IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIAM G. SCOTT — APPELLANT

VS. — NO. 2005-KA-0915

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2005-KA-0915**

STATE OF MISSISSIPPI **APPELLEE**

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PROCEDURAL HISTORY:

On March 28-31,2005, William G. Scott, "Scott" was tried for murder before a Hinds County Circuit Court jury, the Honorable Tomie T. Green presiding. R. 1. Scott was found guilty and given a life sentence in the custody of the MDOC. R. 597. From that conviction, he appealed to this Court. C.P. 176.

ISSUES ON APPEAL

I.

SHOULD TRIAL COUNSEL HAVE BEEN ALLOWED TO WITHDRAW?

II.

SHOULD THE TRIAL COURT HAVE RECUSED ITSELF?

III.

SHOULD SCOTT HAVE BEEN PRESENT DURING AN EX PARTE HEARING IN CHAMBERS?

IV.

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V.

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VI.

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VII.

SHOULD A MISTRIAL HAVE BEEN GRANTED DURING CLOSING ARGUMENT?

STATEMENT OF THE FACTS

On December 20, 2002 , Scott was indicted for the capital murder of Ms. Paula Dinks on July 9, 2002 by a Hinds County Grand jury. C.P. 8.

Prior to trial, Scott filed numerous "pro se" motions with the trial court. C.P. 19-70. Among them was a motion to compel discovery, motion to subpoena alleged alibi witnesses, two motion to suppress alleged confessions, motion to substitute court appointed counsel, two motions to dismiss for alleged violations of speedy trial rights , and a pro se motion for a continuance. The motion to substitute counsel included notice of "several complaints" against the public defender's office, Mr. Knapp, with the State Bar Commission. C.P. 10- 141; R. 5. The motion to suppress claimed among other things that Scott's in custody statements to Jackson Police investigators in Marietta, Georgia were "untrue." C.P. 32.

The defense, Mr. Knapp, filed a motion for a mental evaluation and a motion to withdraw from representing Scott. C.P. 13-14; 141-142. The motion to withdraw was based upon concern over rule 3.3 of professional conduct rules, dealing with "candor toward tribunal" C.P. 141. Knapp also filed a separate motion to suppress Scott's inculpatory statements to investigators as being allegedly involuntary. C.P. 15; 71-72; 141.

On November 5, 2004, the trial court set a trial date of March 28, 2005. C.P. 30.

In response to Mr. Knapp's concerns over conflicts between his responsibilities under the Rules of Professional Responsibility and his ability to represent Mr. Scott "with candor,"the trial court granted Mr. Knapp an ex parte hearing. This was without prosecutors or Scott being present. R. 12-13. This was premised upon Scott's alleged admissions to his counsel. After hearing from Mr. Knapp, the trial court advised him to continue his representation of Mr. Scott. She noted that Mr. Knapp could provide Scott with an opportunity to give a narrative before the jury. This would

be in keeping with his theory of his defense as known to Knapp at that time. See sealed in chambers transcripts in separate manila envelop included in the record.

The trial court ruled that since Mr. Scott had made no arrangements for private counsel, and had requested, more than once, a dismissal for alleged speedy trial violations, his pro se motion for a continuance would be denied. Mr. Knapp would represent him at the previously established trial date. Mr. Knapp was experienced in trying murder cases. R. 15-17; C.P. 147. In fact, Knapp had successfully reduced the capital murder charge to murder in the instant cause prior to trial. R. 11.

On March 29-31,2005, Scott was tried for murder, rather than capital murder, before a Hinds County Circuit Court jury, the Honorable Tomie T. Green presiding. R. 1. Scott was represented by public defenders Mr. Michael Knapp and Ms. Sharon Witty. R. 1.

A suppression hearing was held before the trial court. R.31-121. Detectives White and Denson testified that there was neither an offer of leniency nor any coercion made in exchange for Scott's incriminating statements. R. 37-38; 70. White and Denson corroborated each other in testifying that no other persons were present during their interview with Scott. R. 54; 75. White and Denson also testified that Scott was given his **Miranda** rights, and signed the waiver. Scott then admitted to inadvertently shooting Mr. Paula Dinkins in the back of the head. R.37-39;76-79. This was at the Cash Depot on Ellis Avenue in Jackson, Mississippi on July 9, 2002. It was during a robbery. Both White and Denson denied ever having shown Scott any pictures of a prison lethal injection gurney or table during their interview with him. R. 55 ; 79.

Scott testified that he did not sign the **Miranda** waiver, and that there were Georgia officers present outside the door during his interview in Marietta, Georgian. R. 93-116. Scott admitted on cross examination that he signed his name differently on various occasions. R. 105-106. He also claimed Officer White showed him a lethal injection table during this interview to frighten him. R.

97. Scott did not claim that any Georgia official questioned him during his interview with Officers White and Denson. R. 106-107. Scott admitted to signing pages of his statement, but denied having admitted to having killed or robbed Ms. Dinkins at any time. R. 93-94.

Officers White and Denson corroborated each other in testifying no one else was present during the interview. R. 49; 54; 80. A notary, Ms Cheryl McDonald, and a Georgia prison official came into the room "after" the interview was finished. The notary notarized Scott's signature, and the prison official came into the interview room to return Scott to his cell where he would await extradition to Mississippi.

After hearing from investigators Allen White and Keith Denson, as well as from Scott, the trial court found that Scott's incriminating statements were voluntarily and intelligently made. This was after a **Miranda** waiver had been signed and witnessed. R.118-121.

Mr. Antoine Reed testified that he was the assistant manager of "The Cash Depot." It is located at 1220 Ellis Avenue in Jackson, Mississippi. R. 241. On July 9, 2002, when he arrived for work, he found Ms. Paula Dinkins on the floor inside the store. She had been murdered. R. 242. He had arrived about 8:46 A. M. Dinkins was lying on the floor near the office safe. Some $2,200.00 was missing from the safe. R. 245. Reed told investigators that the Saturday prior to the Tuesday on which the murder occurred, Ms. Dinkins had informed him that Scott acted inappropriately toward her. R. 251. He tried to coerce Dinkins into going outside the building while he was inside as a customer wanting to borrow money. R. 254.

At that time, Scott worked at the Amoco service station next door to the Cash Depot. R. 252. Scott was a regular customer. R. 262. Reed identified Scott in the court room. R. 253. Reed also testified that he saw Scott drive by Cash Depot the day of the slaying without stopping. R. 253. A crowd had gathered there at the time.

Detective Keith Denson testified that he witnessed White giving Scott his **Miranda** rights, and saw Scott sign the waiver. R. 318-320. Scott never requested an attorney or refused to answer any questions. R. 321. No one made any offers of rewards or threats. R. 323. After an initial delay, tears came into Scott's eyes and he said "I didn't mean to kill her." R. 324-326. This was not in answer to any questions about what happened at the Cash Depot by either officer.

After this admission, in answer to questions, Scott explained events leading up to the shooting of the victim. This included Scott's s need for money, his receiving a handgun from a Mr. Bennett, his taking money in the safe at Cash Depot after killing Ms. Dinkins and then going to Marietta, Georgia. He disposed of the handgun somewhere in Georgia. He admitted to shooting Ms. Dinkins in the head while she was on her knees near the safe. With the cash, Scott paid his cell phone bill, and rent. He got his T V and stereo out of the pawn shop on McDowell Road. See S-8 for Scott's statement to investigators read into the record at page 331-337. Scott admitted going back by the Cash Depot business the day of the slaying. R. 341. He was driving a white Toyota MR-2 which was impounded by police in Marietta Georgia. R. 332.

The narrative of Scott's statement was typed up, and printed. Scott initialed the pages, and his signature was notarized by a notary at the Marietta jail. Officer Denson testified to seeing Scott sign his statement when the interview was completed. R. 341. At his apartment, police found a pawn ticket from the McDowell Road pawn shop, a Sylvania 13 inch colored television, and an Emerson CD player. R. 347. Also recovered from the apartment was some Wolfe Lugger 9 millimeter ammunition. R. 354.. The casing or shell recovered at the murder scene was also a .9 millimeter Wolf Lugger shell. R. 356. The interview with Scott occurred on August 25, 2002..

