No. 2005-KA-00915-COA

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIAM G. SCOTT

Appellant,

vs.

STATE OF MISSISSIPPI

Appellees.

On Appeal From the Circuit Court of the
First Judicial District of Hinds County, Mississippi.

BRIEF FOR APPELLANT

(ORAL ARGUMENT REQUESTED)

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IN THE SUPREME COURT OF MISSISSIPPI COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

WILLIAM SCOTT **APPELLANT/DEFENDANT**

VS. **No. 2005-KA-00915-COA**

STATE OF MISSISSIPPI **APPELLE/PLAINTIFF**

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 the Supreme Court may evaluate possible disqualification or recusal:

1. Honorable Judge Tommie Green, Hinds County Circuit Court Judge, Post Office Box 327, Jackson, MS 39205

2. Faye Peterson, Office of the Hinds County District Attorney, Post Office Box 39225, Jackson, MS 39225

3. Phillip Weinberg, Office of the Hinds County District Attorney, Post Office Box 39225, Jackson, MS 39205

4. Michael Knapp, Counsel for Appellant during the trial court proceeding while at Hinds County Public Defender, now in private practice, 405 Tombigbee Street, Jackson, MS 39201

5. Sharon Witty, Office of the Hinds County Public Defender, Post Office Box 2916, Jackson, MS 39056

6. William LaBarre, Office of the Hinds County Public Defender, Post Office Box 23029, Jackson, MS 39225

7. Jim Hood, Attorney General, State of Mississippi

J. CHRISTOPHER KLOTZ
Attorney of Record for William Scott

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STATEMENT REGARDING ORAL ARGUMENT

Mr. Scott requests that this Court allow oral argument to help resolve the issues of his case. Oral Argument is permitted pursuant to M.R.A.P. 34 and needed to help the understanding of Mr. Scott's appeal.

STATEMENT OF ISSUES

Defendant William Scott Raises the following issues on appeal:

I. The trial judge erred in failing to grant trial counsel's motion to withdraw after revealing to the Court that his client had confessed, that he believed his client was going to offer false testimony and that an unresolveable conflict existed which would prevent counsel from being able to effectively represent the Defendant at trial.

II. The trial court erred in not recusing itself after defense counsel inappropriately revealed items of attorney client privilege that were prejudicial to the Defendant, thus depriving the Defendant of his due process right to a fair trial.

III. The Defendant was denied both counsel and the right to be present at a critical phase of the prosecution when the Court did not allow him to be present in chambers during the two *Ex Parte* hearings in which defense counsel acted as a witness against his client by telling the trial court that the defendant had confessed to him, that he did not believe he could continue to represent him, and that he believed the defendant was about to lie on the stand.

IV. The trial court erred by not entertaining the Defendant's Motion to Dismiss for Failure to Grant a Speedy Trial and also for not actually dismissing the Defendant's case due to violations of his U.S. Constitutional right to a speedy trial under the 6th and 14th Amendment and Article II, Section 26 of the Mississippi Constitution.

V. The Court erred by failing to suppress the alleged statement of the Defendant after the State failed to meet its burden of proof under *Agee* by not producing all parties who were witnesses to the custodial statement.

VI. Trial counsel's case preparation, investigation, and trial performance were insufficient and thus ineffective, depriving the Defendant of his

right to effective assistance of counsel when considered cumulatively.

VII. The trial court erred in not granting a mistrial after the prosecutor repeatedly called the defendant a shyster and con artist.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

Nature of the Case and Course of the Proceedings:

This is a direct appeal of a non-death penalty capital murder conviction arising from indictment number 02-1149CRG in the First Judicial District of Hinds County. The death penalty was not pursued or requested by the prosecution. The underlying crime supporting the capital murder indictment is armed robbery by gun. The capital murder conviction came after a four day trial at the Hinds County Courthouse in Jackson, Mississippi. The trial occurred from March 28, 2005 to March 31, 2005. The Defendant was convicted and sentenced to life in prison without parole.

The underlying indictment alleges that on or about July 9, 2002 that the Defendant William Scott (hereinafter "Defendant" or "Scott") killed Paula Kay Dinkins while committing an armed robbery upon her. Scott was arrested on July 23, 2002, two weeks after the robbery and shooting which occurred at the Cash Depot on Ellis Avenue in Jackson, Mississippi. The Defendant was indicted for capital murder during the September term of the 2002 grand jury in the First Judicial District of Hinds County. He never made bail and has been incarcerated ever since his initial arrest. Defendant was represented at trial by an Assistant Hinds County Public Defender. Subsequent to the trial, the Court appointed separate counsel to prepare the appeal.

Statement of Facts Relevant to the Issues:

Facts: The Crime

Paula Dinkins was a clerk at the Cash Depot on Ellis Avenue in Jackson, Mississippi. On July 9, 2002 the Cash Depot Assistant Manager, Antoine Reed, arrived late for work at 8:46 a.m. Antoine Reed found Paula Dinkins on the floor of a back room, apparently dead from a gunshot wound. (Tr. 243, 255). Antoine Reed saw Paula Dinkins kneeling and unresponsive on the floor in front of the Cash Depot safe. The doors to the safe were open and Reed eventually discovered that the $2200.00 in cash he had placed in the safe the night before was missing. (Tr. 243-5) Sitting in the Cash Depot lobby when Antoine Reed arrived was a customer, Curtis Hearon. (Tr. 242-3).

The Jackson Police Department investigation concluded that Paula Dinkins arrived at work sometime on the morning she was killed and was the victim of a robbery/homicide. (Tr. 281). Paula Dinkins' husband, Eddie Dinkins, testified inconsistently with his original statement to the police about the time Paula left for work on the morning she was killed. His statement to the police on the day she was killed was time specific; she had left around 8:30 or 8:45 a.m. (Tr. 268). He testified at trial that she left at 8:30 a.m. but may have left much earlier than 8:30 to take the kids to summer school, a fact he never previously mentioned to the police. (Tr. 264, 267-8). The two witnesses at the scene, Assistant Manager Antoine Reed and customer Curtis Heron were questioned but were not considered suspects. (Tr. 313). Neither Reed nor Heron were thought by the police to be present during the shooting.

Physical evidence at the scene was minimal. One 9mm shell casing was found near Paula Dinkins' body. (Tr. 296, 299). No projectile was recovered. (Tr. 307). Mark Devries, the Emergency Medical Technician in the ambulance that responded to the call, speculated without

objection that the stage of coagulation of the blood on the Cash Depot floor indicated Dinkins' time of death was an hour, or less, before the time of his observation at approximately 9:00 a.m. (Tr. 279).

Upon questioning by police, Latasha Bryant, an employee of the Amoco station next door to the Cash Depot, stated that she heard a "loud pop" but did not see anyone that morning. (See Exhibit A to Defendant's Affidavit, Supplemental Report JPD Officer Samuel). Another Amoco employee, Leveda Beverly, stated to police that "she observed a black male come into the store [Amoco], sweating [sic] running down his face. The subject asked for a pack of Newport cigarettes. The clerk stated that the store didn't have any more. The black male subject left the store wearing a pinkish gray and blue pullover shirt in an unknown direction." (See Exhibit A to Defendant's Affidavit, Supplemental Report of JPD Officer Samuel). The clerk reported to police that the sweating man who came into the store was on video, and gave the tape to Officer Samuel who logged the tape into evidence. (See Exhibit A to Defendant's Affidavit, Supplemental Report of JPD Officer Samuel). Defense counsel never took the time to view the video, tough it was available and in the possession of the state. (See Affidavit of Defendant).

Another potential witness from whom the police obtained a statement was Mary Holden, a past customer of Cash Depot. She happened to walk in front of the Cash Depot on the morning of the robbery at about 8:30 to 8:50 a.m. (Tr. 515, and Trial Exhibit 22, Statement of Mary Holden). In her statement, she conveyed that she had seen two males leaving the store together in a hurry. (Trial Exhibit 22). She knew Assistant Manager Antoine Reed from conducting previous check cashing business with him. (Tr. 513-4). She did not identify Antoine Reed or Curtis Hearon as either of the males she saw leaving the scene in a hurry. Nor did she ever identify the Defendant as one of the people she saw leaving in a hurry.

The information that led to the development of Defendant Scott as a suspect was a statement that came from Assistant Manager Antoine Reed to the Jackson Police. Antoine Reed told the police that the Saturday before the shooting, Paula Dinkins had told him something unusual happened at the store. Paula Dinkins told Antoine Reed that she saw Defendant Scott outside the Cash Depot, near an adjacent building, acting strangely. Reed testified at trial that Dinkins had told him that the Defendant came into the store and tried to "coerce her outside". (Tr. 251-4). This incident was never reported to the police. (Tr. 251-2). Reed also testified at trial that he saw the Defendant ride by the store on the day of the shooting, but the Defendant did not stop. (Tr. 257-8).

The Jackson Police Department (JPD) located William Scott through the administration at Hinds Community College which directed JPD to the Defendant's ex-girlfriend, Tamika Wray. (Tr. 314-6). The police interviewed Ms. Wray who stated she and the Defendant had broken up and that the Defendant had moved to Georgia. (Tr. 316-317). Tamika Wray also told the police that she had dinner with the Defendant on the night of the shooting and at that time saw the Defendant with a large sum of money and a gun in his car. (Tr.520-3).

Having received his telephone number from Tamika Wray, the police called the Defendant in Georgia. The Defendant voluntarily gave JPD his new phone number, address and place of employment in Georgia. (Tr. 317). Wanting to question the Defendant, JPD contacted the Marietta, Georgia Police Department and faxed them some outstanding misdemeanor traffic warrants from Rankin County, Mississippi as a pretext for detaining Defendant Scott. (See Exhibit C to Affidavit of Defendant). The Marietta Police received the warrants, went to the Defendant's place of employment and arrested him on the Rankin County warrants. (Tr. 317). The Marietta Police arrested him at work. They charged him, after a search of his car incident to

the arrest on the Mississippi warrants, with having a stolen license plate on his car and possessing an altered social security card. (Tr. 461-2). Neither the validity of the warrants nor the pretextual procedure used to detain the Defendant for questioning were ever challenged or objected to during the trial phase.

Detectives Denson and White, the two Jackson Police Detectives who caused the Rankin County traffic warrants to be forwarded to Georgia, drove to Georgia to interview the Defendant regarding the death of Paula Dinkins. (Tr. 318). They interviewed him in the Cobb County Jail on July 24, 2002. (Pretrial Motion Exhibit 22, Trial Exhibit S-8). The Detectives purport that Scott gave a statement in which he admitted his guilt in the robbery/shooting. (Tr. 318-340 and Trial Exhibit S-8). The Defendant testified that he did talk to the detectives in the Cobb County Jail, but that he did not admit to having robbed or killed Paula Dinkins. (Tr. 93-4, 113-4). He testified that the hand-written initials on the statement were not his and that only portions of the contents of the statement were made during the interview. (Tr. 436). The Defendant testified that he did not have time to read statement during the police interview. (Tr. 113).

