IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

Eddie James Pugh, IV — **APPELLANT**

V. — **NO. 2010-KA-1902-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. Eddie James Pugh, IV, Appellant
3. Honorable Anthony Lawrence, III, District Attorney
4. Honorable Dale Harkey, Circuit Court Judge

This the 21st day of June, 2011.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE ONE:

PUGH'S INDICTMENT WAS FATALLY DEFECTIVE FOR FAILING TO CONTAIN ANY AIDING AND ABETTING LANGUAGE. OR, IN THE ALTERNATIVE, ALLOWING THE JURY TO BE INSTRUCTED ON AIDING AND ABETTING CONSTITUTED A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT.

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THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT PUGH OF THIRD-DEGREE ARSON.

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STATEMENT OF INCARCERATION

Eddie Pugh, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Jackson County, Mississippi, and a judgment of conviction on one count of capital murder, one count of aggravated assault and one count of third-degree arson against Eddie Pugh, following a trial on October 18-21, 2010, the honorable Dale Harkey, Circuit Judge, presiding. Pugh was subsequently sentenced to life imprisonment in the

custody of the Mississippi Department of Corrections

FACTS

On October 8, 2008, Elliot Jones was traveling down LaRue Road, in Jackson County, Mississippi, when he saw an SUV off the side of the road with three black males behind it. (T. 467). One of those males, wearing what Jones believed to be a white shirt, shot one of the other men. (T. 468). Jones testified to hearing two to three shots. (T. 469). Jones subsequently stopped his vehicle, turned around, returned to his home and called 911. (T 469).

Jones went to the front porch of his house, and noticed a silver Scion turn around in the driveway directly across the street. (T 470). Jones estimated that this was approximately five minutes after he had returned home. (T 470). Jones and his mother subsequently followed the Scion back to the scene, where deputies had already arrived. (T 471).

Deputy Tyrone Nelson, a deputy with the Jackson County Sheriff's department was dispatched to LaRue Road. (T 458). Once he arrived, he noticed a Toyota Sequoia engulfed in flames. (T. 460). While on the scene, Deputy Nelson stopped a vehicle driven by Torrenda Whitmore. (T. 460). Whitmore was eventually taken into custody. (T. 462).

Deputy Leo Allen was also dispatched to the scene. (T. 475). When Deputy Allen arrived, he and other officers attempted to extinguish the Sequoia. (T. 476). While doing so, he observed what appeared to be a person in the back seat of the vehicle with his hands bound. (T. 476). This body would later be identified as Byron McCoy. Deputy Allen left the scene after receiving a call for assistance at the Costapia Bridge, which was approximately a quarter of a mile from the SUV. (T. 478). The call indicated that there were possibly two men under the bridge. (T. 478).

Deputy Allen waded into the water and handcuffed the two men into the water, one of whom was the Appellant, Eddie Pugh. (T. 481). As Pugh was transported to the Jackson County Sheriff's

department substation, he noticed Pugh had what appeared to be injuries to his arm. (T. 484). According to his testimony, while Deputy Allen awaited the arrival of investigators, he heard the commode flushing in Pugh's holding cell. (T. 485). Pugh had his clothes in the commode, apparently, washing them in the commode. (T. 486). Those clothes were subsequently taken into evidence. (T. 486).

Deputy Joseph Windham was the shift captain on the day of the incident. (T. 492). When responding to the call on LaRue road, he saw a school bus. (T. 494). The driver of the bus was pointing to the ditch, where Deputy Windham found a man who had been shot in the back. (T. 494). This man would later be identified as Rahman Mogilles. Deputy Windham saw an ambulance and radioed them for assistance. (T. 498).

Lieutenant Curtis Spiers, the commander of the narcotics task force of Jackson County, responded to LaRue Road. (T. 507). He arrived on the scene near Deputy Windham's location, and learned that there was a possibility of two suspects in the shooting being in the woods in the area. (T. 507-08). Spiers dispatched his agents to look for those individuals. (T. 508). When the two individuals were located under the Costapia Bridge, Commander Spiers was one of the individuals who entered the water to take them into custody. (T. 510).

Spiers testified that Pugh had burns on his hands. (T. 510). The other individual, identified as Barron Borden, appeared to have a gunshot wound to his leg. (T. 510). According to Spiers, Pugh smelled like gasoline. (T. 510).

Rahman Mogilles testified to living in New Orleans all of his life. (T. 524). Mogilles and McCoy had known each other from attending college together in Atlanta, Georgia. (T. 525). During October of 2008, McCoy had come down to New Orleans seeking employment. (T 526). Mogilles had known Eddie Pugh his entire life. (T. 528). Mogilles and McCoy went to Pugh's house in New

Orleans in order to buy marijuana. (T. 533). The two were in Pugh's SUV, a Toyota Sequoia. (T. 533). McCoy stayed in the car, and Mogilles went inside. (T. 533). Mogilles walked in, informed Pugh of his desire to purchase marijuana, and Pugh told Mogilles that he was going to have to go get it. (T. 534). From Mogilles' testimony, Pugh apparently thought that McCoy was a Department of Corrections agent. (T. 534).

Mogilles and McCoy left and went to get some food, and eventually returned to Pugh's home. (T. 534-35). Mogilles parked the car in the driveway of the house. (T. 535). When Pugh arrived, Mogilles and Pugh went inside the house and proceeded to the patio area outside. (T. 537). Pugh gave Mogilles marijuana, and Mogilles proceeded to roll it up. (T. 550). Then, Mogilles saw Borden walking through the house. (T. 551). Mogilles noticed that Borden was carrying a bag with a baseball bat hanging out of it. (T. 552). At some point, Mogilles testified he was hit in the back of the head with an object. (T. 552). Mogilles collapsed to the ground. (T. 553). He testified he was not knocked unconscious, but that he was simply laying there. (T. 553). Mogilles was picked up and dragged inside, and placed on the floor in the den. (T. 553).