The McDowell Road pawn ticket was admitted as state's exhibit 10, the T.V. 12 , the speakers 14 and the 9 millimeter ammunition 17. R. 339, 348, 349, 355.

Dr. Hayne testified that he did the autopsy on the decedent, Mrs. Paula Dinkins. Hayne found the cause of death to be a gun shot to the back of the victim's head. R. 394. He also found the wound consistent with a 9 millimeter or other suitably large caliber projectile from a hand gun. R. 401.

Mr. Marcus Bennett testified that Scott took his 9 millimeter handgun. R. 403. Bennett explained that Scott wanted to buy the gun but did not have sufficient cash, $100.00. R. 401 Bennett agreed to exchange the gun for a radio. Bennett thought the radio was worth more than the handgun. R. 401. However, after Scott took possession of the hand gun, which was loaded, Bennett neither received the radio or ever saw Scott again. Bennett also testified that police investigators took a box of 9 millimeter ammunition he had for his handgun.

The trial court denied Scott's motion for a directed verdict. R. 410.

After being advised by his counsel and the trial court of his right to decide if he wished to testify in his own behalf , Scott chose to testify before the jury. R. 412-450.

Scott testified that he was arrested in Georgia for "possession of stolen property." He explained this as having a "bogus license plate on the back of my car." R. 429. Scott explained that since he had outstanding traffic violations infractions and fines which he had not paid, this use of a bogus tag was his way of being able to drive across state lines. He admitted to having "an altered social security card." R. 429. Scott admitted to voluntarily signing the extradition waiver to return to Mississippi. R. 430.

Scott admitted that he had a gambling habit. R. 416 . This was his way of explaining his having over $2,000.00 after previously having to use a pawn shop for available cash.

Scott admitted he was "a convicted felon for embezzlement back in Los Vegas, Nevada." R. 432. This was part of his explanation for why he supposedly could not be in possession of a handgun. R.

433. Scott admitted to having the 9 millimeter hand gun he "got from Mr. Bennett." R. 442. However, he denied having this gun in his possession in Georgia.. Scott also denied that he was at Cash Depot after June 14, 2002. R. 441.

During closing argument, the prosecution referred to Scott as a "con man" and a "shyster." There was no objection from the defense. R. 590;594.

Scott was found guilty and given a life sentence in the custody of the MDOC. R. 597. A motion for a JNOV or a New Trial was denied. R. 154-155; 169. From that denial of relief, Scott's appeal counsel, Mr. Chris Klotz , appealed to this Court. C.P. 176.

SUMMARY OF THE ARGUMENT

1. There was insufficient reasons for allowing the public defender to be removed from representing Scott. This occurred on the day of trial with a jury waiting. The Rules of Professional Conduct can not be applied in a vacuum. The rules governing conduct include rule 1.2 as well as 1.16 and 3.3. Rule 1.2 requires trial counsel "to abide by his clients objectives for his representation."

While Scott filed a motion to substitute counsel, he had made no arrangements for private counsel. R.7-10 ; C.P. 54-64. Likewise, he had filed two "motions to dismiss" for alleged failure to have been provided a speedy trial. R. 82-96; 116-130. This is also an issue in his appeal for which he is seeking reversal of his conviction. See issue IV.

The record reflects that Mr. Knapp represented Scott effectively, given the overwhelming evidence against Scott. Scott chose to testify in his own behalf. He chose to deny any culpability for the murder .R. 412-500. He also presented two witnesses, Mary Holden and Tamika Wray, in keeping with his alleged alibi defense. R. 501-538.

There is no evidence that Mr. Knapp did anything to interfere with Scott's ability to defend himself against the murder charge. There is no evidence that Knapp did anything before the jury that indicated any doubts about the credibility of his client. His closing argument was in keeping with Scott's testimony and his denial of any involvement in the murder or robbery. R. 572-587.

2. This issue was waived for failure to raise it with the trial court. In addition, there was insufficient reasons for the trial court to recuse itself. This is aside from the fact that she was not requested to do so.

While the record indicates two bench conferences were held and placed in a sealed record, the record indicates that this was a hearing about Mr. Knapp's problematic representation of Scott as a public defender. R. 14; 411. The record contains Scott's "motions for substitute counsel" prior to trial which contained "several complaints"to the State Bar concerning Mr. Knapp. C.P. 56. The trial court found Mr. Knapp could continue to represent Scott. The trial was set after numerous delays, including continuances to the defense, and two pro se requests for dismissal for alleged speedy trial violation as well as pro se request for "continuance." R. 7-10.; C.P. 82-96; 116-131.

There was no evidence of any bias against Scott by the trial court based upon ex parte conferences. The trial court did not show any bias during the suppression hearing. Her decision is fully supported by record evidence. R. 29-120. The record reflects that Scott testified in his own behalf as well as presented two alleged alibi witnesses. Scott denied that he was guilty of the charge. R. 445. He also indicated that he had never indicated that he was guilty to anyone. This is in keeping with his pre-trial motions, his testimony, as well as his affidavit attached to Appellant's brief, ¶23. R. 445; C.P. 37-38.[1]

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3. This issue was waived for failure to raise it with the trial court. In addition, there is a lack of evidence for holding that Scott should have been allowed to attend the ex parte conferences. This was the bench conference held between Mr. Knapp, the public defender, and the trial court. The record reflects that Scott wanted "a speedy trial," as well as a "pro se continuance." R. 7-10. C.P. 31-92. He wanted "to substitute counsel" when he had made no provisions to retain counsel. In addition, the record reflects that Scott testified in his own behalf. This was against his counsel's advise. R. 412-500.

Scott denied having signed the inculpatory statements about having shot Ms. Dinkins or that he ever having told investigators that he shot her. R. 442-445. His pre-trial motions stated any inculpatory statements were not truthful. C.P. 37-38.

The Appellee would submit that there is a lack of evident that Scott's not attending a ex parte hearing interfered with his ability to defend himself against the murder charge. His testimony was consistent with his pre-trial statement. Neither the trial court nor his counsel showed any bias against him before the jury.

Appellant's brief refers to Affidavit of Defendant. This Affidavit is prominently attached to his brief. It is referred to as Scott's pro se response to allegedly learning for the first time during the appeal process that his trial counsel had made "incriminating revelations" in chambers. See Appellant's brief page 19. Appellee would point out under MRAP, rule 10, this was not designated part of the record to the best of Appellee's knowledge. However, Appellee included ¶ 23 in its arguments concerning professional ethics as showing evidence of the public defenders compliance with rule 1.2. This showed his compliance in abiding by his client's decisions concerning his defense, even if counsel does not agree with the morality or possible effectiveness of those choices. The Appellee also referred to ¶23 to show Scott's consistent pro se denial of any admissions of guilt before, during or after his trial. This would seem to the Appellee to show there was a evidence, as found by the trial court in ex-parte ruling, that it would not be apparent or predicable until Scott actually testified as to what exactly his testimony would be. This would be independent of anything he may have said prior to trial to the public defender.

4. There was a lack of evidence of any violation of the defendant's speedy trial rights. The defense was given three continuances, and there was no evidence of any "actual prejudice" to Scott's defense based upon any delay. A motion to dismiss for failure to be granted a speedy trial, without more, is not grounds for establishing violation of a defendant's right to a speedy trial. The record reflects no request for any trial date other than the one provided by the trial court. C.P. 82-96; 116-131. In addition, there is evidence of "overcrowded court dockets" in the Circuit Court of Hinds County. C.P.147. There was no evidence of the prosecution using delays for any tactical advantage. Anxiety and interference with one's family or education plans are not recognized as prejudicial for speedy trial purposes.