Facts: Pretrial and Trial Proceedings:

After his arrest, Defendant was appointed a lawyer from the Hinds County Public Defender's Office. Defendant Scott came to feel that his case was not being handled in a way that preserved his rights or protected his legal interest so he began to file his own *Pro Se* motions and wrote letters to the Court about the concerns he had about his attorney's performance and case investigation. (*See RE* p. 1-7, Docket Sheet Indicating Letters to Court from Defendant, Defendant's Affidavit, and Exhibit B to Defendant's Affidavit , Letters to Court from Defendant). Defendant wrote to the Mississippi Bar Association and copied the trial court concerning the perceived deficiencies in his representation. (*See* Exhibit B to Defendant's

Affidavit, Letters to Court from Defendant). He had specifically asked his attorney to investigate certain aspects of his case and his attorney refused to do the investigation or to undertake the steps requested. (See Tr. 8, Affidavit of Defendant, and Exhibit B to Defendant's Affidavit, Letters to Court).

The most critical failure in the investigation of the case is trial counsel's failure to attempt to view the previously described video tape form the Amoco next door to the Cash Depot. Defendant Scott was told by his attorney that he simply did not have time to go view the tape...a tape which was described by the witnesses to contain footage of someone who may have been a suspect in the case. (See Affidavit of Defendant and Exhibit A to Defendant's Affidavit, Supplemental Report of JPD Officer Samuel).

The Defendant's motions and communications with the Court reveal that there appears to have been a total breakdown in the attorney/client relationship. These communications and *Pro Se* motions are the reason some of the issues of ineffective counsel are raised in this brief when they might normally be found in a Petition for PCR . Ordinarily, these issues might not be part of the apparent record. Out of an abundance of caution, appellate counsel raises these issues since they may be considered apparent from the record, to a degree, from the Defendant's Letters and *Pro Se* motions to the court. Long before trial, Defendant Scott points out to the trial court that there is a problem with his relationship with his attorney. (See Defendant's Affidavit, and Exhibit B to Defendant's Affidavit, Letters to Court). Prior to the beginning of the trial, counsel informed the trial court that he too wanted off of the case because there was a conflict that prevented counsel form being able adequately to represent the Defendant. Counsel asked several times to be relieved as the Defendant's attorney.

Shockingly, defense counsel revealed to the court in detail how the Defendant had allegedly confessed the crime to him and how the rules of professional conduct and ethical cannons prohibited counsel from calling his client to the stand or asking him questions. (Tr. 7-15, and Sealed In Chambers Hearing #1 pp. 1-11). More puzzling is that after this hearing, defense counsel proceeded to put his client on the stand and actively question him during a suppression hearing. (Tr. 92-101).

Defendant vehemently denies that he ever confessed or admitted his guilt to his attorney, or anyone else for that matter. (See Affidavit of Defendant). Defendant was not allowed to be present to defend himself during the two sealed in chambers hearings where trial counsel told the court that the Defendant had confessed to him. (See Sealed In Chambers Hearing #1 pp. 1-11 and See Sealed In Chambers Hearing #2 pp. 1-4).

After the state rested but before the defense presented its case, defense counsel again told the trial court in a closed chambers hearing that an untenable conflict existed, that he could not fairly represent the Defendant, that he could not call his client to the stand or examine him and that substitute counsel should be appointed. (See Sealed In Chambers Hearing #2 pp. 1-4). Trial counsel again revealed to the court that he believed the Defendant was going to offer perjured testimony. (See Sealed In Chambers Hearing #2 pp. 1- 2).

Immediately after telling the court for the third time that he needed to withdraw due to ethical dictates stemming from his belief his client would offer false testimony, defense counsel called the defendant to the stand and conducted a detailed direct examination. (Tr. 412-450).

SUMMARY OF THE ARGUMENT

The most troublesome error in this trial springs from the incredible exchanges that took place between defense counsel and the court in chambers. Defense counsel, in no equivocal or vague terms told the judge that his client had outright admitted to the murder and robbery and that because of this admission, defense counsel could not effectively represent the client. The judge denied counsel's request to withdraw. A request for substitute counsel came independently from the Defendant who felt that his lawyer was ignoring reasonable requests of investigation, reasonable requests for motions and not developing the trial strategy that he was suggesting. The requests for substitute counsel were made well in advance of trial.

The first three assignments of error have to do with this ethical morass. The trial court should have granted the defense request to give the Defendant another lawyer. Anytime a lawyer is put into a position of being adverse to his client by making the ultimate breach of client confidence, divulging a confession to a homicide, it is time to allow the that lawyer to leave the case. A client cannot be adequately represented at trial by an attorney who has been compelled to divulge this type of confidence to the judge hearing the case.

The second assignment of error stems from defense counsel's revelation of the alleged confession and the effect it had on the trial court. As the trier of fact on suppression and evidentiary issues, the court was irretrievably tainted by learning from defense counsel that there had been an alleged admission of guilt within the sacrosanct confines of an attorney/client communication. The judge should have stepped aside and allowed an impartial judge to hear the issues of fact and law.

Third, the Defendant was not allowed to be present when his lawyer told the judge that the Defendant had admitted to the murder. This is a two fold problem of denial of counsel at a

critical stage and denial of the Defendant's ability to assert the attorney/client privilege. To illustrate, the defense attorney was essentially a witness against the defendant in an in chambers hearing. The defendant was not present at this in chambers hearing. A procedure that excludes a defendant from a hearing between the a judge and a witness adverse to the defendant would be unacceptable. Certainly, a defense lawyer telling a judge in chambers that his client has admitted to capital murder is an adverse witness to the Defendant. He cannot be considered to be both representing his client and condemning him at the same time. At that moment, the defendant was without counsel and unable to assert his privilege. Again, the lawyer and judge should have stepped back from the case.

Fourth, the Defendant had filed a timely motion to dismiss for failure to provide a speedy trial and asserted it again on the morning of trial. The trial court refused to entertain the motion at any point in the proceedings. The Defendant has squarely prevailed on the four *Barker* tests. The prosecution never rebutted or even addressed the motion. The only statement made by the court was on the morning of trial: "the court is going to give you a speedy trial making your motion for a speedy trial moot". (Tr. 9). This process fails constitutional review and demands reversal.

Fifth, the court did not suppress the statement of the Defendant made to police shortly after his original detention. There were witnesses present at points in the statement , including a notary who witnessed his signature, which were not produced by the state at the suppression hearing. No constitutionally acceptable reason for the witnesses' absence was provided.

Sixth, defense counsel provided deficient representation of the Defendant, amounting to constitutional ineffectiveness. Defendant requests a remand for evidentiary hearing on this issue. Some of the issues of ineffectiveness are; Trial counsel did not object to the pretextual arrest of

the Defendant which led to evidence that would have been fruit of the poisonous tree. Counsel did not investigate the Defendant's alibi or interview witnesses to the crime. Counsel did not attempt to view a piece of video tape evidence from a business adjacent to the crime scene which was in the custody of the police that may have had footage of the real killer. Counsel failed to move to suppress or to object to other crimes evidence. (Defendants Affidavit is Attached as Appendix 1 to this Brief).

The final assignment of error concerns inflammatory statements by the prosecutor during closing argument: to which defense counsel, unfortunately, did not object. An exception to the rule requiring objection is asserted herein.

For these reasons and the rationale provided below, the Defendant moves this Court for reversal and discharge or in the alternative, a new trial.

ARGUMENT

I. The trial judge erred in failing to grant trial counsel's motion to withdraw after divulging to the Court that his client had confessed, that he believed his client was going to offer false testimony, and that an unresolveable conflict existed which would prevent counsel from being able to effectively represent the Defendant at trial.

> Attorneys' Duties: *It is the duty of attorneys....(4) To maintain inviolate the confidence and, at every peril to themselves, to preserve the secrets of their clients;*

§ 73-3-37, MCA. Emphasis Added.

In an a criminal trial where trial counsel believes his client will offer false testimony from the witness stand, that lawyer has a duty to counsel his client not to lie under oath. If that fails, the lawyer should inform the Court only that trial counsel is required to move to withdraw. No client confidences should be revealed. *See* § 73-3-37, MCA. The lawyer should be allowed to withdraw if it is apparent that he cannot properly represent his client.

> 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?**

Ferguson v. State, 507 So.2d 94, (Miss. 1987). Emphasis Added.

In the case at bar, there had been at least six requests for trial counsel to be relieved as counsel. Three by the Defendant, beginning with a Motion for Substitution of Court Appointed Counsel filed on June 7, 2004, renewed by supplemental Motion on February 2, 2005 and renewed again by the Defendant on the day of his trial. (See Tr. 7-8; RE 54-63, Motion and Amended Motions for Substitution of Court Appointed Counsel).

Trial counsel also made three requests. The first on March 22, 2005 by written Motion to Withdraw. (RE 141-146). The second two requests were made orally. The first oral request was made the morning trial began and the second oral request was made after the state rested, but before the Defendant testified. (*See* RE 141-146, Motion to Withdraw; 1st Sealed In Chambers Conference Transcript, pp 1-11; and 2nd Sealed In Chambers Conference Transcript, pp 1-4.)

All of these requests to substitute counsel were denied because the court believed that the Defendant would run into this conflict, caused by the Defendant "confessing" to his attorney, with any attorney who represented him in the future. (Tr. 16, ln. 5). Meaning, that even if the court appointed a new attorney, the Defendant could again manipulate the system and delay by

"confessing" to his attorney. The Defendant was never queried about this issue. The Defendant denies that he confessed to his attorney. (See Affidavit of Defendant, ¶ 23.) Since he was not allowed to attend the in chambers proceedings, he only first learned about his trial lawyer's incriminating revelations to the judge when the sealed transcripts were unsealed for this direct appeal. (See Affidavit of Defendant, ¶ 23.)

The presumption of the court, that this trap of delay and manipulation would befall any lawyer appointed in the future, was contradicted by trial counsel's statement in the 1st Sealed In Chambers Hearing:

> **By Trial Counsel:** And I have talked to him so extensively. He's even said, well I shouldn't have told you.....**He will never tell another lawyer that he did it again. He knows that. And without that, the conflict is not there**. I mean it took that for me to get here.

(1st Sealed In Chambers Conference Transcript, pp 4-5).

Counsel went further to assure the court that he thought the Defendant was not trying to play the system by stating :

> **By Trial Counsel:** And then in closing when I don't even mention what he says, there's no doubt there's prejudice to him. The question is, is this a –I think he didn't know about these Canons until I showed him.
>
> **I think this time he may not have been trying to work the system** because I've gone over with him, I've got feelings and that—

(1st Sealed In Chambers Conference Transcript, p. 9).