Mogilles heard sounds of an altercation, and then McCoy was brought and placed on the ground next to him. (T 555). Mogilles testified that he and McCoy had their hands pulled behind their backs and were tied up with either electrical wire or a phone cord of some type. (T. 556). Mogilles testified to being dragged out of the house and placed in the SUV. (T. 558). McCoy was also dragged out into the vehicle. (T. 559).

Mogilles saw Torrenda Whitmore, Pugh's girlfriend as they were being dragged out of the house. (T. 559-60). Pugh drove the Sequoia, while Borden sat in the back of the vehicle, with the gun pressed up against McCoy's head. (T. 560). The group drove on I-10 and crossed into Mississippi. (T. 561-62). Mogilles testified to seeing a Scion that was parked in front of Pugh's

house follow them to a gas station. (T. 561). Whitmore got out of the Scion, and Pugh got out of the Sequoia and appeared agitated. (T. 563).

The cars eventually exited the interstate and ended up on LaRue road. (T 564). Mogilles testified that Pugh made a hand gesture, and seconds later, Mogilles heard a "pow." (T 564). Mogilles looked over, saw blood coming from McCoy's head, and got free from his restraints. (T. 564). Mogilles attempted to wrestle the gun from Borden's hands. (T. 564). The vehicle then stopped, and, according to Mogilles, Pugh ran and opened the back hatch of the Sequoia. (T. 566). Mogilles and Borden rolled out the back of the vehicle and were fighting over the gun. (T. 566).

Mogilles eventually let go of the gun and began running. (T. 566). Mogilles heard gunshots but kept running. (T. 566). He was eventually hit by a bullet. (T 566). Mogilles was hit twice, once in the buttocks and once in the back. (T. 566-67). Mogilles, unable to move, waited until he heard his vehicle drive off, and looked up – both vehicles were gone. (T. 571). Mogilles made a tourniquet with his clothing and "struggled back through the briar patch to the other side of the highway." (T. 571). Mogilles got the attention of the school bus, and collapsed. (T. 572).

Mogilles was eventually transported to a medical facility, had several surgeries, and stayed a total of seven days in the hospital. (T. 573). At the hospital, Mogilles spoke with the FBI and openly admitted to telling them a lie. (T. 574). Mogilles testified he lied because he was scared. (T. 574).

Dr. Paul McGarry performed the autopsy on McCoy. (T 643). Dr. McGarry found that both of McCoy's hands had been bound with telephone cord wrapped around both wrists. (T. 647). McCoy had burns over his arms and legs. (T. 647). There were also two holes going into McCoy's skull that "had the characteristics of a gunshot wound of tight contact type." (T. 647). Dr. McGarry also found some cut wounds to McCoy's left ear, a broken bone in his nose and some scrape marks

across his right forearm. (T. 662). Dr. McGarry determined the cause of death to be a double gunshot wound to the head. (T. 662).

Pascagoula Police Department Officer Louis Miller, who was assigned to the FBI task force, was also involved in investigated this case. (T. 686). At the scene of the shooting, Officer Miller recovered a .40 caliber live round, as well as some .40 caliber shell casings. (T. 690). Officer Miller observed damage to the front right bumper of the Sequoia as well as paint chips that were knocked off of the front of the vehicle when it supposedly hit an embankment. (T. 698). Officer Miller also obtained a DNA swab from Mogilles. (T 699). Officer Miller further recovered a receipt dated October 8th, 2008, from a Chevron gas station in Whitmore's purse. (T. 703-04).

Joseph Nicholson, another officer with the Pascagoula Police Department and the FBI task force also was involved in investigating the incident. Officer Nicholson and Agent Jerome Lorraine went to Pugh's house in New Orleans, after obtaining a search warrant. (T. 712-13). When he arrived in the house, he noticed a piece of cut up telephone cord laying on the bar. (T 715). Officer Nicholson also noticed reddish-colored dried spots on the floor in the dining room area of the house. (T. 720). Officer Nicholson took swabs of these dried spots. (T. 721). In the patio area of the house, he discovered more reddish stains. (T. 722-23).

The next day, Officer Nicholson and others went back to the scene on LaRue Road in order to search the surrounding area. (T. 729).

Various agencies also searched the LaRue Road scene on Saturday, October 11th. On this date, two cell phones, one of them being shot, a set of keys to a Toyota, and a .40 caliber handgun were recovered. (T. 737). Importantly, these were recovered because Pugh had led officers to them. However, because his statements to police were suppressed because of a violation of his constitutional rights, the jury was not aware of the source. (C.P. 173-74). The evidence was allowed

to be admitted, however, under the inevitable discovery exception to the exclusionary rule. (T. T. 434-36). Officer Nicholson also obtained a buccal swab from all of the suspects in the case. (T. 729-31).