Scott has yet to name an alleged witness for whom he had a name or an address who was knowledgeable about his location at the time of the slaying. The record reflects that Scott testified in his own behalf, and presented alleged alibi witness, Mary Holden, as well as Ms. Tamika Wray. R. 501-538. The record reflects that neither witness knew where Scott was when the slaying occurred. In addition, Mr. Knapp unsuccessfully tried to find witnesses for Scott for which he had no mailing address or telephone number. R. 17-26.

5. The record reflects that the trial court correctly found Scott's inculpatory statement was voluntarily and intelligently entered. R. 118-121.This was after hearing testimony from the only officers present when a **Miranda** rights waiver was signed by Scott. Both Sergeant Allen White and Detective Keith Denson testified that Scott indicated he understood his **Miranda** rights, did not request an attorney, signed a **Miranda** waiver, and then made inculpatory statements of having inadvertently shot the victim in the head at the Cash Depot. They testified that there were no promises or coercion used. R. 37-38; 70. They denied ever showing Scott any photos or pictures of a "death penalty gurney" as used for executions in prison.

They also both denied that any one else was present until the conclusion of the interview. R. 54; 80 A notary came to notarize Scott's signature after the interview. A Georgia prison official came after the interview to escort Scott back to his jail cell, where he would be waiting extradition to Mississippi.

Scott claimed to not have signed the waiver, and that Georgia officers were present outside the door during his in custody interrogation. R. 93, 105; 482. However, Scott did not indicate any Georgia official participated in questioning him. R. 105-106; 482-483.

The trial court properly found from the evidence that Scott's statements were voluntarily and intelligently entered. R. 118-121. The record contains credible, corroborated evidence in support of her ruling.

6. The record reflects Scott received effective assistance of counsel. There is a lack of evidence of deficient performance or of prejudice to Scott's defense based upon his counsel's representation. Mr. Knapp successfully had the death penalty charge reduced to murder. This enabled Scott to avoid a possible death penalty. R. 11. There is also no affidavit from Knapp who is being accused of incompetency..

There was also overwhelming evidence of guilt, including inculpatory post-**Miranda** statements. It also included Scott's own rambling contradictory testimony before the jury. R. 412-500. This included admissions of prior convictions involving dishonesty as well as practices in Mississippi involving deception, trickery and dishonest conduct for financial advantage. R. 450-500.

The filling of motions, arguing motions, calling of witnesses, and making of objections is a matter of "trial strategy." There is also a "strong presumption" of competence on the part of experienced trial counsel. There is a lack of evidence that Knapp did anything that undermined confidence in the fairness of the proceedings against Scott.

7. The record reflects that this issue was waived for failure to even raise it with the trial court. R. 450-456; C.P. 154-155. In addition the record reflects that the prosecution's closing argument was based upon facts in evidence and inferences from those facts. Scott testified in his own behalf. He admitted to having been previously convicted of embezzlement, a crime involving dishonesty, and subterfuge. R. 432. He also admitted to knowingly driving a car without a proper tag, and knowingly using a social security card which he had personally altered for employment and cash checking purposes R. 429-430. He admitted to getting a .9 millimeter handgun from Mr. Bennett. R. 442; 474. Mr. Bennett had already testified that Scott had failed to provide the radio he was to receive in exchange for the 9 millimeter. R. 408. He admitted to lying about being married to Ms. Tamika Wray.

Consequently, the appellee believes that the prosecutor's use of "con artist" and "shyster" were based upon evidence before the jury. The trial court can not be faulted for denying a motion for a mistrial where none was requested, much less warranted. A prosecutor can not be faulted for arguing in closing about evidence before the jury, and valid inferences from those facts.

ARGUMENT

PROPOSITION I

THE COURT PROPERLY DENIED A MOTION FOR SUBSTITUTE COUNSEL.

Appeal counsel believes that the trial court erred in not allowing Mr. Knapp to be relieved of his duty to defend Mr. Scott. The trial court should have done so because in an ex- parte hearing Knapp informed the trial court that Scott allegedly had admitted to him that he killed and robbed Mrs. Dinkins. Scott also informed the public defender that he would be using an alibi defense. Knapp informed the court that he did not believe that Scott would allegedly admit what he had done to any subsequent counsel. He also believed that by substituting counsel that there would have been no compromising of Mr. Knapp's ability to defend Scott as hypothetical non-adversarial counsel. Appellant's brief page 17-21.

To the contrary, the record reflects that Scott denied having made any inculpatory statements. This would be any admissions about his killing Ms. Jenkins or robbing the Cash Depot. He denied doing so in his pre-trial motions, in his testimony at a suppression hearing, and in his testimony before the jury. . C.P. 31-40; R. 91-116; 445. Scott's affidavit (although never admitted into the record) , nevertheless, also denies that he ever told anyone that he was guilty. See Scott's pro se Affidavit ¶ 23.

In addition, Knapp's questions about the actual murder were made in the context of having Scott explain to the jury which of his statements to investigators, already in the record, were accurate. R. 437-442. In other words, the Appellee would submit the record reflects that Scott's defense to the murder charge was not hampered by any thing Mr. Knapp did or said prior to or during the trial.

In addition, there was insufficient reasons for allowing the public defender to be removed from representing Scott. This request came on the day of trial with a jury waiting. While Scott filed a "motion to substitute counsel," he also had made no arrangements for private counsel. R. 7-17. Likewise, he had filed "two motions to dismiss" for alleged failure to have been given "a speedy trial." C.P.82-96; 116-131.

The record reflects that Mr. Knapp represented Scott effectively , having the capital murder charge reduced to murder and thereby removing the possibility of a life sentence. R. 11; C.P. 147. This shows Mr. Knapp's compliance with rule 1.2 of the Canons of Professional Conduct. He abided by his clients wishes as to how he would defend himself. He did this after Scott benefitted from his counsel's successful negotiations to eliminate the death penalty from consideration in the instant cause.

The record reflects that Mr. Knapp represented Scott effectively , given the evidence against him. Scott chose to testify in his own behalf. .R. 412-500. This was against the advise of his counsel. He also presented two witnesses, Mary Holden and Tamika Wray, as alleged alibi witnesses.. R. 501-538. The record reflects that there is a lack of evidence for holding that Scott was entitled to counsel other than that provided by the public defender's office.

As stated by the trial court in her ruling denying Mr. Knapp and Mr Scott's request for substitute counsel.

> 1. Defendant has failed to state adequate reasons for substitution of counsel. Court appointed attorneys Tom Fortner and Mike Knapp are both competent to try defendant's capital murder case (death penalty not sought). **Trial date is set for March 28, 2005 and those attorneys are familiar with the case, and appointment of new counsel will result in delay of trial, which would be contrary to defendant's speedy trial motion.** C.P. 147. (Emphasis by Appellee).

In **Feazell v. State** 750 So.2d 1286, *1288 (Miss. App. 2000), the Court found that the

granting of a continuance and/or a motion to withdraw counsel was within the trial court's discretion.

> ¶7.We address first the motion of Feazell's court-appointed counsel to withdraw. The motion was filed on the morning of the scheduled trial and was denied. The basis for this motion was Feazell's desire to hire private counsel and his failure to cooperate with his current attorney. On the hearing on the motion, appointed counsel stated that Feazell was unhappy with the decisions made by his attorneys. Additionally, Feazell allegedly believed that the victim's family had bribed his attorneys to assure a conviction. Upon examination, Feazell testified that he had contacted a private attorney who would not proceed without a continuance. Feazell also seemed to indicate that the private attorney recommended the same course of action taken by his appointed counsel.
>
> ¶ 8. Feazell had once before been permitted to replace an appointed counsel because of the allegation that this previous attorney had been "bought out" by the victim's family. The judge termed the new motion filed on the day of trial as a "thirteenth hour" motion. To the extent one of the grounds was Feazell's refusal to cooperate, the judge concluded that Feazell was fully aware of the consequences of his actions and would have to bear them. **To find error would require us to conclude that the trial judge is at the mercy of the manipulations of a defendant. We do not so find. Counsel's motion to withdraw was properly denied.** (Emphasis by Appellee).