These statements by trial counsel should have been sufficient to assuage the court's fear that the Defendant was merely trying to manipulate the system. Simply appointing a new attorney coupled with counseling the Defendant that no further substitutions of counsel would be made would have protected the Defendant's right to counsel, his right to present his theory of defense and to right to have non adversarial counsel present to represent him.

The fact that the Defendant could not receive a fair trial without assistance from counsel became apparent during the Defendant's trial testimony. Court and counsel had agreed that in order to avoid the ethical dilemma that faced trial counsel, he should not ask the Defendant any questions on direct examination. Trial counsel said to the court: "I can't ask him any questions. I can't assist him." (1st Sealed In Chambers Conference Transcript, p. 5).

However, the Defendant's need for guidance from counsel became so apparent during his testimony that, contrary to what had been discussed so urgently earlier, Defense counsel began to conduct a direct examination of the Defendant. (Tr. 412-450). In fact the court participated in instructing defense counsel how to question the Defendant during his testimony to the jury. (Tr. 425, 433).

Despite his several earlier protests, trial counsel conducted a partial examination of the Defendant that included questions such as: "Did you kill Paula Dinkins"; "Did you know Paula"; "Did you point a firearm at Ms. Dinkins"; "Did you rob the Cash Depot." (Tr. 439-442). It seems at least a possibility that at some point, counsel's conviction that his client was lying abated and he decided that it was appropriate for him to question his client. No explanation for this change of heart was ever given.

This change of tactics at trial leaves two possibilities. Counsel either decided on the spur of the moment that his client was no longer presenting a false defense or, he violated the ethical canons that he had previously attempted to invoke to remove himself from the case. In either case, a dark shadow is cast on the adequacy of the Defendant's representation at trial. The Defendant was effectively denied counsel at trial, evidenced

by the ultimately adversarial role the attorney occupied after divulging an alleged confession to capital murder to the court.

In this instance, the Defendant was denied his due process rights to a fair trial, due process right to present a defense and right to counsel, all under the 5th, 6th and 14th Amendments of the U.S. Constitution and those corollary rights under the Mississippi Constitution.

II. The trial court erred in not recusing itself after defense counsel inappropriately revealed items of attorney client privilege that were prejudicial to the Defendant, depriving the Defendant of his due process right to a fair trial.

It was inappropriate for trial counsel to state to the court that the Defendant had confessed the murder to him. This statement completely removed the trial court's ability to impartially rule on the Defendant's Motion to Suppress and any other evidentiary motions of the Defendant. Having been so advised by counsel, the court should have recused itself before ruling on any of the defendant's pre-trial motions.

> 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.**

Ferguson v. State, 507 So.2d 94, 97 (Miss.1987). Emphasis Added.

In the *Ferguson* case, the Judge was the trier of fact on all issues, including guilt. Although there was a jury in the case at hand, *Ferguson* still applies because the trial court was the trier of fact on Defendant Scott's pretrial motions, evidentiary issues and motion for directed

verdict. Mississippi jurisprudence holds that a court sitting on a motion to suppress is considered a trier of fact:

> The trial judge heard this testimony and, in declining to suppress the confession, found the testimony of Officer Marlett to be credible, and that of the defense witnesses incredible. **The resolution of issues of credibility is the province of the trier of fact.** *Hester v. State* 753 So.2d 463(¶ 24)(Miss.Ct.App.1999). **In a suppression hearing, that trier of fact is the trial judge.**

Jackson v. State, 778 So.2d 786 (Miss App. 2001).

Prior to considering the Defendant's motions, trial counsel had twice informed the court of his belief that the Defendant would offer false testimony from the stand; once in an in-court motion that took place before the court staff and prosecutor, and once in an in chambers conference (Tr. 10-15; and 1st In Chambers Hearing Transcript, pp. 1-11).

> **By Trial Counsel**:...The situation I have here is I have been told directly by my client that he committed the crime and that he intends to take the witness stand and provide alibi witnesses.....

(*See* 1st Sealed In Chambers Hearing Transcript, p.1, ln. 20).

The trial court should have allowed counsel to withdraw without further explanation or divulging attorney/client confidences.

> The court may wish an explanation of the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. **The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient**.

Comment to Rule 1.16, Mississippi Rules of Professional Conduct. Emphasis Added.

Before considering the testimony of the detectives and the testimony of the Defendant in the Motion to Suppress Defendant's Statement, the court's objectivity had been removed by the statements of trial counsel about his client's admission of guilt. Once this had been revealed,

there was no possibility that the court could objectively rule on whether the Defendant's statements were freely, voluntarily and knowingly given. This effectively denied the Defendant's federal and state constitutional rights to a fair trial and due process under the 5th, 6th and 14th Amendments of the U.S. Constitution and those corollary rights under the Mississippi Constitution.

III. The Defendant was denied both counsel and the right to be present at a critical phase of the prosecution when the Court did not allow him to be present in chambers during the two Ex Parte hearings in which defense counsel acted as a witness against his client by telling the trial court that the defendant had confessed to him, that he did not believe he could continue to represent him, and that he believed the defendant was about to lie on the stand.

A defendant is entitled to counsel and entitled to be present at all critical stages of prosecution. When trial counsel asked to address the court *Ex Parte*, in chambers, the defendant was not allowed to be present to defend himself from the condemnation of his own lawyer.

> In *Chase v. State*, 699 So.2d 521, 534 (Miss.1997) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 2667, 96 L.Ed.2d 631 (1987)) this Court stated that "**a criminal defendant 'is guaranteed the right to be present at any stage of the criminal proceedings that is critical to its outcome if his presence would contribute to the fairness of the procedure.' "**

Davis v. State, 767 So.2d 986 (Miss. 2000). Emphasis Added.

The Defendant was not allowed to be present during the two in chambers hearings where defense counsel divulged to the court that the Defendant had allegedly admitted his guilt to defense counsel and that the Defendant was going to offer false evidence during his testimony to the jury. (*See* 1st Sealed In Chambers Hearing Transcript, and 2nd In Chambers Hearing Transcript). Defendant denies that he ever made these statements to his trial counsel. (See Defendant's Affidavit).

Because of the Defendant's absence, he was unable to deny his lawyer's claims or assert his right to the protections of the attorney/client privilege. Since his trial lawyer was the one breaching the attorney/client privilege, the Defendant was harmed two-fold. First, by effectively being rendered without counsel and second, not being present or having someone present on his behalf to invoke the attorney client privilege at this critical stage.

> 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)).

Burns v. State, 729 So.2d 203 (Miss. 1998).

Defendant asserts that the *Ex Parte* hearing in which his attorney violated the attorney/client privilege by revealing an alleged confession of the Defendant was a critical stage. Counsel effectively became a witness testifying against his client to the court. The court was just about to sit as the trier of fact on pretrial evidentiary and suppression issues. It would have been improper for any witness, lawyer or not, to come before the court and relay an alleged confession outside of the presence of the Defendant.

The trial court's interview of a witness to a confession to murder satisfies the "confrontation" requirement of the definition of a critical stage. The second element is whether "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)). Had the Defendant had effective, non-adverse legal counsel at the in chambers hearings, counsel could have denied the statements on behalf of the Defendant, invoked the attorney/client privilege for the defendant or advised the Defendant to deny the statements or to invoke the privilege himself.

The prejudicial statements of trial counsel coupled with the inability of the Defendant to assert the attorney/client privilege, or deny the statements, deprived him of counsel at a critical phase in the proceedings. Thus he was deprived of his Federal and State rights to due process and the assistance of counsel under the 5th, 6th and 14th Amendments of the U.S. Constitution and those corollary rights under the Mississippi Constitution.

IV. The trial court erred by not entertaining the Defendant's Motion to Dismiss for Failure to Grant a Speedy Trial and also for not actually dismissing the Defendant's case due to violations of his U.S. Constitutional right to a speedy trial under the 6th and 14th Amendment and Article II, Section 26 of the Mississippi Constitution.

The Sixth Amendment of the United States Constitution insures all persons a right to a speedy trial. The Sixth Amendment applies to the State of Mississippi by way of the Fourteenth Amendment of the United States Constitution. *Klopler v. State of North Carolina,* 386 U.S. 213, 222-23 n.6 (1967). This is a fundamental right that clearly triggers due process. *Barker v. Wingo*, 407 U.S. 514, 515 (1972).

> **The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh. State claims have never been favored by the law, and far less so in criminal cases.**

Dickey v. Florida, 398 U.S. 30, 37-38 (1970) (emphasis supplied) (footnotes omitted).

Additionally, Article III § 26 of the Mississippi Constitution of 1890 insures an accused person a right to a speedy trial. See *Ross v. State,* 605 So.2d 17, 21 (Miss. 1992).

The Mississippi Supreme Court has held that "the right [of a speedy trial] attaches at the time of the accused's arrest, indictment or information." *Id.* "Under Mississippi law a delay of eight months is *presumptively prejudicial.*" *Id.* (citations omitted) (emphasis supplied).

The United States Supreme Court established four factors that must be addressed when analyzing a speedy trial violation. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Here, the trial court did not even attempt examine the *Barker* factors. In fact, the only mention of the Defendant's speedy trial rights was between the Defendant himself and the trial Court. Scott's counsel never aided him in this issue. The conversation regarding the Defendant's speedy trial rights went as follows:

> The Court: Now, you are free to hire you an attorney and have who you want. But I'm not going to pick and choose in the Public Defender's Office somebody that you like. I'll have an individual that is competent to represent you.
>
> Mr. Knapp has represented many defendants and did represent one this morning that's also charged with the same thing that you are charged with.
>
> Now, he may not do what you want him to do, but that's life. People don't do what I want them to do.
>
> The motion before the Court is a motion to withdraw. **And then you had a speedy trial motion where you didn't want to go - - you wanted a speedy trial but you didn't want the attorney.**
>
> **The Court is going to deny the motion to withdraw. Mr. Knapp has been told he needs to prepare for trial. And the Court is going to give you a speedy trial making your motion for a speedy trial moot.**

(Trial Tr. p. 9) (emphasis supplied).

This is the only consideration that the trial court gave to the Defendant's Motion to Dismiss for Lack of a Speedy Trial. Defendant's appointed counsel at no time inquired about the issue nor did he request the trial court address the *Barker* factors. The trial court did not ask the State **any** questions about what good cause it had for delaying the trial. It was error for the Court to deny the Motion to Dismiss without providing him a hearing on the *Barker* factors. It

denied him due process. Since the trial Court did not address the issues, the issues are individually briefed below.

A. Standard of Review

Since the trial court did not provide a hearing on the *Barker* factors then this Court must proceed *de novo*. *State v. Ferguson,* 576 So.2d 1252, 1255 (Miss. 1991).