Brandon Giroux a forensic firearm and toolmark examiner formerly employed at the FBI Crtime Lab in Quantico, Virginia tested various evidence in the instance case. (T. 762). Giroux tested the firearm recovered near LaRue Road and determined that the firearm would not cycle properly. (T. 774). There was debris and rust on the firearm causing it to jam every time he attempted to perform a second fire test. (T. 774). Giroux fired two test shell casings to use in comparison to the recovered shell casings submitted for analysis. (T. 778). Giroux was able to determine that the bullet fragments recovered during McCoy's autopsy as well the fragments taken from Mogilles were fired from the firearm recovered at the scene on LaRue Road. (T. 778-81). Giroux also determined that the shell casings recovered from the LaRue Road matched the firearm as well. (T. 782-83). Giroux determined that the live round fired inside the Sequoia was extracted from the submitted firearm. (T. 784).

Machelle Reid, a shoe print and tire tread examiner for the FBI Crime Lab, also analyzed evidence in the instant case. (T. 793). Reid received a shoe impression from the scene and analyzed it. (T. 796). Reid compared footwear impression on a cast to shoes submitted in the case and concluded that the footwear impression matched shoes recovered from Pugh. (T. 800-01).

Tamyra Moretti, a forensic examiner with the nuclear DNA unit at the FBI laboratory tested DNA involved in the instant case. (T. 808). Moretti was able to detect the presence of blood on Borden's clothing, but was unable to get a DNA profile from the clothes. (T. 819). Moretti confirmed the presence of blood from a swab taken on the outside of the Sequoia. (T. 822-83). The DNA profile from that swab matched that of McCoy. (T. 823). A second swab taken from the back door

handle on the driver's side also matched McCoy's DNA. (T. 824). Moretti did analysis on the blood stains inside Pugh's residence in New Orleans and determined that they contained McCoy's DNA. (T. 827-28). The swab of the blood from the patio area of the house contained my Mogilles's DNA. (T. 830). Moretti performed a swab on the gun and was able to make a determination that the major contributor for DNA on the gun was McCoy. (T. 832-33). The minor contributor of DNA found on the gun was inconclusive, but Moretti was able to exclude both Pugh and Borden as contributors. (T. 833).

After Moretti's testimony, the State rested. (T. 838). The defense moved for a directed verdict, which was denied by the trial court. (T. 840-41).

After deliberations, the jury returned a verdict of guilty of capital murder, aggravated assault and third-degree arson. (C.P. 229-31, R.E.14-16).. In a subsequent sentencing phase, the jury unanimously returned a sentence of life without eligibility of parole in the custody of the Mississippi Department of Corrections. (C.P. 231, R.E. 16). The trial court sentenced Pugh to an additional twenty years for the aggravated assault conviction, as well as an additional three years for the third-degree arson. (C.P. 231, R.E. 16). Pugh was sentenced to serve all three sentences consecutively. (C.P. 231, R.E. 16).

On October 26, 2010, trial counsel filed a Motion for New Trial, or, in the Alternative, for Judgment Notwithstanding the Verdict. (C.P. 232-34, R.E. 17-19). This motion was denied by the trial court on November 5, 2010 (C.P. 240, R.E. 20). Feeling aggrieved by the verdict and sentence, Pugh filed his timely notice of appeal on November 15, 2010. (C.P. 241, R.E. 21).

SUMMARY OF THE ARGUMENT

Pugh's indictment did not contain any aiding and abetting language. Accordingly, the

indictment was fatally defective. Because the State's theory at trial was that he was either the principle or acting as an aider and abetter, Pugh's indictment failed to adequately provide him notice of the cause against him. Alternatively, if the indictment was sufficient, the trial court erred in allowing the jury to be instructed on aiding and abetting, as it constituted a constructive amendment of the indictment.

The State prevented insufficient evidence to convict Pugh of third-degree arson. The State presented positively no testimony as to the value of the vehicle charged in the indictment. Accordingly, Pugh's arson conviction should be reversed and rendered.

Pugh's right to a speedy trial under the United States Constitution was violated by the 481-day delay. A balancing of the ***Barker*** factors weighs in his favor. Accordingly, the trial court erred in failing to dismiss the charges against him.

The trial court misapplied the inevitable discovery doctrine when it allowed physical evidence obtained as a result of Pugh's impermissible statements to be admitted in trial.

The violation of Uniform Rule of Circuit and County Court Practice 6.03 warrants suppression of the evidence obtained as a result. Rule 6.03 requires criminal defendants to be given an initial appearance withing 48 hours of arrest. In the instant case, Pugh did not have an initial appearance until five days after his arrest. During the course of this violation, Pugh made statements to police that were ultimately suppressed. However, the evidence obtained was allowed to be admitted. Because this evidence was admitted despite the violation of Rule 6.03, the trial court erred and Pugh is entitled to a new trial.

A proper harmless error analysis does not render any of the above errors harmless beyond a reasonable doubt.

Lastly, cumulative error deprived Pugh of his fundamental right to a fair trial.

ARGUMENT

ISSUE ONE: PUGH'S INDICTMENT WAS FATALLY DEFECTIVE FOR FAILING TO CONTAIN ANY AIDING AND ABETTING LANGUAGE. OR, IN THE ALTERNATIVE, ALLOWING THE JURY TO BE INSTRUCTED ON AIDING AND ABETTING CONSTITUTED A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT.

Pugh was indicted in a multi-count, multi defendant indictment for capital murder, aggravated assault, and third-degree arson. (C.P. 9, R.E. 12). All three counts in the indictment tracked the appropriate statutory language for their specific offenses. The State's case, as evidenced by the instructions given to the jury, indicated a differenct theory. The jury was instructed on all counts that they could find that Pugh had acted "alone or in conjunction" with others. (C.P. 186, 191, 192).[1]

It is our state and federal constitutions, above all else, that govern the requirements of an indictment, specifically the right to due process of law and the right "to be informed of the nature and cause of the accusation." **U.S. Const. amend. VI.** *See also* **U.S. Const. amend. XIV; Miss. Const. art. 3, §§ 14, 26.**

Mississippi Code Section 99-17-20 provides, in relevant part,

> Any conviction of the accused for an offense punishable by death shall not be valid unless the offense for which the accused is convicted shall have been set forth in the indictment by section and sub-section number of the Code which defined the offense allegedly committed by the accused.