In **Davis v. State** 811 So.2d 346, *351 (Miss. App. 2001), the Court found that Davis was playing "cat and mouse" with the court. Davis wanted self representation yet also wanted to claim ineffective assistance of counsel for his ineptitude during his trial.

> ¶ 9. While it is unclear from the brief, Davis implies that he was provided with ineffective assistance of counsel. It is not made clear by the brief what aspect of assistance of counsel was ineffective. Rather, Davis claims that he was incompetent to represent himself and, for that reason, allowed inadmissable hearsay evidence to be admitted. While the defendant has a right to self-representation, "[H]e may not use this right to play a 'cat and mouse' game with the court, ... or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of Counsel." **Evans v. State**, 273 So.2d 495 (Miss.1973). The record reflects the trial judge forewarned Davis of the dangers and responsibilities of self-representation. Davis chose to ignore those warnings and proceed on his own behalf. It is far too late to argue that he lacked the legal knowledge to represent himself.

In the instant cause, Scott wanted to fault his counsel for not effectively finding alibi witnesses for which he had no addresses or telephone numbers in order to get new counsel while at the same time trying to have his case dismissed for failure to provide him with a speedy trial.

The Appellee would submit that this is a variation of "the cat and mouse game" condemned in **Davis**.

The Appellee would submit that under this set of facts, as summarized above, the trial court did not abuse its discretion. This issue is lacking in merit.

PROPOSITION II

THIS ISSUE WAS WAIVED. AND THE COURT PROPERLY DENIED A MOTION FOR RECUSAL.

Appellant counsel believes that the trial court erred in failing to recuse itself from hearing this case. He believes she should have done so once Mr. Knapp informed her that he believed that Mr. Scott was going to give false testimony in two different versions. First, when he testified, and second when he had alibi witnesses testify. He believes that by hearing of Scott's alleged inculpatory admissions of guilt the trial court lost her impartiality to serve as a fact finder at the suppression hearing and during the trial. Appellant's brief page 21-25.

To the contrary, the record reflects that this issue was waived for failure to raise it with the trial court. The trial court was not asked to recuse itself. This issue was also not raised by appeal counsel or by Scott pro se. R. 29-121; C.P. 154-156; 162-164. .

In **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994),

the Court stated:

> Because these arguments are not preserved for appeal, this Court cannot reverse based upon them. The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal. **Baine v. State**, 606 So. 2d 1076 (Miss. 1992); **Willie v. State**, 585 So. 2d 660, 671 (Miss. 1991); Crawford v. State, 515 So. 2d 936,938 (Miss. 1987);...

Without conceding that this issue was waived, I will also address the merits. The record reflects that the trial court did not show any partiality in her ruling on factual issues. Nor does the record indicate any attempt by the court, or the public defender to prevent Mr. Scott from defending himself. The record reflects Scott did so in the manner in which he wished before the jury. Against his counsel's advise, he chose to testify in his own behalf.

Prior to trial, at the suppression hearing as well as before the jury, Scott denied having

signed the **Miranda** waiver, or having made any admissions much less confessions of having actually having killed Ms. Dinkins. C.P. 37-38; R. 91-116.

There was insufficient reasons for the trial court to recuse itself. The record indicates that two bench conferences were held and not placed in the open record. These hearings were about Mr. Knapp's representation of Scott as a public defender. R. 14;411. The record contains Scott's "motions for substitute counsel" prior to trial contained various unsubstantiated charges against Mr. Knapp. This included alleged filling of "several complaints" with the Mississippi State Bar. C.P. 56. The trial court found Mr. Knapp could continue to represent Scott, given the facts of this case, and the fact the trial was set for trial after numerous delays, and two pro se dismissal for alleged speedy trial violation motions were filed by Scott pro se. It must also be noted that "speedy trial" is also being used on appeal as allegedly grounds for reversal. See issue IV.

In **Ferguson v. State** 507 So.2d 94, *97 (Miss.1987), relied upon by Scott, there was record evidence that trial counsel informed the jury "in open court" that Ferguson was lying.

> We are of the opinion that an independent violation of the Sixth Amendment occurred in the present case when Ferguson's lawyer denounced him as a liar in open court before the trier of fact, and that this was an evil of such magnitude that no showing of prejudice is necessary for a reversal.
>
> [2] **Strickland** itself recognizes that a lawyer has a duty to represent his client not only with diligence but with loyalty. **Strickland v. Washington**, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed.2d 674, 694 (1984). See also, **Anders v. California**, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed.2d 493, 498 (1967); **U.S. v. Alvarez**, 580 F.2d 1251, 1256 (5th Cir.1978). No more devastating breach of this duty can be imagined than for a lawyer to denounce his client before the trier of fact as untruthful.
>
> **Lowery v. Cardwell**, 575 F.2d 727 (9th Cir.1978), was, like the present case, a bench trial. In that case a lawyer was conducting direct examination of his client. From the answers it became apparent to the lawyer that his client had perjured herself. The lawyer immediately moved for permission to withdraw from representation, stating that he could not give his reasons for doing so. The Ninth Circuit held that the lawyer's action had effectively deprived the defendant of his

> Sixth Amendment right to a fair trial. The court reasoned that under the circumstances, the motion amounted to an unequivocal announcement that the defendant had lied on the stand. Although it commended the lawyer for refusing to condone his client's perjury, the court saw no way out of reversing the conviction:
>
> We start with the basic proposition that where under these circumstances, counsel informs the fact-finder of his belief [that his client was lying] he has by that action disabled the fact-finder from judging the merits of the defendant's defense. Further, he has by his action openly placed himself in opposition to his client upon her defense. The consequences of such action on the part of counsel in our judgment are such as to deprive defendant of a fair trial. 575 F.2d at 730.
>
> If such reasoning applied in Lowery, which merely involved the fact finder's drawing an inference from the lawyer's conduct, it obviously applies with even greater force in the present case, where the lawyer denounced his client in open court as a liar. How can a trial be called fair when the defendant's own attorney is attacking him

The record indicates that this issue was waived. There was no request for recusal. In addition, the record reflects that the public defender did not state or imply any doubts about Scott's veracity before the jury. Neither did the trial court. This issue is also lacking in merit.

PROPOSITION III

THIS ISSUE WAS WAIVED. AND SCOTT WAS NOT HARMED BY NOT BEING PRESENT IN CHAMBERS ON A MATTER OR POSSIBLE CONFLICT OF INTEREST IN ALLOWING PUBLIC DEFENDER REPRESENTATION IN THIS CASE.

Appeal counsel believes that the trial court erred in not allowing Scott to be present during two ex parte hearings held between the trial court and the public defender. Since the public defender admitted to the trial court that Scott had allegedly indicated that he was guilty, this made Scott's presence necessary. Appeal counsel believes this conference could be considered "a crucial phase" of the trial against him for murder. By not being present, Scott could not defend himself against the alleged pre-trial admission of guilt. Appellant's brief page 23-25.

To the contrary, the record reflects that this issue was waived for failure to raise it with the trial court. R. 29-121; C.P. 154-156; 162-164. **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994)

Without conceding that this issue was waived, I will also address the merits. Scott in his pre-trial motions to the court, in his testimony before the court at the suppression hearing and before jury denied that he ever at any time told anyone that he, in fact, was responsible for the death and robbing of Ms Dinkins. C.P. 37-38. R. 91-116; 445 . There is therefore no record evidence from Scott corroborating his counsel that he made any admission of guilt under any circumstances.

There is a lack of evidence that the ex-parte hearing outside the presence of the jury was "a critical stage" of the proceedings against Scott. In **Strickland v. State**, 477 So. 2d 1347 (Miss 1985), the Supreme Court found error in excluding Strickland and his counsel from being present during the trial court's examination in chambers of potential jurors. This was about possible outside

contact about their case. The Supreme Court also found in **Davis v. State**, 767 So. 2d 986 (Miss. 2000) that Davis was not harmed by not being present during the routine preliminary statutory qualification of the jury. This would be prior to any voir dire by the trial court and the attorneys preparatory to trial.