B. All four Barker factors weigh in favor of Mr. Scott and require his dismissal with prejudice.

A decision regarding an accused's speedy trial rights is made reviewing the totality of the circumstances. See *Barker* at 530; and *Jefferson v. State*, 818 So.2d 1099, 1106 (Miss. 2002) holding "[n]o one factor is dispositive of the question. Instead the totality of the circumstances is considered." The factors to be addressed are: "(1) length of delay; (2) reason for the delay; (3) whether the defendant has asserted his right to a speedy trial; (4) whether the defendant was prejudiced by the delay." *Birkley v. State*, 750 So.2d 1245, 1249 (Miss. 1999) quoting *Barker*, 407 U.S. at 530.

1. Length of Delay

Mr. Scott was arrested on July 23, 2002, indicted on December 20, 2002, and his case finally went to trial on March 28, 2005. According to the record there were three continuances entered. The first continuance was granted on April 21, 2003, the second was granted on July 14, 2003 and the third was granted on January 19, 2004. The trial court set a trial date of March 28, 2005 by Order on November 5, 2004. A total of nine hundred forty-nine (949) days passed from the time Mr. Scott was arrested until his trial date. There were three continuances entered that are attributable to the Defendant that encompass the time span from April 21, 2003 until November 5, 2004. This means that the delay attributable to the State was three hundred ninety-two (392) days.

Since over twelve months passed between the time of his arrest and his trial date, this passage of time is presumptively prejudicial according to *Ross* and numerous other Mississippi Supreme Court decisions.

This first factor weighs in favor of Mr. Scott and against the State and required the trial court to assess the other factors. No analysis was done and this failure resulted in a violation of Mr. Scott's Sixth Amendment and State Constitutional right to a speedy trial.

2. Reason for Delay

The second factor is the reason for delay. In this case there is **no** reason at all for the delay. At no time did the State explain the reason for the delay, attributable to it, to the trial court or to Mr. Scott. No good cause exists and the following explains this Court's duty when no "probative evidence" exists to support such a finding:

> ***Review of a speedy trial claim encompasses the fact question of whether the trial delay rose from good cause. Under this Court's standard of review, this Court will uphold a decision based on substantial, credible evidence; if no probative evidence supports the trial court's finding of good cause, this Court will ordinarily reverse.*** *Folk v. State*, 576 So.2d 1243, 1247 (Miss. 1991). ***The state bears the burden of proving good cause for a speedy trial delay, and thus bears the risk of non-persuasion.*** *Flores v. State*, 574 So.2d 1314, 1318 (Miss. 1990); *Vickery v. State*, 535 So.2d 1371, 1377 (Miss. 1988); *Beavers v. State*, 498 So.2d 788, 791 (Miss. 1986); *Perry v. State*, 419 So.2d 194, 199 (Miss. 1982).

Ross v. State, 605 So.2d 17, 21 (Miss. 1992) (emphasis supplied). The State never explained the reason for the delay and the trial court never probed the State for the reason causing the delay. As such, the State failed to meet their burden for providing a good cause reason for delaying Mr. Scott's trial for over twelve (12) months. "Where the accused has not caused the delay, and where the prosecution has failed to show good cause therefore, this factor weighs in favor of the accused." *State v. Ferguson*, 576 So.2d 1252, 1254 (Miss. 1991) citing *Handley v. State*, 574

So.2d 671, 676 (Miss. 1990); *Trotter v. State*, 554 So.2d 313, 317 (Miss. 1989); *Smith v. State,* 550 So.2d 406, 409 (Miss. 1989); *Perry v. State*, 419 So.2d 194, 199 (Miss. 1982).

The prosecution has shown no good cause at all, thus failing to meet its burden. The Mississippi Supreme Court has held that "[w]here the record is silent regarding the reason for delay, as the record is silent here, the clock ticks against the State because *the State bears the risk of non-persuasion on the good cause issue.*" *Vickery v. State*, 535 So.2d 1371, 1375 (Miss. 1988) (emphasis supplied). See also *Brengettcy v. State*, 794 So.2d 987, 993 (Miss. 2001); *Jefferson v. State,* 818 So.2d 1099, 1106 (Miss. 2002); and *Riley v. State*, 855 So.2d 1004, 1009 (Miss. Ct. App. 2003). Indeed, the record is silent as to the reason that the trial was delayed for over twelve months. If the record is silent then how can the trial court's denial of Mr. Scott's motion to dismiss have been based on "probative evidence" supporting good cause? The answer is that no "probative evidence" exists and this Court must reverse. Since the record is silent this factor must weigh in favor of Mr. Scott and against the State.

3. Assertion of a Speedy Trial Right

The third *Barker* factor requires a determination of whether Mr. Scott asserted his right to a speedy trial. He filed two separate Motions to Dismiss Based on Speedy Trial Violation. Mr. Scott, without help from trial counsel, wrote *a Motion to Dismiss* that is compiled in the record. (RE at 81 and 116, Defendant's Motions to Dismiss Based on Speedy Trial Violation). In one *Motion to Dismiss*, Mr. Scott referenced a prior Motion written on June 7, 2004 asking the trial court to substitute his trial counsel. In that June 7th Motion, Defendant asserted the following: ***"Scott is prepared to go to trial."*** (RE at p. 59) (emphasis supplied). He hand wrote this motion himself without the help of trial counsel. This is clearly an assertion of his readiness to go to trial and request that he be placed on the trial docket. This request was made *pro se* and should

be given the credit of asserting his speedy trial rights. He certainly did not waive this right. He asserted it in the only fashion that he, as a layperson, knew how. See *Harvey v. Stone County School Dist.*, 862 So.2d 545, 551 (Miss. Ct. App. 2003) holding "pleadings filed by pro se litigants are to be held 'to less stringent standards than formal pleadings drafted by lawyers.' Quoting *Haines v. Kerner*, 404 U.S. 519, 529 (1972).

Even if the Defendant had not brought the trial Court's attention to his speedy trial violation the issue is not waived. See *Barker*, 407 at 528 holding that "[w]e reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right." This Court has held it will "indulge every reasonable presumption against the waiver of a constitutional right." *Vickery v. State,* 535 So.2d 1371, 1377 (Miss.1988) (quoting *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 393 (1937). This factor must be weighed in favor of the Defendant as there is absolutely no evidence that requires this factor to be weighed in favor of the State. Especially since the State never filed a response to Mr. Scott's Motion to Dismiss Based on Speedy Trial Violation and remained silent when the trial court addressed the motion on March 28, 2005.

4. Prejudice

Somewhere in the past thirty years the prejudice factor in the balancing test has taken on a life of its own. Better yet, perhaps it is more accurate to say that this factor seems to trump all others, when in fact the four (4) *Barker* factors should be considered together. In essence, the Mississippi appellate courts have given this factor more credence than any other factor. The balancing test set forth in *Barker* requires that this Court make a determination on the "totality of the circumstances." *Jefferson v. State*, 818 So.2d 1099, 1106 (Miss. 2002).

The final *Barker* factor is whether the Defendant was prejudiced by the delay. As stated in *Ross, supra*, a delay of more than eight months is presumptively prejudicial. The United

States Supreme Court has held that "affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Dogget v. U.S.*, 505 U.S. 647, 655 (1992). However, the actual prejudice that Mr. Scott has experienced is overwhelming. "[T]he presumption that pretrial delay has prejudiced the accused intensifies over time." *Id.* at 652.

In this case Scott set forth the following forms of actual prejudice in his motion to the Court. First, Mr. Scott was unable to locate witnesses in his case. (See, *Motion for Speedy Trial*, signed by the Defendant, RE at 81 & 116). This is a fact admitted several times by defense counsel. (Tr. 17-26, and 1st Sealed In Chambers Hearing, p 7-9). Second, Mr. Scott experienced anxiety and concern. (See, *Motion for Speedy Trial*, signed by the Defendant, RE 86 & 116). Third, Mr. Scott was not able to work at this time and, at the time he was arrested, he did have employment in Atlanta, Georgia. (See, *Motion for Speedy Trial*, signed by the Defendant, RE at 86 & 116). Fourth, he was prevented from attending college. He was enrolled to begin at Hinds Community College in the Fall of 2002. (See, *Motion for Speedy Trial*, signed by the Defendant, RE. at 86 & 116). Fifth, he was taken away from his mother and child who resided in another state. (See, *Motion for Speedy Trial*, signed by the Defendant, RE at 86 & 116).

The Defendant provided five forms of prejudice to the trial Court on March 10, 2005. He did this without the help of his trial counsel. The State never responded to this motion and the trial court did not address these factors when deciding whether to grant or deny the Defendant's motion to dismiss. The State's silence is equivalent to a confession of the issue!

*"[T]he **State** actually has to show lack of prejudice in order to prevail on this factor."* *Jasso v. State*, 655 So.2d 30, 35 (Miss. 1995) (emphasis supplied) quoting *State v. Ferguson*, 576 So.2d 1252, 1255 (Miss. 1991), citing *Moore v. Arizona*, 414 U.S. 25, 26 (1973). See also the Court of Appeal's ruling in *Biggs v. State*, 741 So.2d 318, 330 (Miss. Ct. App. 1999) holding that

"*[a] defendant does not bear the burden of proving actual prejudice. When the length of the delay is presumptively prejudicial, the burden of persuasion is on the State to show that the delay did not prejudice the defendant*". (Emphasis supplied). The State was silent. Since the State never said one single word, then there is nothing in the record to support an appellate court's ruling that the State met its burden. This factor weighs in favor of the Defendant and against the State. It certainly cannot weigh in favor of the State when it did and said nothing!

A local federal district court has held "'where the delay is not only excessive but the result of unexcused inaction or misconduct by the Government, it is prima facie prejudicial' and the burden thus shifts to the government to demonstrate that the defendant was not prejudiced." *U.S. v. Rogers*, 781 F.Supp. 1181, 1189 (S.D. Miss. 1991) quoting *Murray v. Washington*, 450 F.2d 465, 471 (5th Cir. 1971). The delay is excessive and no excuse exists in the record to provide the State with evidence to overcome this burden. The State never once addressed the Defendant's prejudice in the Record. Mr. Scott's prejudices, both presumptive and actual, have been amply proved and this Court should, by case law, weigh this factor in favor of the Defendant.

Alternatively, dismissal is proper without even determining prejudice because the first three factors weigh heavily in favor of the accused and prejudice is "totally irrelevant." *U.S. v. Rogers,* 781 F.Supp. 1181, 1189 (S.D. Miss. 1991). In *Rogers*, Judge Tom Lee held:

> Indeed, there can come a point where the first three factors are so heavily weighed against the government that prejudice, either actual or presumed, becomes totally irrelevant. Citing *U.S. v. Avalos*, 541 F.2d 1100, 1113 (5th Cir. 1976) quoting *Hoskins v. Wainwright*, 485 F.2d 1186, 1192 (5th Cir. 1973); see also *U.S. v. Dennard*, 722 F.2d 1510, 1513 (11th Cir. 1984) (well settled that when first three *Barker* factors weigh heavily against government, defendant need not demonstrate actual prejudice)...