Miss. Code Ann. § 99-17-20.

The Mississippi Supreme Court has repeatedly discussed the well-established rule that any

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1. It should be noted that it appears the jury was accurately instructed as to aiding and abbetting with Instruction S-5 (C.P. 187), which comports to the Fifth Circuit's Model Jury Instruction on aiding and abetting as adopted by the Mississippi Supreme Court in ***Milano v. State*** 790 So.2d 179 (Miss. 2001). In essence, the issue before this Court is not how the jury was instructed on aiding and abetting, but, rather, that they were instructed.

citation to a code section cannot properly charge a crime, and that it is the language of the charging document that informs a defendant of the specific crime he or she is alleged to have committed. ***Golden v. State***, 968 So.2d 378, 386 (Miss.2007); ***Pearson v. State***, 248 Miss. 353, 358-59, 158 So.2d 710, 712 (1963); ***Dendy v. State***, 224 Miss. 208, 213, 79 So.2d 827, 829 (1955).

A proper indictment provides protection of one's due process right to adequate notice of the crime the accused is alleged to have committed. ***Jefferson v. State***, 556 So.2d 1016, 1020 (Miss.1989). *See also* **U.S. Const. amend. VI** (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation."); **Miss. Const. art. 3, § 26** (1890) (stating "[i]n all criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation."). As noted by the Mississippi Supreme Court, this rule has significant historical underpinning; "from the earliest colonial days in this country it has been the settled rule that a formal accusation is an essential condition precedent to a valid prosecution for a criminal offense." ***Woods v. State***, 200 Miss. 527, 27 So.2d 895, 896-897 (1946). The ***Woods*** Court further opined that an indictment is:

> first to furnish the accused such a description of the charge against him as will enable him to prepare his defense and avail himself of the conviction or acquittal against further prosecution for the same offense, and, second to inform the court of the facts alleged, so that it may be able to say whether the facts are sufficient in law to support a conviction if one should be had.

Id. at 897.

Citation to a statute, as **§ 99-17-20** requires, informs the accused of the nature of the accusation; but it does not inform him or her of the cause. For instance, citation to statue informs an individual that they are alleged to have committed a robbery, but being informed of the cause requires something more.

The indictment under which Pugh was charged did not provide him with an accurate

description of the charge against him so that she could adequately prepare his defense. The indictment did not contain any language whatsoever that would put him on notice as to the his purported aiding and abetting the crimes under which he was indicted.

Indictments must contain a "plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation." **URCCC 7.06.** See also **U.S. Const. amends. VI, XIV; Miss. Const. art. 3, §§ 14, 26.** The indictment in the present case could not have satisfied these Constitutional requirements.

Should this honorable Court conclude that the indictment in this case is sufficient, it was still plain reversible error for the trial court to allow the jury to be instructed as to aiding and abetting, because doing so amounted to a constructive amendment of the indictment, which is *per se* reversible error.

"It has been the law since 1858 that the court has no power to amend an indictment as to the matter of substance without the concurrence of the grand jury by whom it was found, although amendments as to mere informalities may be made by the court." ***Quick v. State***, 569 So. 2d 1197, 1199 (Miss. 1990) (citing ***McGuire v. State***, 35 Miss. 366 (1858)).

The Mississippi Supreme Court has held that:

> A constructive amendment of the indictment occurs when the proof and instructions broaden the grounds upon which the defendant may be found guilty of the offense charged so that the defendant may be convicted without proof of the elements alleged by the grand jury in its indictment.

Bell v. State, 725 So. 2d 836, 855-56 (¶58) (Miss. 1998), (citing ***United States v. Miller***, 471 U.S. 130, 105 S.Ct. 1811 (1985)). ***Bell*** also instructed that :

> A constructive amendment of an indictment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential

element of the offense charged. . . . In such cases, reversal is automatic because the defendant may have been convicted on a ground not charged in the indictment. . . ."

Bell, 725 So. 2d at 855-56 (¶58)(quoting ***United States v. Adams***, 778 F.2d 1117, 1123 (5th Cir. 1985)).

While courts may amend an indictment to correct defects as to form, defects of substance must be corrected by the grand jury." ***Spears v. State***, 942 So. 2d 772, 774 (¶6) (Miss. 2006) (quoting ***Evans v. State***, 813 So. 2d 724, 728 (¶21) (Miss. 2002)). In this regard, "[i]t is well settled . . . that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case." *Spears*, 942 So. 2d at 774 (¶6) (quoting ***Miller v. State***, 740 So. 2d 858, 862 (¶13) (Miss. 1999)).

As explained above, Pugh's indictment for all three counts contains no language whatsoever as it relates to aiding and abetting.

Thus, the indictment did not charge that Pugh either alone, or in conjunction with others committed these offenses; Rather, the indictment accused that specifically, Pugh and his two co-indictees directly committed the offenses charged with no reference at all to any theory of accomplice liability.

Accordingly, Pugh submits that he is entitled to have this Court reverse and render the judgment of conviction and sentence entered against him or, alternatively, reverse his conviction and sentence and remand this case for a new trial.

