

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**COPY**

NO. 2005-KA-0661-COA

JOHN JOHNSON

APPELLANT

VS.

**FILED**

DEC 26 2007

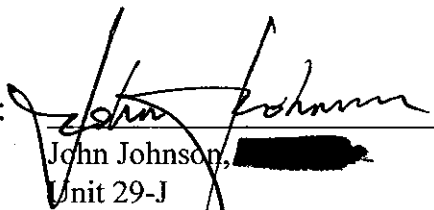
STATE OF MISSISSIPPI

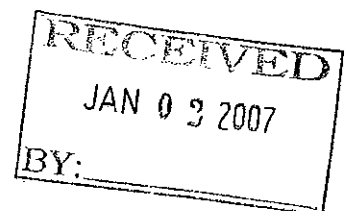
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COURT OF APPEALS

APPELLEE

**REPLY BRIEF FOR APPELLANT**

BY:

  
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**REPLY BRIEF FOR APPELLANT**

The State of Mississippi has filed its brief in this case and has failed to refute Appellant's claims that:

- a) Appellant was subjected to ineffective assistance of counsel at trial in violation of the 6th Amendment rights under the United States Constitution.
- b) The verdict of the jury was against the overwhelming weight of the evidence.
- c) The amendment of the indictment was improper.
- d) The final closing arguments of the state was improper.
- e) The admission of Dandridge's pretrial identification of improper.
- f) Appellant's speedy trial rights were violated.
- g) Appellant suffered cumulative error which caused him to be deprived of his constitutional right to a fair trial violation of the 5th and 14th Amendment to the United States Constitution.

**REPLY ARGUMENT**

The argument advanced by the state fails to recognize that the assistance provided to Appellant by the defense counsel was deficient performance. Defense counsel was deficient in failing to assert Appellant's right to a speedy trial which could have been completed by the filing

of a timely filed motion in the trial court. It was the state's cause of the delay of Appellant's trial. Naturally the Appellee would argue that such claim is procedurally barred. This claim made by Johnson cannot be refuted by the state nor rebutted when the record is so clear.

The state do not recognize that in certain 6th Amendment contexts prejudice can be presumed from what an attorney failed to do or where counsel stood still and did nothing. Harveston v. State, 742 So.2d 1163 (Miss. App. 1999). In the instant case the actions of the defense attorney amounts to deficient performance which effectively caused prejudice to Johnson's case.

Johnson's speedy trial claims cannot be procedurally barred here since it is argued by way of ineffective assistance of counsel. The only possible avenue in which the state may defeat this claim would be that the state show where Johnson's attorney was effective during trial and pre-trial proceedings. The state can not show this and is attempting to avoid the speedy trial claim by arguing that such claim is procedurally barred. This court should reject such argument.

### **ISSUE ONE**

Johnson would argue to this court that the verdict of the jury was clearly against the weight of the evidence. The state treats Johnson's argument under issue one as a challenge to the sufficiency of the weight of the evidence. The applicable stand and for proof on such issue is utterly impossible to satisfy. The state is given the benefit of all favorable instances which may be drawn from the evidence. This would leave practically nothing to support Johnson's claim here. However, had Johnson been adequately represented by counsel at the trial then the odds of this claim would have been extremely more favorable to Appellant. While Appellant do not concede this issue, Appellant would assert that the state stacked the deck against Appellant. The evidence, under those circumstances, cannot help but appear the way it do.

As previously presented in the initial brief, the in-court identification by Mr. Dandridge demonstrates that Appellant was not properly identified by the state's key witness. Moreover, this testimony creates the possibility that Mr. Dandridge was coached in his testimony and the Mr. Dandridge identification of Appellant was not genuine.

## **ISSUE TWO**

The state argues that Appellant's challenge to the closing argument is procedurally barred. However, such issue is presented on the basis that defense counsel was ineffective in failing to raise this issue in the trial court and for that reason the state's procedural bar assertion cannot suffice. Appellant would assert that this claim was not reserved for review on the basis that counsel was ineffective in failing to raise the issue before the court to preserve the issue. Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).

## **ISSUE THREE**

The testimony of Chief Smith was clearly hearsay. While the defense did ask Chief Smith the question on cross examination, the state had previously questioned Chief Smith on this issue during direct. Moreover, Appellant is raising the issue of ineffective assistance of counsel. The state argument here bolsters this point that defense counsel was ineffective during the trial. Clearly if the defense attorney brought out such prejudicial evidence as to allow Chief Smith to testify on hearsay, was clearly ineffective. This court should find that this issue had merit and should be granted. This court should reverse and remand this case to the trial court for an evidentiary hearing on the issue.

## **ISSUE FOUR**

The state argues that the trial court properly accepted the state's argument that the proof shows one thing and the indictment alleges another. The indictment made the charge in which

the defendant was required to defend against. The proof should coincide with the contents of the indictment. While the state argued that the crime also robbery itself, and not the ownership of the money, the law requires that the charge set out who owned the property being the subject of the robbery.

The amendment allowed by the court was one of substance rather than mere form. Such an amendment should have only been made by the grand jury. Evans v. State, 813 So.2d (Miss. 2002). The state was allowed to amend a portion of the charge in which was the essence of the offense, the name of the owner of the money. The state cannot be allowed to amend the indictment each time the proof shows different from what has been sworn out by the grand jury. If this was allowed then there would be no need for an indictment at all.

This court should find that the trial court erred in allowing such amendment and that this case should be reversed and remanded to the trial court for a new trial.

#### **ISSUE FIVE**

As previously pointed out, the speedy trial issue is not procedurally barred in this case. Aside from the reason already presented, Johnson would point out that this is not a case of a plea of guilty where such issue would be automatically barred and waived by such a plea. Here Johnson went to trial right by his own actions. Counsel was ineffective in such actions and should not have waived such right without consulting with Johnson.

This court should find that Johnson's speedy trial claim was not waived and is not procedurally barred.

#### **ISSUE SIX**

Johnson would assert that the argument in this brief and that which is contained in the initial brief clearly demonstrates that Johnson was denied effective assistance of counsel.

Johnson would assert here that the state has not refuted this claim in it's brief and that this court should reverse and remand this case on such ground.

#### **ISSUE SEVEN**


Appellant would assert that under this issue he was denied his right to a fair trial based upon the additional errors asserted in this brief. The state has not refuted this issue since the state has failed to refute other issues raised by this brief. This court should grant the relief requested in this argument and reverse and remand this case to the trial court for a new trial.

#### **CONCLUSION**

Johnson would respectfully ask this Court to reject the state's argument and find that Appellant suffered a violation of his constitutional rights and that a new trial should be granted or that the case should be dismissed with prejudice on the speedy trial issue.

Respectfully submitted,

BY:

  
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CERTIFICATE OF SERVICE

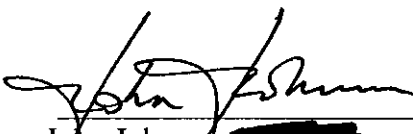

This is to certify that I, John Johnson, Appellant pro se, have this date delivered a true and correct copy of the above and foregoing Appellant's Reply Brief, to:

Honorable Jim Hood  
P.O. Box 220  
Jackson, MS 39205

Honorable W. Ashley Hines  
Circuit Court Judge  
P.O. Box 1315  
Greenville, Ms 38702-1315

Honorable Joyce I. Chiles  
District Attorney  
P. O. Box 426  
Greenville, Ms 38702

This, the 26 day of December, 2007.

BY:   
John Johnson,   
Unit 29-J  
Parchman, Ms 38738