Id. at 1189. Mr. Rogers' trial was delayed for 14 months and Judge Lee ultimately held that Mr. Rogers' constitutional right to a speedy trial was violated.

Mr. Scott has shown this Court that the State has not met its burden of producing "substantial, credible evidence" to support any finding of "good cause" delay. As stated in *Ross* above "if no probative evidence supports the trial court's finding of good cause, this Court will ordinarily reverse." Citing *Folk v. State*. A constitutional speedy trial violation exists in this case and no evidence suggests that good cause existed to delay Mr. Scott's trial for over twelve (12) months. As such "the sole remedy is to reverse the trial court's decision and dismiss the charges." *Ross* at 21, citing *Strunk v. United States,* 412 U.S. 434, 439-440, 93 S.Ct. 2260, 2263, 37 L.Ed.2d 56, 61 (1973); *Barker*, 407 U.S. at 522, 92 S.Ct. at 2188, 33 L.Ed.2d 101, *Bailey v. State*, 463 So.2d 1059, 1064 (Miss. 1985); *Turner v. State*, 383 So.2d 489 (Miss. 1980); *Perry*, 419 So.2d at 197. "***Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.***" *Barker*, 407 U.S. at 522 (footnote omitted) (emphasis supplied). A constitutional speedy trial violation has occurred here. As quoted above, the **"only"** remedy is to dismiss the charges against Mr. Scott.

C. EVIDENTIARY HEARING

Alternatively, Mr. Scott requests that this Court act in accordance with *Barnes v. State,* 577 So.2d 840, 844 (Miss. 1991) and *Jasso v. State*, 655 So.2d 30, 35 (Miss. 1995) and remand the case for an evidentiary hearing on the *Barker* factors since he was not given a proper hearing by the trial court.

V. The Court erred by failing to suppress the alleged statement of the Defendant after the State failed to meet its burden of proof under *Agee* by not producing all parties who were witnesses to the custodial statement.

On the morning of trial, a motion to suppress the Defendant's alleged confession was held. (Tr. 31-121). Testimony showed that two officers from the Jackson Police Department drove to Marietta, Georgia to interview the Defendant subsequent to his detention by Georgia officials. (Tr. 37-40). A notary and a jail guard were present at the time that the defendant gave his custodial statement. The jail guard was near the door of the room in which the Defendant made his statement to the two Jackson Police Officers. (Tr. 98, 106). The notary came in to witness the Defendant's signature on the statement. (Tr. 49-50). Neither the jail guard nor the notary were produced to testify on behalf of the state at the suppression hearing (Tr. 32-116).

Defendant asserts that the failure to produce these witnesses is an *Agee* violation and demands the suppression of the alleged statement. Mississippi case law states:

> This hearing is conducted in the absence of the jury. Lee v. State, supra, is also authority for the proposition that when, after the State has made out a prima facie case as to the voluntariness of the confession and the accused offers testimony that violence, threats of violence, or offers of reward induced the confession, then **the State must offer all the officers who were present when the accused was questioned and when the confession was signed, or give an adequate reason for the absence of any such witness**. See also *Holmes v. State*, 211 Miss. 436, 51 So.2d 755 (1951).

Agee v. State, 185 So.2d at 673; see also *Abram v. State*, 606 So.2d 1015 (Miss.1992). Emphasis Added.

Defendant contends that adequate reasons for the absence of the jail guard and the notary (who is believed to be a jail guard also) were not provided to the court, necessitating the suppression of the alleged statement. The failure of the trial court to suppress the statement deprived the Defendant of his right to counsel, right to be free from self incrimination and right

to due process under the 4th, 5th 6th and 14th Amendments of the U.S. Constitution and those corollary rights under the Mississippi Constitution.

VI. Trial counsel's case preparation, investigation, and trial performance were insufficient and thus ineffective, depriving the Defendant of his right to effective assistance of counsel when considered cumulatively.

"The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case. Id. at 687, 104 S.Ct. 2052." Cited in *Burns v. State*, 913 So.2d 668 (Miss. 2001).

Defendant alleges that the following failings of trial counsel before and during trial constituted a breach of trial counsel's duty to adequately represent the Defendant and resulted in a materially different outcome of the case than if the duty had been met. A remand for evidentiary hearing on the following issues is requested by the Defendant. Defendant alleges via his attached sworn affidavit that trial counsel:

A. Failed to object to the original detention of the Defendant based on the Rankin County traffic warrants. These warrants were used as a pretextual method of detention of the Defendant in Georgia. Subsequent to his detention by Georgia officials on the Mississippi traffic ticket warrants, evidence that was used at trial against the Defendant was gathered. A grant of this motion would have led to the suppression of evidence gathered thereafter as fruit of the poisonous tree. Remand for an evidentiary hearing is requested on this issue.

B. Failed to investigate the Defendant's alibi. Remand for an evidentiary hearing is requested on this issue

C. Failed to interview crime scene witnesses Reed & Hearon. Remand for an evidentiary hearing is requested on this issue

D. Failed to view the potentially exculpatory video tape from the store next to the business where the homicide occurred described in Exhibit A to the Affidavit of Defendant. Remand for an evidentiary hearing is requested on this issue

E. Failed to object to introduction of other crimes evidence of desertion, the suspected offense of fraudulent SS card, license plate. Remand for an evidentiary hearing is requested on this issue

F. Failed to object and move for mistrial after the prosecutor called the defendant a shyster and con artist. This issue is briefed below.

G. Informed the Court that the Defendant had allegedly confessed the murder to counsel. This issue is briefed in the preceding assignments of error which contain the law and argument on this issue.

The combination of these errors by counsel acted cumulatively to prejudice the Defendant in the eyes of the jury, depriving him of a fair trial. Mississippi's Courts have said:

> "at a minimum, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case." *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir.1985) (emphasis added). See also, *Bell v. Watkins*, 692 F.2d 999, 1009 (5th Cir.1982); *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir.1979). It appears to us that trial counsel made little or no effort to conduct an independent investigation; rather, he seems to have relied almost exclusively on material furnished to him by the state during discovery.

Ferguson v. State, 507 So.2d 94, (Miss. 1987).

Defendant asserts that trial counsel's performance was deficient in the preceding manners and that these deficiencies prejudiced the defense of the case resulting at a different outcome at trial. It is necessary for the Defendant to be able to supplement the record with additional findings of fact that can only be obtained by remand for evidentiary hearing in this matter. Respectfully, Defendant believes he has made a prima facie showing of ineffectiveness and remand for evidentiary hearing is justified.

Because of the above errors, the Defendant was denied his rights to due process and effective assistance of counsel under the 5th, 5th and 14th Amendments of the US Constitution and those corollary rights under the Mississippi Constitution.

VII. The trial court erred in not granting a mistrial after the prosecutor repeatedly called the defendant a shyster and con artist.

During the state's closing arguments, the prosecutor twice referred to the Defendant as a "shyster" and "con artist". (Tr. 590, 594). This was done solely to inflame and prejudice the jury against the Defendant and was not based on any facts in the record. In addressing this issue, the following standard applies:

> The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created.

Slaughter v. State, 815 So.2d 1122 (¶ 45) (Miss.2002).

Unfortunately in these two incidences, trial counsel did not object. However, an objection is not always required to preserve the error for appeal:

> "[W]here appellant cites numerous instances of improper and prejudicial conduct by the prosecutor, this Court has not been constrained from considering the merits of the alleged prejudice by the fact that objections were made and

sustained, **or that no objections were made.**" *Smith v. State*, 457 So.2d 327, 333-34 (Miss.1984).

Davis v. State, 2006 WL 3593210 (Miss.App. 2006). Emphasis Added.

Defendant argues that these statements were not based on any facts shown in evidence and rose to the level of denying the Defendant a fundamentally fair trial as guaranteed by the 5th 6th and 14th Amendments of the U.S. Constitution and those corollary rights under the Mississippi Constitution.

IV. CONCLUSION

For the reasons set forth above, the Defendant believes that he was denied his constitutional rights to counsel and his constitutional rights to due process and a fair trial. Respectfully, the Defendant prays for this court to reverse and render this case. Alternatively, he requests a reversal for a new trial with new trial counsel and a new trier of law.

Respectfully submitted,

WILLIAM SCOTT

BY:  2/8/07
J. CHRISTOPHER KLOTZ

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Appendix 1 To Appellant's Brief

Defendant's Affidavit

AFFIFAVIT OF FACTS

STATE OF Ms.

COUNTY OF Greene

PERSONALLY CAME AND APPEARED BEFORE ME, the undersigned WILLIAM SCOTT, who on his oath states the following:

1.) That on or about December 23, 2003, Mr. Mike Knapp visited me at the Hinds Country Detention Center. I informed him of my decision to fight the case after several attempts by him to take a plea bargain for life in prison. After stating my decision, Mr. Knapp stated that if we started filing motions, the state would not take any deals and they would seek the death penalty.

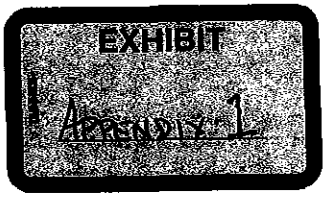
2.) That on or about January 14, 2004, I wrote Mr. Knapp requesting him to file a Motion to Suppress and inquired about findings of my roommates and the Cobb County Correctional officer who was at my March 24, 2002, interrogation. I also requested a transcript of Tamika Wray's interrogation.

3.) That on February 10, 2004, I wrote the Mississippi Bar about client-lawyer confidentiality being broken.

4.) That on or about February 29, 2004, I wrote the Mississippi Bar giving details about Tom Furtner and Mike Kapp's reluctance to investigate my case.

5.) That on or about March 17, 2004, I mailed letters to Honorable Judge Green, Mr. Fortner, and Mr. Knapp requesting a change of counsel.

6.) That on or about April 19, 2004, Mr. Knapp visited me to inform me that Mr. Furtner would not let him off of my case and that he does not investigate a cases until two to three weeks before trial.



7.) That on or about May 2, 2004, I wrote Mr. Knapp requesting information on witnesses, evidence, and the Suppression Motion. I also declined to take a mental evaluation.

8.) That on or about May 5, 2004, an order for mental evaluation was filed by Mr. Knapp without my knowledge and against my request.

9.) That on or about June 7, 2004, I filed a Motion to Substitute Counsel for lack of communication, failure to interview or investigate witnesses, and failure to investigate my case.

10.) That on or about June 17, 2004, Mr. Knapp visited me stating that I was not going to get another attorney, that he had not investigated my case, and that they usually ignore mail from inmates.