ISSUE TWO: THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT PUGH OF THIRD-DEGREE ARSON.

Mississippi Code Annotated § 97-17-7 defines third degree arson, as follows:

> Any person who wilfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any personal property of whatsoever class or character; (such property being of the value of twenty-five dollars and the property of another person), shall be guilty of arson in the third degree and upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than three years.

Miss. Code Ann. § 97-17-7

At trial, there was never any testimony as to the value of the vehicle in question. While it may seem somewhat trivial, the State was required to present evidence of all the elements of the offense of third degree arson. In this case, no evidence whatsoever as to the value was ever presented. Accordingly, Pugh's conviction for third degree arson should be reversed and rendered.

In reviewing the sufficiency of the evidence, the relevant inquiry is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Bush v. State***, 895 So. 2d 836, 843 (Miss. 2005) (quoting ***Jackson v. Virginia***, 443 U.S. 307, 315, 99 S.Ct. 2781, (1979)). The verdict will not be disturbed where the evidence so reviewed is such that "reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense." ***Id.*** (citing ***Edwards v. State***, 469 So. 2d 68, 70 (Miss.1985)). However, the proper remedy is to reverse and render where the evidence "point[s] in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty[.]" *Id.*

Pugh recognized that the property in question in this case is a car, and that, for nearly every instance, a car's value exceeds that of $25 dollars. This fact, however, does not absolve the State from its burden of presenting evidence of every element of the offense charged. There was no testimony of current value of the Sequoia. There was no testimony of purchase price of the Sequoia.

The jury simply had no testimony or evidence to consider an essential element of the offense charged. Accordingly, the State's failure to present sufficient evidence on the charge warrants reversal of Pugh's conviction and sentence for third-degree arson.

ISSUE THREE: WHETHER PUGH'S SPEEDY TRIAL RIGHT UNDER THE UNITED STATES CONSTITUTION WAS VIOLATED BY A 481-DAY DELAY WHICH PREJUDICED HIS DEFENSE AT TRIAL.[2] [3]

For the ease of this honorable Court's analysis, the following table provides the relevant time-line regarding as it relates to the argument.

SPEEDY TRIAL TIME LINE

Event	Date	Time Elapsed
Pugh arrested by JCSD	10/8/08	0 days
Initial Appearance, County Court	10/13/08	5 days
Indictment	9/10/09	337 days
Arraignment	10/5/09	362 days
First trial setting	2/1/10	481 days

i. Standard of Review

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2. Pugh concedes that his right to a speedy trial under the Mississippi Code was not violated because Pugh was not arraigned until three-hundred and sixty two days after his arrest. While the statutory speedy trial right triggers at arraignment, Pugh questions the length of the delay in indictment, as it seemingly circumvented the spirit of Mississippi's statutory speedy trial right. However, absent some additional evidence, Pugh cannot, in good faith, raise this issue on direct appeal. Pugh respectively requests this issue be preserved for any state post-conviction relief proceedings.

3. Pugh recognizes that February 2, 2010 was just the first trial setting in his case. On February 11, 2010, the trial court denied the motion to dismiss for a speedy trial violation. (C.P. 106-110). Pugh's trial did not happen until October 18-21, 2010. (T. 1).

Review of a speedy trial claim involves a question of fact: whether the trial delay arose from good cause. ***Flora v. State***, 925 So. 2d 797, 814 (Miss. 2006) (citing ***Deloach v. State***, 722 So. 2d 512, 516 (Miss. 1998)). An appellate court will uphold the trial court's finding of good cause if the decision is supported by substantial credible evidence. ***Id.*** (citing ***Folk v. State***, 576 So. 2d 1243, 1247 (Miss. 1991)). On the other hand, if no probative evidence supports the trial court's findings, the appellate court must reverse the decision and dismiss the charge. ***Ross v. State***, 605 So. 2d 17, 21 (Miss. 1992) (citing ***Strunk v. United States***, 412 U.S. 434, 440 (1973)). The State bears the burden of proving good cause for the speedy trial delay, and thus bears the risk of non-persuasion. ***Flores v. State***, 574 So. 2d 1314, 1318 (Miss. 1990); ***Nations v. State***, 481 So. 2d 760, 761 (Miss. 1985).

The Sixth Amendment of the United States Constitution guarantees the right to a speedy trial, which is a fundamental right. ***State v. Woodall***, 801 So. 2d 679, 681 (Miss. 2001). Unlike the statutory right provided to a criminal defendant via the statutes of the State of Mississippi, a defendant's Constitutional right to a speedy trail arises when an indictment or information is returned against him, or when "actual restraint [is] imposed by arrest and holding to a criminal charge." ***Bailey v. State***, 463 So. 2d 1059, 1062 (Miss. 1985); *See also* ***U.S. v. Marion***, 404 U.S. 307 (1971). The Mississippi Supreme Court has held that the placing of a detainer against an individual "suffices to make him an accused." ***Perry v. State***, 419 So. 2d 194, 198 (Miss. 1982).