In **Burns v. State** 729 So.2d 203, *217 (Miss. 1998), the Supreme Court found that Burns was not prejudiced by the failure of the court reporter to transcribe the colloquy during bench conferences during his trial. The court found under **Ormond, infra**, that this did not effect the outcome of the trial in a prejudicial manner.

> We have said that failure to provide counsel at non-critical stages such as scientific analysis of fingerprints, blood samples, hair and clothing is not a constitutional violation. See **Baylor**, 246 So.2d at 519. We have reiterated the same holding several times since Baylor. See, e.g., **Magee v. State**, 542 So.2d 228 (Miss.1989)(photographic lineup not critical stage); **Newton v. State**, 321 So.2d 298 (Miss.1975)(fingerprinting not critical stage); **Ewing v. State**, 300 So.2d 916 (Miss.1974) (chemical test for intoxication not critical stage).
>
> [17] ¶ 60. Critical stage has been defined by this Court as "any confrontation in which the results might affect the course of the later trial and in which the presence of counsel might avert prejudice at trial." **Ormond v. State**, 599 So.2d 951, 956 (Miss.1992) (citing **Coleman v. State**, 592 So.2d 517, 520 (Miss.1991)). Ormond dictates that as long as there is an opportunity for counsel to cross-examine at trial or otherwise confront witnesses, there is no constitutional violation for not having counsel present during non-critical stages. Therefore, because counsel for Burns had the opportunity to cross-examine witnesses in regard to the handwriting exemplar, as well as, the letters written to Kohlheim to which they were compared, he was able to "avert prejudice at trial" thus meeting the standard set forth in Ormond

The appellee would submit that not being present at a bench conference did not interfere with Scott's ability to defend himself under the facts of this case. Neither the trial court nor Mr Knapp revealed any thing about Mr. Scott's alleged inculpatory statements before the jury.

One fact can not be denied . As stated above, in Scott's pre-trial motions, in his testimony, Scott denied that he had ever indicated to Mr. Knapp or anyone else that he was guilty of the murder

in the instant cause.

The trial court's ruling was that Knapp could represent Scott. If and when Scott chose to testify, Knapp could do so by giving Scott an opportunity to make a narrative statement before the jury in his own words. This would avoid any conflict with the professional canons of ethics concerning candor before a tribunal under the Rules of Professional Conduct..

As stated by the trial court in its ruling:

> This matter came before the court, during the trial of this case, on the motion of counsel for defendant, Honorable Mike Knapp, to withdraw from representing defendant, for fear that he might breach the cannons of ethics if he continues to represent the defendant. The Court has conducted two ex parte conferences to address this matter. Having throughly considered counsel's concerns and being otherwise advised in the premises, the court is of the opinion that defense counsel should continue to represent his client in this case. Additionally, if defendant Scott chooses to take the witness stand, he shall be allowed to give a narrative statement on direct and be subject to cross examination by the prosecutor. C.P. 148.

The Appellee would submit that under the facts of this case, the ex-parte hearing was not a critical stage of the proceedings against Mr. Scott. It did not result in any decision which presupposed any particular outcome to his murder trial. Scott made his own credibility a matter for the jury to determine in its deliberations. Neither his counsel nor the trial court interfered with his doing so. This issue is lacking in merit.

PROPOSITION IV

SCOTT WAS PROVIDED WITH A SPEEDY TRIAL.

Scott argues that he was denied a speedy trial. He believes that since there was no evidence of good cause shown for continuances other than the three continuances granted to his own counsel. He thinks there was a delay of some 392 days attributable to the prosecution by his own calculation. Scott believes these delays hindered his ability to locate his alleged alibi witnesses as well as caused him anxiety, interfered with his education and his ability to visit his sick mother. Appellant's brief page 27-33.

To the contrary, the record reflects that delays were the result of the granting of continuances for counsel for Scott as well as the result of crowded court dockets in Hinds County. In addition, the record reflects that Scott filed two separate motions "to dismiss" for alleged violations of his right to a speedy trial. C.P. 82-96; 116-131. However, he has yet to request a trial date other than the one provided him by court order. That trial date was set on November 5, 2004 by the trial court for March 28, 2005. Scott also mentioned speedy trial in some of his many other motions with the trial court. He did not state any prejudice to his defense because of delays in either of his motions. And he did not state any prejudice for the record when given an opportunity before the trial court. R. 9-10.

In addition, Mr. Knapp pointed out for the record that he made numerous attempts to locate alleged witnesses for Scott but to no avail. R. 17-26. Scott had no last names or last known addresses for some of the witnesses. In addition, two witnesses were located to testified as alleged alibi witnesses. However, contrary to Scott's claims, the record reflects that neither witness had any specific knowledge about Scott's location at the time Ms. Dinkins was murdered as the Cash Deport

in Jackson. R. 501-538.

The trial court denied a motion to dismiss for alleged failure to deny Scott a speedy trial. C.P. 147. A major reason for the delay was "the overcrowded criminal court docket" in Hinds County, as well as granting continuances for the defense in preparation for what was initially a death penalty case. C. P. 147. The trial court also indicated that time was needed prior to trial to deal with Scott's numerous pro se pre trial motions. This would indicate his own pro se motions, including complaints against law enforcement personnel caused some of the delay. This included his motion to substitute counsel without having any means to hire retained counsel. C.P. 54-64. This included filling "several complaints" with the state bar against his counsel, which would require his counsel to take additional time defending himself and his actions on behalf of Scott to the bar. C.P. 56.

> 2. Defendant was indicted in December 2002, was arrested in Marietta, Georgia and extradited back to Mississippi to stand trial. **Trial date was set for March 28, 2005, in a timely manner, with consideration of the court's overcrowded docket and the time needed for preparation of defendant's defense.** Speedy trial is moot.
> 3.. Defendant's motion to suppress will be heard March 28, 2005.
> 4. Appropriate motions filed pro se will be heard March 28, 2005 C.P. 147. (Emphasis by Appellee).

In **Perry v. State**, 637 So. 2d 871, 875 (Miss. 1994), this Court held that the demand for a dismissal for violation of the right to speedy trial is not to be confused with a demand for a speedy trial.

> In **Adams** we observed that a demand for dismissal for violation of the right to speedy trial is not the equivalent of a demand for speedy trial. There we held that a demand for dismissal coupled with a demand for an instant trial was insufficient to weigh this factor in favor of the defendant, where the motion came after the bulk of the entire period of delay had lapsed. Id. Similarly, as the trial court observed, Perry never demanded trial; he demanded dismissal claiming that his speedy trial rights had already been violated.

In **McGehee v. State**, 657 So. 2d 799, 802 (Miss. 1995), this Court found that "overcrowded

trial dockets" and "understaffed prosecutors" which required the delaying of a trial should be weighed only lightly against the state.

> There were no continuances requested by either the State or McGhee. There is no indication in the record that any delay was intentional on the part of the State. Nor was there a showing by McGhee that the State gained any tactical advantage from the delay. As noted by Special Circuit Court Judge W.M. O'Barr, this was the "normal usual operation of the court." The delay was caused not by the State or McGhee but rather, the overcrowded trial docket and the system in Harrison County of assigning each case to a particular judge as that case preceeded up to and through the trial process. Where the reason for the delay is overcrowded dockets and understaffed prosecutors, this Court has stated that this factor will not be weighed heavily against the State, **Adams**, 583 So. 2d 165 (Miss. 1991);...

The record reflects that Scott filed two motions to dismiss for alleged violations of his speedy trial rights. C.P. 82-96; 116-131. Neither motion requested a different trial date or any legitimate reason for a different trial date. While both motions mention possible missing witnesses, there were no names or addresses included. Moreover, the alleged missing witnesses are mentioned as grounds for charges of alleged ineffective assistance against his counsel and as grounds for his need to substitute counsel. There was no proffer about what they would testify to in the instant cause. C.P. 85-86 ;120-121.