11.) That on or about August 10, 2004, I had filed a pro se Motion to Compel Discovery requesting several missing items from the Discovery including a video tape that could place the correct arrival of both Mr. Antone Reed and Mr. Curtis Hearon. This video tape was handled by detective Allen White. Mr. Knapp also visited me requesting me to take a mental evaluation. I then showed him a time line chart proving my innocence, only for him to say that, "time in my case is not important". Thereby dismissing this line of plausible defense

12.) That on or about August 12, 2004, Mr. Knapp visited Mr. Scott stating that he still had not investigated my case and that he did not have the time to properly work on my case. He then said that he would support my motion to substitute counsel.

13.) That on or about August 17, 2004, Mr. Knapp visited me and informed me that the State would not seek the death penalty and that the trial was pushed back because Judge Green was not prepared to go to trial yet. I was also told

that he did not have time to go and look for the video tape and that he could not subpoena anyone of state. He also had not yet investigated my case.

14.) That on or about September 16, 2004, I received a letter from Mr. Knapp stating that he had drafted a motion to suppress, subpoena a handwriting expert, had to subpoena my cell phone records, and that he would file more motions.

15.) That on or about November 1, 2004, I wrote Judge Green about Mr. Knapp's reluctance to investigate my case.

16.) That on or about January 14, 2005, I wrote Judge Green requesting a hearing date be set for substitution of counsel.

17.) That on or about March 24, 2005, Mr. Knapp visited me stating that he had not investigated my case, that he had just filed a motion to withdraw, that he had not looked for either the Cobb County Correctional Officer or Ms. Cheryl McDonald. He also stated again that he could not subpoena anyone out of state.

18.) That on or about March 25, 2005 Mr. Knapp stated that it was too late to ask the State for the video tape, and that I was not allowed to attend the Ex-parte Hearing between him and Judge Green.

19.) That on or about March 31, 2005, Mr. Knapp did tell me that I could win my case on Appeal if I raised ineffective counseling before the conclusion of trial. He also refused to use the time line I had requested him to use, and that he would be forced to withdraw after the trial.

20.) That on or about March 28, 2005, Mr. Knapp had still not located or sought after the 911 recording of the July 9, 2002, emergency call that Mr. Antonie Reed made. This Recording was to be used to place what time Mr. Reed had arrived. Mr. Knapp had told me that he would have this by trial.

21.) That on or about March 28, 2005, Mr. Knapp had failed to interview, investigate, or subpoena Mr. Curtis Hearon, who was proven to be the first person at the crime scene, and could have been a possible suspect.

22.) That on or about March 28, 2005, Mr. Knapp refused to ask for a continuance after detective Denson started in his testimony that detective White's mother was in the emergency room. Detective Allen White's suppressed testimony contracted detective Keith Denson's testimony, and that this testimony was not placed in front of the jury.

23.) That at no time or date, did I tell imply or confess to Mr. Knapp everyone else that I was guilty of this crime. Mr. Knapp never informed me that he told the judge in her chambers I had allegedly confessed to the crime. If I had known my lawyer did this I would have fired him on the spot. I had no knowledge of this until the 2 transcripts of the sealed hearings were made for appeal. Had I known I would have in I would have invoked the attorney client privilege and instructed him not to discuss anything he and I may have talked about, even if what he was saying I said was not true.

24.) That at no time or date, that Mr. Knapp informed me that he requested any continuances. He stated that all continuances were from Honorable Judge Green because she was not prepared for trial.

25.) That on or about July 23, 2002, detective Allen White of the Jackson Police Department did promise to have my Georgia criminal charges dismissed if I signed the alleged confession. This act was heard and witnesses by Cobb County Detention Center Notary/Deputy Cheryl McDonald. She also could have noticed the other unknown named jail guard present and the fact that I did not have time to read over the said alleged confession because signing it because of Detective White's obstruction of the various papers and that he

instructed that there was not enough time to read them because of the jail shift change occurring. The Georgia criminal charges were dismissed on either July 24, 2002 or July 25, 2002.

I have read the contents of this Affidavit and hereby state that all facts herein are true and correct to the best of my knowledge, information, and belief

WITNESS MY SIGNATURE this the 7th day of Feb., 2007.

WILLIAM G. SCOTT

SWORN TO AND SUBSCRIBED BEFORE ME, this the 7th day of Feb., 2007.

NOTARY PUBLIC

My Commission Expires: NOTARY PUBLIC STATE OF MISSISSIPPI AT LARGE
~~MY COMMISSION EXPIRES:~~ June 2, 2010
BONDED THRU NOTARY PUBLIC UNDERWRITERS

LAURA STEWART NOTARY PUBLIC GREENE COUNTY, MS

instructed that there was not enough time to read them because of the jail shift change occurring. The Georgia criminal charges were dismissed on either July 24, 2002 or July 25, 2002.

I have read the contents of this Affidavit and hereby state that all facts herein are true and correct to the best of my knowledge, information, and belief

WITNESS MY SIGNATURE this the 7th day of Feb., 2007.

WILLIAM G. SCOTT

SWORN TO AND SUBSCRIBED BEFORE ME, this the 7th day of Feb., 2007.

NOTARY PUBLIC

My Commission Expires: NOTARY PUBLIC STATE OF MISSISSIPPI AT LARGE ~~MY COMMISSION EXPIRES:~~ June 2, 2010 BONDED THRU NOTARY PUBLIC UNDERWRITERS

LAURA STEWART NOTARY PUBLIC GREENE COUNTY, MS

City of Jackson, Mississippi Police Department

Continuation of Original

Narrative/Supplementary Report Form

Supplement

Case Number 2002-29319

ative Headings ☒ Circumstances of Incident ☐ Witness/Interviews ☐ Investigative Follow-Up ☐ Status/Recommendations ☐ Synopsis

mplainant	Charge	Date & Time
PAULA DINKINS	HOMICIDE	7.9.02 / 0849

Continuation, Narrative and Witness Statement

On this date and time I, Offic Samuel responded to 1220 Ellis ave- ue in reference to a subject lying down in a puddle of blood. Upon my ival I noticed a black female lying on her back facing South. The ack female was covered in blood around the facial area. I, Offic Samuel nd next door north of Cash Depot to talk to several employees. One empl e (Latasha Bryant) stated that she heard a loud pop but didn't see anyb y. Employee two (2) stated that she observed a black male came into the e sweating running down his face. The subject asked for a pack of Newport igarettes. The clerk stated that the store didn't have anymore. The black ma subject left the store wearing a darkish gray and blue pullover shirt a unknown direction. The clerk captured the subject on video mera. I, Offic Samuel got witness statement from both employees nd a video Cassette tape. The video cassette tape was logged into evi- nce authority of (Det. Allen White #784). No further at this time.

Employe #1 - LATASHA BRYANT
200 Fleming Rd.
Jackson, MS. 39212
Phone # 371-1668

Employee #2 - Leveda Beverly
200 Fleming Rd.
Jackson, MS. 39212
Phone # 371-1668

EXHIBIT "A" to Appendix 1

Complainant/Witness Signature (When used as Complainant/Witness Statement Form)

Closure Code	Closure Date	Reporting Officer Signature & IBM	Supervisor Signature	Date

WILLIAM G. SEAT #52038
H.C.D.C. A1-5152
1450 COUNTY FARM RD
RAYMOND MS 39154

OCTOBER 27, 2004

MR. ROBERT GLENN WADDLE
THE MISSISSIPPI BAR
P.O. BOX 2168
JACKSON, MS 39225-2168

DEAR MR. WADDLE:

I AM WRITING TO TRY & FILE A FORMAL COMPLAINT AGAINST THE HINDS COUNTY PUBLIC DEFENDERS' OFFICE, MR. TOM FORNER-ESQ.; & MR. MIKE KNAPP. ESQ. THIS HAS BECOME MORE THAN A COMMUNICATION ISSUE. FOR THE PAST TWENTY-SEVEN(27) MONTHS, NOTHING HAS BEEN DONE BY THE PUBLIC DEFENDER'S OFFICE IN THE DEFENSE OF MY CASE. I HAVE MADE SEVERAL COMPLAINTS TO THE MISSISSIPPI BAR & TO HONORABLE JUDGE TOMMIE GREEN. HERE ARE THE FACTS STEMMING FROM MY FIRST REQUEST OF THE PUBLIC DEFENDER'S OFFICE, UNTIL THIS DAY.

DECEMBER 23, 2003 - I INFORMED MR. MIKE KNAPP, ESQ., THAT I WOULD NOT TAKE A PLEA BARGAIN FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE. THIS WAS AFTER

SEVERAL THREATS THAT IF WE START FILING MOTIONS THAT THERE WOULD BE NO PLEA BARGAINS OFFERED & THAT THE STATE WOULD SEEK THE DEATH PENALTY. THIS WAS TOLD TO ME MY MR. KNAPP THIS DAY

JANUARY 14, 2004 - I WROTE MR KNAPP REQUESTING HIM TO FILE A MOTION TO SUPPRESS MY ALLEGED STATEMENTS. I ALSO REQUESTED INFORMATION ABOUT MY ALIBI, WITNESSES, AUDIO TAPED STATEMENTS, EVIDENCE, & A COPY OF MY PRELIMINARY HEARING TRANSCRIPT.

FEBRUARY 29, 2004 - I WROTE TO THE MISSISSIPPI BAR ABOUT THE PUBLIC DEFENDERS OFFICES RELUCTANCE TO ADEQUETLY INVESTIGATE MY CASE.

MARCH 4, 2004 - I RECEIVED A LETTER FROM THE MISSISSIPPI BAR STATING THAT MR. TOM FORTNER, ESQ., CONTACT ME IMMEDIATELY & PROVIDE ME IN WRITTING WITH ANY INFORMATION I MAY REQUIRE IN MY CASE

MARCH 17, 2004 - I MAILED HONORABLE JUDGE TOMIE GREEN A COMPLAINT ON THE PUBLIC DEFENDER'S OFFICE & INQUIRED ABOUT A POSSABILITY OF CHANGE OF COUNSEL

MARCH 22, 2004 - I RECEIVED A LETTER FROM MR. MIKE KNAPP STATING THAT HE WAS UNABLE TO

TO SEE ME FOR THE REMAINDER OF THAT TERM DUE TO TRIALS.

APRIL 19, 2004 - MR. MIKE KNAPP, ESQ., VISITED ME AT 1:55 P.M. TO INFORM ME THAT HE WOULD HAVE MR TOM FORTNER COME & TALK TO ME. HE ALSO STATED THAT TOM FORTNER WOULD NOT LET HIM OFF OF MY CASE. MR. MIKE KNAPP THEN REQUESTED ME TO TAKE A MENTAL EVALUATION, WHICH I VERBALLY DECLINED. HE ALSO REQUESTED A COPY OF ALL OF MY NOTES.

