled their duty. (T. 6) That being so, the trial court gave scant attention to the defense pleas to be given time to investigate the confidential informant and develop a strategy to

impeach his testimony.

This case illustrates the difficulty of the task of the public defender, if they cannot count on the rules concerning discovery being enforced, they cannot adequately defend a client. Counsel had only 23 days from the date he received the indictment, which did not name the confidential informant, until trial. While said counsel met with numerous clients, and appeared in court for pleas and arraignments, he was also charged with obtaining discovery in Patterson's case, and thoroughly investigating the case against him. Patterson's attorney timely requested discovery, and should have been given complete discovery, including names and addresses, and other requested information, including as an NCIC report. When he was not given the name of the State's chief witness until two days before trial, and afforded no means of even talking to the witness until the eve of trial, it was simply not possible to have assessed the State's case, investigated the confidential informant, followed up on any information gleaned from the informant after speaking with him, and to have used what he had learned to prepare for trial. And thus, it is clear that despite counsel's efforts, Patterson could not have received a fair trial under these circumstances. Patterson was not afforded the right's enumerated to him under the rules of discovery, rendering the rules of discovery as no rules at all.

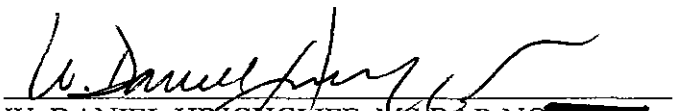
Accordingly, this cause and the judgement of the trial court must be reversed and remanded for a new and fair trial.

CONCLUSION

It is respectfully submitted that premised upon the forgoing argument, the judgement and sentence of the lower court herein should be reversed and this cause remanded for a new trial

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

W. DANIEL HINCHCLIFF, MS BAR NO [redacted]
STAFF ATTORNEY

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Jerome Patterson, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 25th day of June, 2010.

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