While these motions mention another pro se motion to subpoena witnesses, it does not include any names or addresses for persons knowledgeable about Scott's location at the time of the slaying in keeping with his alibi defense. The proposed witnesses were law enforcement personnel in Georgia and Mississippi. C.P. 42-45.

Mr. Knapp stated for the record that he had tried to find more than once "Kevin at Kinkos" who according to Scott was a possible witness, but to no avail, See page 7 of sealed in chambers record under seal.

In **Martin v. State**, 872 So.2d 713, *719 -720 (Miss. App. 2004), the Court found merely

claiming alibi witnesses were lost by delays in trial without stating specifically how this impaired a defense was insufficient to show "actual prejudice" for speedy trial purposes.

> Martin claims prejudice from the death of an alibi witness. This Court cannot decide an issue based on assertions in the briefs alone; rather, issues must be proven by the record. **Medina v. State**, 688 So.2d 727, 732 (Miss.1996). On December 31, 1997, Martin filed a motion to dismiss. In that motion, Martin claims that the failure to provide him with a speedy trial was one of the reasons he could not utilize an alibi witness who died prior to trial. In his motion, Martin did not specifically state to what the alibi witness would have testified. He merely stated that he had an aunt who could confirm his whereabouts on the days in question. On October 1, 1998, an order was entered denying Martin's motion to dismiss. *720
> While Martin claims that because of the delay in his trial an alibi witness is now deceased which impaired his defense; without greater specificity, Martin has failed to show actual prejudice which resulted from the delay. **Walton v. State**, 678 So.2d 645, 650 (Miss.1996). This issue is without merit.

In **Jenkins v. State** 947 So.2d 270, *277 -278 (Miss. 2006), the Court stated that merely being incarcerated prior to trial was not sufficient for showing prejudice.

> ¶ 21. In considering whether Jenkins was prejudiced by the delay, we must look to the three interests for which the speedy trial right was designed: "(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." **Mitchell v. State**, 792 So.2d 192, 213 (Miss.2001); **Barker**, 407 U.S. at 532, 92 S.Ct. 2182. Generally, proof of prejudice entails the loss of evidence, the death of witnesses, or the staleness of an investigation. **Sharp v. State**, 786 So.2d 372, 381 (Miss.2001) (citations omitted). The possibility of impairment of the defense is the most serious consideration in determining whether the defendant has suffered prejudice as a result of delay. Id. **Mississippi case law does not recognize as prejudice the negative emotional, social, and economic impacts that accompany incarceration. Manix**, 895 So.2d at 177 (citing **Hughey v. State**, 512 So.2d 4, 11 (Miss.1987)). **Consequently, a defendant's assertion of prejudice attributable solely to incarceration, with no other harm, typically is not sufficient to warrant reversal. Ross**, 605 So.2d at 23. *278. (Emphasis by Appellee).

In **Black v. State** 724 So.2d 996, *1002 (Miss. App.1998), the Court of Appeals found prejudice concerning missing witnesses require some record support for this claim rather than the mere verbal or written assertions of such a claim.

> The final factor to be considered is the prejudice the delay has caused the defendant. Here, Black's only contention of prejudice is vaguely argued in his motion to dismiss, where he states, "the delay of this trial has resulted in prejudice in the preparation of Defendant's defense, in that he is unable to recall material events, and is unable to locate material witnesses for his defense to the charge." We note, as previously discussed, that Black stood idly by as the court ruled on his motion to dismiss. He made no attempt to argue his motion, present testimony, or offer evidence on this matter. Again, the record reflects that there were additional charges pending against Black during this period covered in the case chronology.

The record reflects that while Scott's motions mentioned his need for alibi witnesses for his defense, some of the persons whose names he provided could not be located. Neither Scott nor his counsel, through their own efforts, were able to find addresses or make contact with persons for whom they had addresses. R. 17-30. In addition, Scott presented two witnesses in his behalf who allegedly would be alibi witnesses. However, neither Mary Holden nor Tamika Wray, Scott's would-be-girl friend, testified to any knowledge of where he was on July 9,2002 , at 8:45 A. M., the approximate date and time of the murder of Ms. Dinkins at the Cash Depot on Ellis Avenue. R. 501-512; 517-538.

The Appellee would submit that the was sufficient record evidence for denying a motion for alleged violations of Scott's speedy trial rights. This issue is lacking in merit.

PROPOSITION V

SCOTT'S INCULPATORY STATEMENT AFTER A SIGNED MIRANDA WAIVER WAS PROPERLY RECEIVED.

Scott claims that his confession should not have been received into evidence. It should not have been received because a Georgia guard and a notary that were allegedly involved in his interview were not required to testify at the suppression hearing. It was error for the trial court to have not found adequate reasons for why these witnesses were not required to testify at the suppression hearing. Appellant's brief page 34-35.

To the contrary, the record reflects that the trial court found after a suppression hearing that only officers Allen White and Keith Denson from the Jackson Police Department were present at that time. Based upon the testimony, there was insufficient evidence for finding that anyone was present during the interview other that these two investigators. R. 120-121.

Detective White testified that no promises or threats were made to Scott and that he signed the **Miranda** waiver of rights form. R. 37-38..

> Q. Can you tell us whether or not any promises were made to him in order to get him to sign this rights waiver?
>
> A. No, sir.
>
> Q. Any forms of coercion whatsoever?
>
> A. No, sir. R. 37-38.

Sergeant Allen White testified that the only person in the interrogation room with Scott was Detective Denson. R. 54.

> Q. **How many people were in the room while y'all were questioning?**
>
> A. **Just us three.** (i.e. White, Detective Denson and Scott)

Q. Was there a guard from the Marietta Police Department at the door?

A. Not to my knowledge.

Q. Did Detective Denson stay the entire time?

A. Yes, sir.

Q. **When did she (the notary) come in the room?**

A. **At the end of the interview.**

Q. **Did anyone else come in the room at any time?**

A. **If they did, it was when we were releasing him back to go back to his cell there. A guard may have come in and got him then. It was guards walking all around. It was like a glass enclosed room.** R. 54-55. (Emphasis by Appellee).

The record reflects a guard from the Marietta police department was "outside" the shut door. A notary came into the room to notarize signatures "at the end of the interview." R. 54. White also testified that were no promises or threats made to Scott. R. 43. White also testified that Scott signed the **Miranda** waiver of rights form.

Q. Let's talk about the advise of rights first before we get to this statement. Tell the court how you went about advising him of those rights.

A. We took a **Miranda** rights form with us when we went and read over it and allowed him the opportunity to read it, and he signed it with his rights waiver. R. 37

White also testified that the signature on Exhibit 1, the Miranda waiver, was that of Scott and it had not been altered or changed. R. 50.

This was during the interview with Scott. R. 80. Denson corroborated White in testifying that no one else came into the glass walled off room during the interview. R. 80.

Q. **Now while you and Detective White were in the room during the interrogation, did anybody else come into the room?**

A. **Not that I recall. No one interrupted the interview.** (Emphasis by Appellee).

Denson testified that no promises or threats were made to Scott and that he signed the **Miranda** waiver of rights form.

Q. Were any threats or promises made to him?

A. No.

Q. Any offers or favor or reward?

A. No.

Q. Any coercion of any type?

A. None whatsoever. R. 70

Scott testified that he supposedly did not sign the waiver of rights form. R. 93. He admitted to signing an extradition waiver and "multiple pages of a statement that I did give." R. 93. Scott did not claim any inducements from White or Denson caused him to make his post **Miranda** inculpatory statements. He claimed that he had made "parts of this statement" but not others. R. 94. He denied admitting to killing the victim. R. 114. Scott admitted the notary notarized his signatures on his confession. R. 112. Scott admitted that the Georgia officer complained of "stood outside the door." R. 106. He also admitted that this guard he did not ask him any questions during the interview by the JPD officers. R. 106-107.

Q. **And according to you he (Georgia jail officer in Marietta) stood outside the door, right?**

A. **Yes, ma'am.**

...

Q. **Did he ask you any questions during the interview?**

A. **Not during it, afterwards. When we was walking back, but not during the interview.** R. 106-107. (Emphasis by Appellee).