MAY 2, 2004 - I WROTE MR. MIKE KNAPP REQUESTING INFORMATION ON WITNESSES, SUPPRESSION MOTION, & EVIDENCE. I ALSO WROTE THAT I WOULD DECLINE TO TAKE A MENTAL EVALUATION UNTIL I GOT AN EXPLANATION FOR IT

MAY 5, 2004 - AN ORDER FOR MENTAL EVALUATION WAS FILED BY THE PUBLIC DEFENDER'S OFFICE, AFTER I HAD DECLINED WRITTENLY & VERBALLY THAT I WAS NOT GOING TO TAKE ONE. I WAS NEVER TOLD THAT THIS MOTION WAS FILED OR GIVEN A COPY. I FOUND OUT LATER BY RECEIVING A DOCKET INFORMATION SHEET ON ~~AUGUST~~ AUGUST 12, 2004.

MAY 14, 2004 - I WROTE MR. MIKE KNAPP REQUESTING AN UPDATE TO MY LAST LETTER DATED MAY 2, 2004. I ALSO SENT HIM A K [illegible]

CASE. AT THIS POINT, I CAN NOT SEE GETTING A FAIR TRIAL BECAUSE OF THESE ISSUES.

NOW, MR. WADDLE, I SIMPLY & RESPECTFULLY REQUEST A BAR COMPLAINT BE PLACED AGAINST MR TOM FORTNER, ESQ., & MR. MIKE KNAPP, ESQ. OF THE HINDS COUNTY PUBLIC DEFENDERS OFFICE FOR THE MANY REASONS STATED IN THIS LETTER. A COPY OF THIS LETTER WILL BE FWARDED TO HONORABLE JUDGE TOMIE GREEN & TO MR. FORTNER & MR. KNAPP OF THE HINDS COUNTY PUBLIC DEFENDER OFFICE.

I THANK YOU FOR YOUR TIME & LOOK FOWARD TO YOUR RESPONSE.

SINCERELY,

William G. Scott

WILLIAM G. SCOTT #57632
H.C.D.C. A1-5152
1450 COUNTY FARM RD
RAYMOND, MS 39154

WGS

CC: TOM FORTNER, ESQ.
HONORABLE JUDGE TOMIE GREENE

COPY OF LETTER SENT TO JUDGE GREEN

WILLIAM G. SCOTT #57638
AI-5152 H.C.J.C.
1450 COUNTY FARM RD.
RAYMOND, MS 39154

JANUARY 12, 2005

HONORABLE JUDGE GREEN
HINDS COUNTY CIRCUIT COURT JUDGE
P.O. BOX 327
JACKSON, MS 39205-0327
CIRCUIT COURT NUMBER: 03-1-149 CRG

DEAR JUDGE GREEN.

I AM ONCE AGAIN WRITING TO INFORM THE COURT OF THE INEFFECTIVE COUNSELING I HAVE RECEIVED. THIS TIME IT'S A COMMUNICATION ISSUE.

ON DECEMBER 7, 2004, MR. MIKE KNAPP, ESQ., OF THE HINDS COUNTY PUBLIC DEFENDER'S OFFICE, VISITED ME HERE AT HINDS COUNTY DETENTION CENTER. THE CONVERSATION DURING THIS BRIEF VISIT WAS ABOUT HIS INVOLVEMENT IN MY CASE. HE BASICALLY STATED THAT HE DID NOT HAVE THE TIME TO PROPERLY INVESTIGATE MY CASE. MR. KNAPP DID INFORM ME THAT A HEARING WOULD BE HELD IN FRONT OF JUDGE GREEN DURING THE WEEK OF DECEMBER 13, 2004,

THROUGH DECEMBER 18, 2004, FOR THE HEARING OF MY SUBSTITUTION OF COURT APPOINTED COUNSEL MOTION, THAT VISIT CONCLUDED WITH HIS USUAL THREAT OF THE DEATH PENALTY AND HOW I SHOULD RECONSIDER TAKING A PLEA BARGAIN. VERY LITTLE TRIAL STRATEGY WAS DISCUSSED, LIKE ALL OF MR. KNAPP'S VISITS. MOST IMPORTANTLY, HE DID NOT INFORM ME OF MY NEW TRIAL DATE.

ON JANUARY 12, 2005 I RECEIVED COPIES OF THE THREE FILED MOTIONS I MADE FROM THE HINDS COUNTY CLERKS OFFICE. I ALSO RECEIVED A DOCKET INFORMATION SHEET THAT LISTED ALL OF THE MOTIONS AND ORDERS DONE IN MY CASE. I WAS DEEPLY DISTURBED BY THE FINDINGS. BACK ON NOVEMBER 5, 2004, A MARCH 28, 2005 TRIAL DATE WAS ORDERED IN MY CASE. MR. KNAPP HAD VISITED ME ON DECEMBER 7, 2004 AND DID NOT INFORM ME OF THAT TRIAL DATE. NOW, HERE IT IS THE MIDDLE OF JANUARY (TWO MONTHS AWAY FROM TRIAL), AND THERE HAS STILL BEEN VERY LITTLE INVESTIGATION, IF ANY AT ALL, IN MY CASE FROM THE HINDS COUNTY PUBLIC DEFENDERS' OFFICE. FOR THE PAST THIRTY (30) MONTHS, I'VE REQUESTED INFORMATION ON WITNESSES, MY ALIBI, MISSING DISCOVERY DOCUMENTS, AND TRIAL STRATEGY, FROM THE HINDS COUNTY PUBLIC DEFENDERS' OFFICE. I'VE MADE COMPLAINTS TO THE

MISSISSIPPI BAR, & TO YOU, YOUR HONOR, ABOUT THE INEFFECTIVE COUNSELING I'VE RECEIVED. SEVEN OF THE EIGHT MOTIONS FILED IN MY CASE WAS HAND WRITTEN BY ME. MR. KNAPP HAS NOT INVESTIGATED MY CASE, NOR DID HE INFORM ME OF THE NEW TRIAL DATE. THERE IS NO WAY THAT I COULD RECEIVE A FAIR TRIAL, WHICH IS GUARANTEED BY THE UNITED STATES CONSTITUTION, WITH THE INEFFECTIVE COUNSELING I'VE RECEIVED FROM THE HINDS COUNTY PUBLIC DEFENDERS' OFFICE.

PLEASE, YOUR HONOR, I RESPECTFULLY REQUEST TO HAVE THE MOTION HEARD FOR SUBSTITUTION OF COURT APPOINTED COUNSEL, TO RECTIFY THESE MANY ISSUES, AND TRY TO GET PREPARED FOR TRIAL THE DATE THAT THE COURT HAS SET. THANK YOU FOR YOUR TIME AND PATIENCE.

SINCERELY,

COPY OF LETER

WILLIAM G. SCOTT #57638

cc: TOM FORTNEY, ESQ.
HINDS COUNTY PUBLIC DEFENDER

COURT COPY

02-1149

MR. WILLIAM J. SCOTT
CMCF #110780
P.O. BOX 88550
PEARL, MS 39288

CIRCUIT COURT #:
02-1-149

MR. MIKE KNAPP, ESQ.
OFFICE OF THE PUBLIC DEFENDER
429 TOMBIGBEE STREET
P.O. BOX 23029
JACKSON, MS 39225

FILED
APR 20 2005
BARBARA DUNN, CIRCUIT CLERK
BY [signature] D.C.

APRIL 8, 2005

DEAR MR. KNAPP:

I APPRECIATE YOUR EFFORTS AT MY TRIAL. BUT YOU KNOW THAT THERE IS STILL A LONG ROAD AHEAD I AM REQUESTING YOU FOR A NEW TRIAL BASED ON THE FOLLOWING FACTORS MENTIONED. AND IF & WHEN THAT REQUEST FOR A NEW TRIAL IS DENIED, THEN I'M ASKING FOR AN APPEAL FOR THE FOLLOWING FACTORS:

1) THE TRIAL COURT ERRORED BY PERMITTING THE STATE TO USE THE CONFESSION THAT WAS NOT VOLUNTARY, INTELLIGENTLY, OR KNOWINGLY GIVEN. THE STATE FAILED TO PRODUCE CHERYL MCDONALD, WHO WAS THE NOTARY THAT WOULD HAVE WITNESSED THE DEFENDANT SIGNING ALL OF THE PAGES OF HIS

STATEMENT. AT THE SUPPRESSION HEARING ON MARCH 28, 2005, THE DEFENDANT TESTIFIED THAT MS. MCDONALD & ANOTHER GUARD, ALONG WITH DETECTIVES WHITE & DENSON, WAS PRESENT AT THE SIGNING OF HIS STATEMENT. THE DEFENDANT ALSO TESTIFIED THAT THE CONFESSION USED AGAINST HIM WAS NOT TRUE & CORRECT BECAUSE OF THE MISSING SIGNATURES THAT HE SIGNED ON HIS STATEMENT. ACCORDING TO THE RULES OF THE COURT, CRIMINAL LAW NUMBER 53.2:

> "WHEN AN ACCUSED OFFERS TESTIMONY AT A PRELIMINARY HEARING ON ADMISSIBILITY OF CONFESSION THAT VIOLENCE, OR OFFERS OF REWARD INDUCED THE CONFESSION, THE STATE MUST OFFER ALL OFFICERS WHO WERE PRESENT WHEN THE ACCUSED WAS QUESTIONED AND WHEN CONFESSION WAS SIGNED; OR GIVE AN ADEQUATE REASON FOR ABSENCE OF ANY SUCH WITNESS."

THE STATE FAILED TO PRODUCE CHERYL MCDONALD, (WHO NOTARIZED THE STATEMENT) & THE GUARD. THEY COULD HAVE TESTIFIED TO THE FACTS OF THE THREATS BY J.P.D. OFFICERS, THE PROMISE OF GETTING THE DEFENDANTS GEORGIA CHARGES DROPPED IF THE DEFENDANT WOULD SIGN A STATEMENT, & MOST IMPORTANTLY, MS. MCDONALD ALONG WITH THE JAIL GUARD COULD TESTIFY IF THE DEFENDANT SIGNED ALL OF THE PAGES OF HIS STATEMENT. THE DEFENDANT ATTEMPTED TO SUBPOENA MS. MCDONALD ALONG

WITH SEVERAL OTHER MARIETTA LAW ENFORCEMENT OFFICIALS. THE STATE HAD THE SAME PEOPLE LISTED ON ITS WITNESS LIST. WITH A MOTION TO SUPPRESS ON FILE, THE STATE WAS PUT ON NOTICE THAT PRUDENT TRIAL PREPARATION DICTATED HAVING ALL OFFICERS PRESENT DURING THE DEFENDANT'S INTERROGATION & THE SIGNING OF THE STATEMENT, TO BE READY & AVAILABLE AS WITNESSES AT A COMPETENCY HEARING. THE DEFENCE DID RAISE THE ISSUE THAT SOME OF THE OFFICERS THAT WERE PRESENT AT INTERROGATION OR THE SIGNING OF THE ALLEGED STATEMENT, HAD NOT GIVEN TESTIMONY AT THE SUPPRESSION HEARING ON MARCH 28, 2005. NOR DID THE STATE GIVE AN ADEQUATE REASON FOR THE ABSENCE OF ANY SUCH WITNESSES, WHICH IS IN VIOLATION OF RULE NUMBER 532. BECAUSE OF THE ABSENCE OF THE GUARD & Ms. CHERYL MC DONALD, THE CIRCUIT COURT JUDGE SHOULD HAVE RULED THE ALLEGED CONFESSION INADMISSABLE. SEE POWELL V. STATE, 483 So. 2d 363 (Miss 1986).