In ***Barker v. Wingo***, the United States Supreme Court established the test for judging the merits of speedy trial claims. ***Barker v. Wingo***, 407 U.S. 514 (1972). There, the United States Supreme Court declined to make a bright line rule, but instead adopted a four-factor balancing test "in which the conduct of both the prosecution and the defendant are weighed." ***Id.*** at 529. The four factors are: (i) length of the delay, (ii) the reason for the delay, (iii) the defendant's assertion of his

right, and (iv) prejudice to the defendant. ***Id.*** at 530.

ii. Length of the Delay

Any delay of over eight months is presumptively prejudicial and triggers the balancing of the other three ***Barker*** factors. ***Woodall***, 801 So. 2d at 682. The lodging of a detainer against a person otherwise in custody suffices to make the prisoner an accused. ***Bailey***, 463 So. 2d at 1062. Because Pugh was in custody since the date of his alleged crime, the presumptively prejudicial length of time has been triggered. Therefore, a balance of the other three factors of the ***Barker*** test should be conducted.

iii. *Reason for the Delay*

Under the ***Barker*** test, " 'different weights' are to be 'assigned to different reasons' for delay" ***Doggett v. United States,*** 505 U.S. 647, 657 (1992) (quoting ***Barker,*** 407 U.S. at 531). Pugh was held in Jackson County for the entire duration of his federal trial. While both Mississippi and the Federal Government had concurrent jurisdiction for this matter, nothing would have prohibited the State from, at the very least, indicting Pugh for his alleged crimes. Rather, the State of Mississippi simply waited on the Federal Prosecution to end before doing anything on the State level.

Pugh contends that this factor weighs in his favor, or, at the very least, should not count against him.

iv. *The Defendant's Assertion of his Right*

The duty to bring a defendant to trial always rests with the State. ***Stevens v. State***, 808 So. 2d 908, 917 (Miss. 2002); ***Sharp v. State***, 786 So. 2d 372, 381 (Miss. 2001). While the State bears the burden to bring the defendant to trial, the defendant has some responsibility to assert the speedy trial right. ***Wiley v. State***, 582 So. 2d 1008, 1012 (Miss. 1991). Pugh asserted his speedy trial right

on October 5, 2009, less than a month after he was indicted. (C.P. 12-13). He again asserted his speedy trial rights in a *pro se* motion on December 7, 2009. (C.P. 17-23).

Mississippi courts have been open to demands for speedy trials offered by defendants. *See,* ***State v. Fergusson***, 576 So. 2d 1252, 1254 (Miss. 1991) (noting "Nothing in the law requires that the demand [for a speedy trial] be in writing").

Therefore, this factor weighs in favor of Pugh,

v. Prejudice

There are three interests that an individual's speedy trial rights are intended to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *See* ***Jenkins v. State***, 607 So. 2d 117 (Miss. 1992).

In ***Doggett***, the United States Supreme Court concluded that "the speedy trial inquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice." ***Doggett***, 505 U.S. at 655. The ***Doggett*** Court further concluded that "affirmative proof of particularized prejudice is not essential to every speedy trial claim." ***Id.*** at 655 (emphasis added). Excessive delay may compromise the trial in ways that neither side can prove, so that the longer the delay becomes, the more prejudice it may cause, even without proof, should take an increasing role in the mix of relevant factors. ***Id.*** at 656.

In the case *sub judice*, Pugh was clearly prejudiced by the delay. While Pugh was being prosecuted by the federal government, the prospect of prosecution by the State of Mississippi undoubtedly lurked over his head. Clearly, this would cause anxiety, which the speedy trial right is intended to prevent. In this case, the anxiety is only exacerbated by the fact that the State could charge Pugh with capital murder and sentence him to death. Obviously, the possibility of the State

executing him if he were charged and ultimately convicted weighed heavily on Pugh. Accordingly, this factor weighs in Pugh's favor.

vi. Conclusion.

Upon a balancing of the Barker factors, this Honorable Court should conclude that Pugh was denied his Constitutionally-mandated right to a speedy trial. All four factors weigh in favor of Pugh; therefore, this Honorable Court should grant appellant the proper remedy for the violation of his Constitutional rights. It is widely established that the sole remedy for a Sixth Amendment speedy trial violation is the dismissal of the charges with prejudice. ***Bailey,*** 463 So. 2d at 1064. *See also* ***Ross v. State***, 605 So. 2d 17 (Miss. 1992); ***Strunk v. United States***, 412 U.S. 434 (1973). Because of this, Pugh asks this honorable Court to reverse his conviction and release him from the custody of the Mississippi Department of Corrections.

ISSUE FOUR: THE TRIAL COURT MISAPPLIED THE INEVITABLE DISCOVERY DOCTRINE IN ALLOWING THE STATE TO ADMIT PHYSICAL EVIDENCE OBTAINED IN VIOLATION OF PUGH'S CONSTITUTIONAL RIGHTS.

The "fruit of the poisonous tree" doctrine-also known as the exclusionary rule-"prohibits introduction into evidence of tangible materials seized during an unlawful search." ***Murray v. United States***, 487 U.S. 533, 536, 108 S.Ct. 2529, 2532, 101 L.Ed.2d 472, 480 (1988) (citing ***Weeks v. United States***, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914)). The doctrine prohibits "testimony concerning knowledge acquired during an unlawful search." ***Id.*** (citing ***Silverman v. United States***, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). Of critical import to this case, the doctrine "prohibits the introduction of derivative evidence, both tangible and testimonial, that is, the product of the primary evidence, or that is otherwise acquired as a result of the unlawful search, up to the point at which the connection becomes 'so attenuated as to dissipate the taint.' " Id. (citing *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939) (emphasis added); *see also Wong*

Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Exceptions to the "fruit of the poisonous tree" doctrine have been carved by the United States Supreme Court. *See, e.g.*, ***Silverthorne Lumber Co. v. United States***, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920) ("independent source" exception); ***Nix v. Williams***, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) ("inevitable discovery" exception).