On cross examination, Scott admitted that he had been convicted of "embezzlement" in Nevada. R. 102. He admitted that he had "lied" about being married to Tamika Wray. R. 103. Scott

admitted to signing his name in different ways at different times. R. 105-106. As shown above with a cite to the record, Scott admitted that the Georgia guard outside the door did not enter the room during questioning and did not ask him any questions. R. 106-107. Scott admitted the tag on the car he was driving in Georgia was taken from a car at the Northpark Mall. R. 108. He did this because he was not supposed to be driving, since he had too many traffic infraction tickets. R. 109.

The trial court found based upon the testimony summarized above that there was sufficient evidence for finding that Scott's statements were given voluntarily and intelligently after a signed **Miranda** waiver. There was sufficient evidence for finding that the Marietta guard and the notary outside the closed door did not play any role in influencing Scott's inculpatory statement.

The trial court found, after hearing from everyone present, as well as Scott, that his inculpatory statement was voluntarily and intelligently made. It could be admitted into evidence against him.

> The Court finds that the statement that has been provided by the defendant was also signed by the defendant, and that there is no credible evidence that has been presented to the Court to indicate that those are not his signatures, although they may be different at different times. And that there were initials on each of the responses that indicated WGS. R. 118-119.
>
> The Court believes that he has the education and experience, and he did freely, voluntarily and knowingly sign the **Miranda** statement as well as the **Miranda** form. ... As to the notary that the officers indicated came in to the room to witness the signature, the Court does not find that the notary would have added or taken away anything from the voluntariness of the statement and the **Miranda** rights form. **Likewise, the Court rejects the testimony of the defendant that there was a third person who somehow was outside of the room and participating in the interrogation. Outside the room is not inside.** R. 120-121. (Emphasis by Appellee).

In **Mayes v. State** 925 So.2d 130, *135 (Miss. App.,2005), the court pointed out that the prosecution only needs to present witnesses claimed to have "coerced" or "induced" a confession at a suppression hearing. The Court of Appeals relied upon **Abram v. State, infra**, in its ruling.

> Only those persons who are claimed to have induced a confession through some means of coercion are required to be offered by the State under **Agee.**" **Abram v. State**, 606 So.2d 1015, 1030 (Miss.1992) (citing **Reid v. State**, 266 So.2d 21, 26 (Miss.1972)). Mayes accused only Detective Harris of coercing him to make a statement. In fact, Mayes testified at the suppression hearing that although Shegog was present during interrogation, "he was way across the room and he couldn't hear what was going on on our side of the room." Therefore, the trial court did not err in not requiring Shegog to testify at the suppression hearing. This issue is without merit.

The record reflects that Scott did not claim any coercion by either the Georgia notary or jail guard in Marietta. Therefore, even if they had been present when Scott signed the **Miranda** waiver, did not request counsel, and then made his incriminating statements, there was no need for these Georgia public servants to be required to testify. The Appellee would submit that this issue is also lacking in merit.

PROPOSITION VI

SCOTT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Scott's appeal counsel believes that Scott did not receive effective assistance of counsel. He believes that trial counsel did not adequately contests Scott's arrest in Georgia, prepare for trial, make better use of alleged alibi witnesses and did not make sufficient objections to various evidentiary matters introduced into evidence against Scott. He requests that the trial court grant an evidentiary hearing on some of the issues mentioned in his brief. Appellant's brief page 35-39.

To the contrary, the record reflects that Scott was given adequate representation by his trial counsel. Mr. Knapp successfully had the death penalty charge for murder eliminated prior to trial. R. 11.

There is neither evidence of deficient performance or of any prejudice to Scott's defense based upon these alleged errors. There is evidence of adequate preparations for trial, as well as proper trial strategy for defending Scott, given the overwhelming evidence against him and Scott's choice to testify in his own behalf and use an alibi defense against the advise of his counsel..

For Scott to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Scott must prove: (1) that his counsel's performance was "deficient," and (2) that this supposed deficient performance "prejudiced his defense." The burden of proving both prongs rests with Scott. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990). Finally, Scott must show that there is "a reasonable probability" that but for the errors of his counsel, the outcome of his trial would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992),

Ahmad v. State, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington,**, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is "a reasonable probability" that but for the alleged errors of his counsel, Mr. Knapp, the result of Scott's trial would have been different. This is to be determined from "the totality of the circumstances" involved in his case.

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is "a reasonable probability" that Mr. Knapp erred in his representation of Scott. Mr. Knapp successfully negotiated a reduction in the capital murder charge to murder which would not carry the death penalty. R. 11.

The record reflects that Knapp properly advised Scott concerning his rights and options for his defense before the jury. There is no evidence that any of the alleged alibi witnesses suggested to Mr. Knapp by Scott could be located with diligent effort. R. 17-31. Nevertheless, the record reflects that Knapp issued subpoena's for these witnesses for which he had addresses. R. 17-31.

There is a lack of evidence that there was any deception or subterfuge on the part of the prosecution involved in the charges against Scott in the state of Georgia. Scott testified that he was arrested in Georgia for "possession of stolen property." He explained this as having a "bogus license plate on the back of my car." R. 429. He admitted to having "an altered social security card." R. 429. Scott admitted to "voluntarily" signing the extradition waiver to return to Mississippi. R. 430.

Likewise, the record does not reflect, as shown under previous propositions, any harm to Scott as a result of Mr Knapp's having had ex parte conferences with the trial court about his conversations with Scott prior to trial. As shown previously, Scott had filed pre-trial motions indicated that he had not admitted he was guilty. C.P. 31-41. This was in keeping also with his testimony at the suppression hearing, and in his testimony before the jury. R. 91-101; 412-450.

. Scott admitted that he "had a gambling habit." R. 416 . This was his way of explaining his having over $2,000.00 after having very little money , and having to use pawn shops for cash. Scott admitted he was "a convicted felon for embezzlement back in Los Vegas, Nevada." R. 432. This was part of his explanation for why he supposedly could not be in possession of a handgun. R. 433. Consequently, Scott opened up issues about his previous charges in his rambling testimony. His admissions of convictions involving "dishonesty" opened up questions about his veracity concerning his testimony relevant to the murder charge against him. M. R. E. 609(2)

As stated in **Strickland**: and quoted in **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991):

> Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' The defendant must prove both prongs of the test. Id. 698.

Scott bears the burden of proving that both parts of the tests have been met. **Leatherwood v State**, 473 So. 2d 964, 968 (Miss. 1985).

> The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was deficient and that the deficient performance prejudiced the defense.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Lindsay v. State**, 720 So. 2d 182, 184 (6 (Miss. 1998); **Smith v State**, 490 So. 2d 860 (Miss. 1986). As stated previously, the only affidavit included with appellant's brief is from Mr. Scott. There was no affidavit from Mr Knapp who is being accused of incompetence.

In **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden

of showing prejudice could not be met by merely alleging it.

> Additionally, there is a further requirement which Johnston must hurdle, prejudice. Claims alleging a deficiency in the attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **Strickland,** 466 U. S. at 693., 104 S. Ct. at 2067. However, Johnston fails to make any allegations of prejudice. As in **Earley,** Johnson must affirmatively prove, not merely allege that prejudice resulted from counsel's deficient performance. *Earley,* 595 So. 2d at 433. Johnston has failed on the second prong of **Strickland.** Having failed to meet either prong of the **Strickland** test, we find that there is no merit to the ineffective assistance of counsel claim raised by Johnston.

In **Scott v. State** 742 So.2d 1190, *1196 (Miss. App.1999), the court of appeals found that trial counsel's filing of motions, calling of witnesses, and making of objections during the trial was a matter of trial strategy.

> Counsel's choice of whether or not to file certain motions, call certain witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy. **Cole v. State,** 666 So.2d 767, 777 (Miss.1995); **Murray v. Maggio,** 736 F.2d 279, 283 (5th Cir.1984). Likewise, upon a careful review of the record and the instances assigned by Scott, we are not persuaded that these instances fall outside the ambit of trial strategy as to infer any deficient performance of representation on the part of Roussell. Scott's contention that Roussell's failure in these decisions was both prejudicially deficient and that a "reasonable probability" of a more favorable result would have occurred has not been shown. The decisions in question- 1) to forgo any cross-examination of Agent McIntosh, 2) to forgo any voir dire of an expert witness prior to acceptance, whose qualifications were exceptional, and 3) to forgo the calling of any witnesses in defense of Scott-- have neither been argued as to how they were prejudicial to Scott's defense nor presented in a manner on appeal which would demonstrate to this Court that a more favorable outcome other than the one reached was probable had Roussell decided other than he did.

In **Ferguson v. State,** 507 So. 2d 94, 97 (Miss. 1987), quoting **Strickland,** 466 U S at 687, 104 S. Ct. 2052.

> Although it need not be outcome determinative in the strict sense, it [deficient assistance of counsel] must be grave enough to 'undermine confidence' in the reliability of the whole proceeding.

The Appellee would submit that under the facts of this case, there is a lack of evidence of

either deficient performance or of any prejudice to Scott as a result of the actions or inactions of Mr. Knapp. Knapp did nothing that would undermine confidence in the reliability of Scott's trial. This issue is also lacking in merit.

PROPOSITION VII

THIS ISSUE WAS WAIVED. IN ADDITION, CLOSING ARGUMENT WAS BASED UPON FACTS AND INFERENCES FROM FACTS IN THE RECORD.

Scott believes the trial court erred during closing argument. He believes that closing argument by the prosecution was prejudicial and inflammatory. His counsel thinks that referring to him as a "shyster" and a "con artist " prejudiced the jury against him. Scott believes that these prejudicial statements were serious enough even without an objection that the court should find that this denied him a fair trial. Appellant's brief page 37.

To the contrary, the record reflect that there was no objection by the defense to the alleged prejudicial remarks by the prosecution during closing argument. R. 590-594.

In **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994), the Court stated issues argued on appeal on different grounds from those objected upon at trial were waived.:

> Because these arguments are not preserved for appeal, this Court cannot reverse based upon them. The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal. **Baine v. State**, 606 So. 2d 1076 (Miss. 1992); **Willie v. State**, 585 So. 2d 660, 671 (Miss. 1991); **Crawford v. State**, 515 So. 2d 936,938(Miss. 1987);...

This issue was also not raised in Scott's pro se or his counsel's Motion For a New Trial or JNOV. C.P. 154-156; 162-164.

In addition to being waived, the comments about Mr. Scott before the jury were based upon record evidence as shown in his testimony. R.. 412-500. Mr. Marcus Bennett testified to how Scott took his handgun without paying for it through trickery. It was done as part of an anticipated exchange. Scott received the gun prior to an anticipated exchange from Scott of a radio. However, Bennett testified that he never received the radio or saw Scott after he took away the .9 millimeter

hand gun and a box of ammunition. R. 408.

In his testimony, Scott admitted that he had previously been convicted of embezzlement, a crime involving dishonesty. R.432; 450. Scott admitted that he used someone else's tag when he traveled from Mississippi to Georgia. R. 461-462. Scott admitted that he had altered numbers on his own social security card. R. 461-462. Scott admitted that he had lied about his being married to Ms. Tamika Wray. R. 103.

Consequently, there was a basis in the record for holding that Scott exhibited characteristics of a "con man" and a "shyster." Con men and shysters are those who use deception, subterfuge, trickery and lies to take advantage of other people for their own financial gain.

In closing argument, District Attorney Peterson argued that there was record evidence indicating that Scott had "hustled him (Bennett) out of his gun." She also used the word shyster and con-man to describe the devious activities Scott admitted to having committed. This was in addition to his claiming to being an addicted gambler.

> Because guess what, he got rid of the gun. He got rid of the purse. He got rid of everything that connected him to Paula Dinkins' murder. Don't assume that this defendant is not smart. Oh, he's smart. He used to be a shyster. He used to be a con artist. But right now today he's a murderer. R. 590
>
> And guess what, he hustled him, too. Just like the shyster and the con artist that he is. He hustled him out of the gun. He had planned that this was what he was going to do. He knew very well where he was going. R. 594.

Marcus Bennett testified to having been cheated out of his hand gun. He never received the radio or any other compensation in ex change for the gun, as Scott lead him to believe he would receive.

> Q. **Did you get cheated out of your gun?**
>
> A. **I think I did, ma'am, because I didn't get the radio like I was supposed to. And then right after that, I found out that this happened. So I never got what**

I was supposed to get in the first place.

During Scott's testimony, he admitted that he was guilty of embezzlement, theft and use of a stolen ATM card.

> Q. And you were convicted of attempted embezzlement, is that right, or conspiracy to commit embezzlement?
>
> A. It was three charges; embezzlement, theft and use of a stolen ATM card. R. . 450.
>
> ...
>
> Q. **So you knew you had a wrong tag on your vehicle when you left Mississippi; is that right?**
>
> A. **Yes, ma'am.**
>
> Q. **And that social security card wasn't your information was it?**
>
> A. **It was my Social Security card. The numbers were altered.**
>
> Q. **And you altered those numbers, didn't you?**
>
> A. **Yes, a long time ago.** R. 461-462. (Emphasis by Appellee).

In **Tanner v. State** 764 So.2d 385, *405 (Miss. 2000), the Supreme Court found that the decision to grant or deny a motion for a mistrial was within the trial court's discretion. The record in the instant cause reflects that no such motion for a mistrial was requested.

> Additionally, Tanner asserts that he was prejudiced by the State's repeated remarks that he "put on the proof." However, a review of the record indicates that the State merely was seeking an explanation of why such questions were relevant to the issue at trial. "The decision to declare a mistrial is within the sound discretion of the trial judge." **Brent v. State**, 632 So.2d 936, 941 (Miss.1994). "To find error from a trial judge's failure to declare a mistrial, there must have been an abuse of discretion." Id. Although the State's comments were somewhat inappropriate at times, this Court finds no such instance where the State's comments were severe enough to prejudice the ultimate decision of the jury. Therefore, this Court finds the trial court did not err in denying Tanner's motion for mistrial based upon prosecutorial misconduct.

In addition, as show with cites to the record, the comments by the prosecution about Scott being a "con-man" was based upon record evidence.

In **Dunaway v. State** , 551 So. 2d 162,163-164 (Miss. 1989), the Court stated that prosecuting attorneys are entitled to great latitude in framing closing argument. Statements based upon "facts introduced into evidence and fair deductions and conclusions" from those facts are "within the limits of proper debate."

> The right to argument contemplates liberal freedom of speech and range of discussion confined only to bounds of logic and reason; and if counsel's argument is within limits of proper debate, it is immaterial whether it is sound or unsound or whether he employs wit, invective and illustration therein. Moreover, figurative speech is legitimate if there is evidence on which it may be founded. Exaggerated statements and hasty observations are often made in the heat of the day, which, although not legitimate, are generally disregarded by the court, because in its opinion they are harmless. There are, however, certain well established limits beyond which counsel is forbidden to go. He must confine himself to the facts introduced in evidence and to the fair and reasonable deduction and conclusions to be drawn therefrom and to the application of the law, as given by the court, to the facts.

The Appellee would submit that this issue is also lacking in merit.

CONCLUSION

Scott's murder conviction and life sentence should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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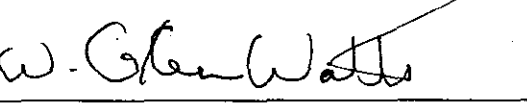
BY: 

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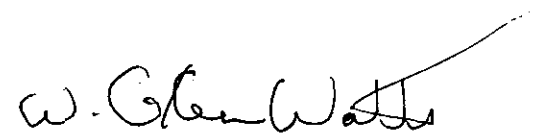
BY: 

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CERTIFICATE OF SERVICE

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

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This the 11th day of May, 2007.

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