In the instant case, the trial court concluded that the statements given by Pugh to officers on October 10 and October 11 were inadmissible and involuntary. (C.P. 169-74). The trial court concluded;

> It is clear that Pugh was told that it was in his best interest to have a federal prosecution as a means of avoiding a capital murder indictment and the possibility of a sentence of death. These exhortations were extensive and repeated. Normally, where a suspect has an extensive history of criminal conduct the effects of such comments may be considered harmless. Here, Pugh's criminal experience led precisely to extensive discussion of possible charges and sentences, favorable jurisdictions, conditions of incarceration, federal sentencing guidelines – rather akin to plea negotiations between prosecutors and defense attorneys. Considering the totality of circumstances, and after careful review of the recording of this interrogation, the Court finds that the statement of October 10, 2008, and any statements made on October 11, 2008, by Pugh to law enforcement must be considered involuntary.

(C.P. 173-74).

While the statements by Pugh to officers on October 11 were not admissible, the evidence which Pugh directed the officers towards was deemed admissible under the inevitable discovery doctrine. (T. 434-36).

The trial court ultimately concluded that the "necessity" of finding the weapon in the case in question would have led to police searching the area until the weapon was eventually located. (T. 435).

While this inevitable discovery is an exception to the exclusionary rule, Pugh contends that

the requirements to meet that exception were not met on the instant case. While the trial court concluded that the evidence that Pugh led Officers to would have been eventually located, it is important to note that, in the two days prior to Pugh's showing them, officers searching the scene had yet to locate the evidence. Furthermore, the "necessity" of finding the weapon is relevant. Just because law enforcement, for the purposes of their investigation want to find certain evidence, it does not necessarily follow that they would find that evidence. The trial court's reliance on necessity is misplaced.

The adage "hindsight is 20/20" is particularly relevant to the facts of this case. Accordingly, the trial court erred in not excluding the evidence obtained as a result of the violation of Pugh's ***Miranda*** rights. Accordingly, the evidence should have been suppressed and a new trial is warranted.

ISSUE FIVE: THE VIOLATION OF UNIFORM RULE OF CIRCUIT AND COUNTY COURT PRACTICE 6.03 WARRANTS SUPPRESSION OF ALL EVIDENCE OBTAINED AS A RESULT OF THE VIOLATION.

Uniform Rule of Circuit and County Court Practice 6.03 provides, in pertinent part, that "every person in custody shall be taken, without unnecessary delay and within 48 hours of arrest, before a judicial officer or other person authorized by statute for an initial appearance." **URCCC 6.03**.

URCCC 6.03 requires that defendants be brought for an initial appearance within forty-eight hours and without unnecessary delay. Pugh was arrested on October 8, 2008, and, some five days after the arrest, was provided his initial appearance on October 13, 2008. The State admitted such. (T. 47).

This delay resulted in a violation of his Constitutional right to counsel under **U.S. Const. amend. VI** and **Miss. Const. art. 3, § 26.** While the statements he made prior to his initial

appearance were ultimately suppressed, the evidence that Pugh led officers to was admitted at trial and used to by the State.

The seminal United States Supreme Court case on this issue is ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56-57, 111 S.Ct. 1661 (1991). In ***McLaughlin***, the court held that while an initial appearance within forty-eight hours will generally suffice, it nonetheless may not pass constitutional muster "if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delays are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id.* The ***McLaughlin*** Court listed examples of reasonable delays, such as transporting defendants, late-night bookings, securing the premises of arrest, "and other practical realities." ***Id.*** The Court noted, however that, after forty-eight hours have passed, "the burden shifts to the [State] to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." ***Id.*** at 57, 111 S.Ct. 1661.

In Mississippi, an initial appearance under **URCCC 6.03** includes a probable cause determination, and at that time the judge will inform the defendant of his right not to incriminate himself, his right to an attorney, his right to communicate with her attorney, family or friends, his right to a preliminary hearing, and the conditions under which she may obtain release, if any.

McLaughlin speaks to "unreasonable delays" and **Rule 6.03** addresses "unnecessary delays," the two terms are used interchangeably here. The predecessor to **Rule 6.03**, **UCRCCP 1.04,** predated ***McLaughlin*** and required an appearance without "unnecessary delay," but did not contain the "within 48 hours of arrest" requirement. **Rule 6.03** became effective May 1, 1995, approximately four years after ***McLaughlin***, and reflects the ruling in that case. The Mississippi Supreme Court has held that **Rule 6.03** is an adoption of the Supreme Court's rule, despite the use of the term

"unnecessary" rather than "unreasonable." ***Swinney v. State,*** 829 So.2d 1225, 1234 (Miss. 2002)

To satisfy **Rule 6.03** and prevailing case law, arrested persons must be afforded an initial appearance both (1) within 48 hours, and (2) without unnecessary delay. "Without unnecessary delay" has been defined as "as soon as custody, booking, administrative and security needs have been met." ***Evans v. State***, 725 So. 2d 613, 644 (Miss.1997) (citing ***Abram v. State***, 606 So.2d 1015 (Miss.1992)). "Once these needs have been met, there is but one possible excuse for delay: lack of access to a judge." ***Abram***, 606 So. 2d at 1029. In ***Abram***, the defendant was not brought for an initial appearance until approximately 72 hours after his arrest, immediately after he confessed. ***Id.*** The Mississippi Supreme Court held that Abram would not have confessed had he been given an initial appearance and, consequently, access to counsel. This was deemed reversible error because Abram's conviction for capital murder was based entirely on his confession. ***Id.***

In the instant case, Pugh's statements were not admitted. However, as noted above, the evidence he lead police to was admitted. Had **Rule 6.03** been followed, Pugh would have been afforded an attorney and surely would not led officers to evidence had such an attorney been afforded.[4] This error is even more significant given the fact that officers either deliberately or mistakenly misadvised Pugh that he was only entitled to an attorney if he obtained one himself. The trial court determined this to be error. (C.P. 169-73).

Furthermore, this argument exists separately from the argument presented in Issue Four, above. Moreover, no Mississippi court has ever applied "inevitable discovery" to evidence obtained in violation of **Rule 6.02.** Pugh would contend that this evidence should have been suppressed as

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4. The record indicates also that even once Pugh had his delayed initial appearance, the appointment of counsel did not to happy until a month later on November 12, 2008, even though he had been charged with a capital offense and certified indigent. (C.P. 87).

a violation of this rule.

ISSUE SIX: WHETHER ANY OF THE ABOVE ERRORS CONCERNING VIOLATION OF PUGH'S FAIR TRIAL RIGHTS MAY BE CONSIDERED HARMLESS.

The repeated holdings of the United States Supreme Court show that the proper harmless error analysis for a constitutional violation is not a review of whether there was overwhelming evidence of guilt properly before the jury upon which the jury could have convicted. Rather, the appropriate analysis is whether the constitutional error "might have contributed to the conviction" or "possibly influenced the jury."

In ***Payne v. Arkansas***, the state of Arkansas asked the United States Supreme Court to affirm a conviction despite the admission of a coerced confession into evidence. ***Payne v. Arkasnas***, 356 U.S. 560, 568 (1958). The State asserted that the conviction should be affirmed because "there was adequate evidence before the jury to sustain the verdict." ***Id.*** at 567-68. However, the Supreme Court rejected the State's assertion recognizing that "no one can say what credit and weight the jury gave to the confession." ***Id.*** at 568.

In ***Fahy v. Connecticut***, the Court revisited this issue ultimately holding, "[W]e are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." ***Fahy v. Connecticut***, 375 U.S. 85, 86-87 (1963) (emphasis added).

Four years later, the Court recognized that the state of California applied a "miscarriage of justice" rule with "emphasis, and perhaps overemphasis, upon the court's view of 'overwhelming evidence.'" ***Chapman v. California***, 386 U.S. 18, 23 (1967). There, the Supreme Court rejected the

California rule, preferring instead the ***Fahy*** approach: "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." ***Id.*** The court reasoned that this analysis "emphasizes an intention not to treat as harmless those constitutional errors that 'affect substantial rights' of a party." ***Id.*** Thus, an "error in admitting plainly relevant evidence which *possibly influenced* the jury adversely to a litigant cannot, under ***Fahy***, be conceived of as harmless." ***Id.*** at 23-24 (emphasis added).

These cases show that for at least fifty years, the United States Supreme Court has rejected a harmless error analysis which simply questions whether there was overwhelming evidence of guilt properly before the jury upon which the jury could have convicted. Rather, the reviewing court should look at the facts and evidence of the case to determine whether the constitutional error "might have contributed to the conviction" or "possibly influence the jury."

Under the proper analysis, it is clear that the multiple violations of Pugh's fundamental right to a fair trial, considered separately or in conjunction, "might have contributed to [his] conviction" and "possibly influence[d] the jury." Therefore, the above errors should not and cannot be deemed "harmless."

ISSUE SEVEN: CUMULATIVE ERROR DEPRIVED PUGH OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.

The cumulative error doctrine stems from the doctrine of harmless error. ***Ross v. State,*** 954 So. 2d 968, 1018 (Miss. 2007). It holds that individual errors, not reversible in themselves, may combine with other errors to constitute reversible error. ***Hansen v. State***, 582 So. 2d 114. 142 (Miss. 1991); ***Griffin v. State***, 557 So. 2d 542, 553 (Miss. 1990). The question under a cumulative error analysis is whether the cumulative effect of all errors committed during the trial deprived the

defendant of a fundamentally fair and impartial trial. ***McFee v. State***, 511 So. 2d 130, 136 (Miss.1987).

Relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged. ***Ross***, 954 So. 2d at 1018.

The quantity of the error in the instant case is significant. Inadmissible evidence was admitted against Pugh in violation of his rights as guaranteed by both the United States and Mississippi Constitutions. And, Pugh's indictment was fatally flawed, or, in the alternative, the jury was improperly instructed.

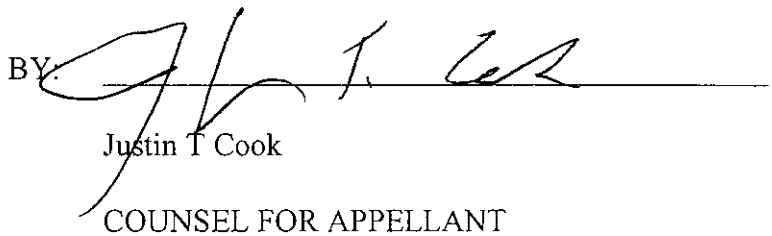
Therefore, Pugh contends that the above errors, taken alone, constitute reversible error, and further that the cumulative effect of these errors deprived Pugh of his fundamental right to a fair trial and warrant reversal.

CONCLUSION

Pugh submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and his conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial for capital murder, third-degree arson, and aggravated assault, with instructions to the lower court. In the alternative, Pugh would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and Pugh discharged from custody, as set out hereinabove. Pugh further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Eddie James Pugh, IV, 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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