2) THE MIRANDA WAIVER THAT WAS ADMITTED INTO EVIDENCE DOES NOT BEARE, NOR RESEMBLE, ANY OF THE DEFENDANT'S SIGNATURES. THE DEFENDANT AT THE SUPPRESSION HEARING & TRIAL DEMONSTRATED & PROVED THAT THE SIGNATURES WERE NOT HIS & THAT HE WAS NOT GIVEN OR READ HIS MIRANDA RIGHTS PRIOR TO THE INTERROGATION ON JULY 24, 2002. BECAUSE OF THIS ERROR, THE ALLEGED CONFESSION SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE, OR

ANY EVIDENCE DERIVED FROM THAT ALLEGED CONFESSION.

3.) THE TRIAL COURT SHOULD HAVE HELD THE ALLEGED CONFESSION INADMISSIBLE DUE TO THE ABSENCE OF Ms. McDONALD & THE GUARD. MOREOVER, ANY & ALL EVIDENCE SEIZED AS A RESULT OF THE DEFENDANT'S ALLEGED CONFESSION MUST BE SUPPRESSED AS THE FRUIT OF THE POISONOUS TREE. THE TRIAL COURT ALLOWED THE TESTIMONY & EVIDENCE OF MR. MARCUS BENNETT. MR. BENNETT & HIS EVIDENCE CAME FROM THE INTERROGATION OF THE DEFENDANT ON JULY 24, 2002, ALONG WITH OTHER ITEMS MENTIONED THAT NIGHT. SEIZED EVIDENCE & WITNESSES WHICH COMES FROM AN INADMISSIBLE CONFESSION CAN NOT BE ADMITTED AS EVIDENCE. SEE DUNAWAY V. NEW YORK, 442 U.S. 200, 218-19, 99 Sct. 2248, 2259-60, L.Ed. 2d 824 (1979).

4.) THE TRIAL COURT ERRORED IN ALLOWING THE TESTIMONY OF STATE'S WITNESS MR. ANTOINE REED TO THE EFFECT THAT THE DECEASED TOLD HIM ON THE TELEPHONE THAT ON THE SATURDAY PRIOR TO THE CRIME (JULY 6, 2002), THE DEFENDANT WAS STANDING IN THE PARKING LOT PRIOR TO HER ARRIVING AT WORK AND THAT HE ATTEMPTED TO GET BEHIND THE GLASS WINDOW. THIS IS HEARSAY & ACCORDING TO THE RULES OF THE COURT, CRIMINAL LAW NUMBER 419, THIS TYPE OF HEARSAY TESTIMONY SHOULD NOT BE ADMISSIBLE AT TRIAL. SEE AGEE V. STATE, 185 So. 2d 671, 672

(Miss. 1966)

5.) THE TRIAL COURT ERRORED BY DENYING THE THE DEFENDANT'S CONSTITUTIONAL & STATUTORY RIGHT TO A SPEEDY TRIAL. THE DEFENDANT WAS DELAYED BY A TOTAL OF NINE-HUNDRED & SIXTY-NINE (969) DAYS IN GETTING A TRIAL BY JURY. THE DEFENDANT FOLLOWED ALL GUIDELINES OUTLINED IN THE BARKER V. WINGO FACTORS, WHICH ARE FOLLOWED BY THE COURTS. THE DEFENDANT FILED A MOTION TO DISMISS BASED ON SPEEDY TRIAL VIOLATIONS ON MARCH 10, 2005, WHICH WAS DENIED. THE DEFENDANT WAS PREJUDICED BY LOSS OF ALIBI WITNESSES, LOSS OF DOCUMENTS, & INEFFECTIVE COUNSELING, WHICH ALL OCCURED FROM THE DELAY IN GETTING THE DEFENDANT TO TRIAL.

6.) THE DEFENDANT SHOULD BE GRANTED A NEW TRIAL ON SOME OR ALL OF THE ABOVE ISSUES & BECAUSE OF THE TRIAL COURTS ERROR BY NOT ALLOWING THE WITHDRAWL OF THE DEFENDANT'S COUNSEL, EVEN AFTER THE SAID COUNSEL'S ADMITING TO NOT BEING ABLE TO GIVE THE DEFENDANT EFFECTIVE COUNSELING ON RECORD PRIOR TO TRIAL ON MARCH 28, 2005

SOME, IF NOT ALL OF THESE FACTORS & ERRORS (IF NOT MORE STATED LATER) SHOULD GET ME A NEW TRIAL, OR AT LEAST AN ATTEMPT AT AN APPEAL.

ALSO, IF POSSIBLE, CAN I HAVE A COPY OF

CERTIFICATE OF SERVICE

I, WILLIAM G. SCOTT, DO HEREBY CERTIFY THAT I HAVE MAILED THIS DAY A TRUE & CORRECT COPY OF THE FOREGOING LETTER TO MR. MIKE KNAPP, ESQ. REQUESTING A NEW TRIAL &/OR APPEAL, TO THE FOLLOWING:

HONORABLE TOMIE GREEN
HINDS COUNTY CIRCUIT COURT JUDGE
P.O. BOX 327
JACKSON, MS 39205-0327

MR. MIKE KNAPP, ESQ.
HINDS COUNTY PUBLIC DEFENDERS OFFICE
429 TOMBIGBEE STREET
P.O. BOX 23029
JACKSON, MS 39225

SIGNED THIS 8 DAY OF APRIL 2005.

William G. Scott
WILLIAM G. SCOTT

*ALSO, MS. DUNN, MAY I HAVE A COPY OF THE LATEST DOCKET SHEET PLEASE.

5:22 pm

#32

Sheriff Department • Rankin County, Mississippi

KEVIN DILLINGHAM
SHERIFF OF RANKIN COUNTY

COMMUNICATIONS CENTER

FAX NUMBER 601-824-0268

TELECOPY TRANSMITTAL SHEET

TO: Det. White

COMPANY OR DEPARTMENT: JPD

DATE: 7-23-02

FAX NUMBER: 960-2470

FROM: Chelsea

NUMBER OF PAGE(S) (INCLUDING THIS ONE) 4

COMMENTS: Please Place a hold for R100 / Bean. Thanks for your help

EXHIBIT "C" to Appeal 1

#51

Print Key Output Page 1
5769SS1 V4R5M0 000526 S1043173 07/23/02 16:48:02

Display Device . . . . . : SO01
User . . . . . : SORR

CMINQ01 UNIFORM TRAFFIC CITATION JCWINQ97/M4
Ticket Book 813 Page 434 Citation Number 10421 Status A (A, I, C)
Defendant Name SCOTT WILLIAM GARRETT (Last, First, Middle)
Defendant Address 2725 SABER DR #21 (line 1)
(line 2)
LAS VEGAS NV 89030 (City, St, Zipcode)
State Licensed NV Drivers License Number 2600294856
Vehicle License 765 JKF State NV Make MAZD Year Type (Auto,Truck)
Judge 2 HON. JOHN SHIRLEY Courtroom Returnable 3 / 19 / 2002
Disposition 4 - 3 - 2002 Time : Code 15 WARRANT ISSUED
Nature of Offense EXPIRED TAG Accident (Y/N)
Owner of Vehicle Offense Date Time
2 - 24 - 2002 :
Filing Date
2 - 25 - 2002 Appeared Y/N
Arresting Officer CRAIG HUNT Badge Number RP7 Agency PRV
Constable
Location SPILLWAY Hwy. CMV Y/N Hazardous Y/N
Sex M Race B Date of Birth 10 - 30 - 1976 SSN
Speed Zone Alcohol Remarks
Plead Found (Guilty/Not Guilty) Represented Jail Time
Fine Amount 176.00 Amount Paid Amount Due 176.00

Please press PF3 For next record

Print Key Output Page 1
5769SS1 V4R5M0 000526 S1043173 07/23/02 16:47:32

Display Device . . . . . : SO01
User . . . . . : SORR

MINQ01 UNIFORM TRAFFIC CITATION JCWINQ97/M4
ket Book 813 Page 433 Citation Number 10420 Status A (A, I, C)
fendant Name SCOTT WILLIAM GARRETT (Last, First, Middle)
fendant Address 2725 SABER DR #21 (line 1)
(line 2)
LAS VEGAS NV 89030 (City, St, Zipcode)
ate Licensed NV Drivers License Number 2600294856
icle License 765 JKF State NV Make MAZD Year Type (Auto,Truck)
ge 2 HON. JOHN SHIRLEY Courtroom Returnable 3 / 19 / 2002
sposition 4 - 3 - 2002 Time : Code 15 WARRANT ISSUED
ture of Offense DWLS(IC) Accident (Y/N)
ier of Vehicle Offense Date Time
2 - 24 - 2002 :
Filing Date
2 - 25 - 2002 Appeared Y/N
esting Officer CRAIG HUNT Badge Number RP7 Agency PRV
onstable
ocation SPILLWAY Hwy. CMV Y/N Hazardous Y/N
< M Race B Date of Birth 10 - 30 - 1976 SSN
ed Zone Alcohol Remarks
lead Found (Guilty/Not Guilty) Represented Jail Time
ine Amount 682.50 Amount Paid Amount Due 682.50

lease press PF3 For next record

Print Key Output Page 1
5769SS1 V4R5M0 000526 S1043173 07/23/02 16:47:20

Display Device . . . . . : S001
User . . . . . : SORR

CHINQ01 UNIFORM TRAFFIC CITATION JCWINQ87/M4
cket Book 813 Page 432 Citation Number 10419 Status A (A, I, C)
efendant Name SCOTT WILLIAM GARRETT (Last, First, Middle)
efendant Address 2725 SABER DR #21 (line 1)
(line 2)
LAS VEGAS NV 89030 (City, St, Zipcode)
tate Licensed NV Drivers License Number 2600294856
hicle License 765 JKF State NV Make MAZD Year Type (Auto,Truck)
dge 2 HON. JOHN SHIRLEY Courtroom Returnable 3 / 19 / 2002
sposition 4 - 3 - 2002 Time : Code 15 WARRANT ISSUED
ature of Offense CARELESS DRIVING Accident (Y/N)
ner of Vehicle Offense Date Time
2 - 24 - 2002 :
Filing Date
2 - 25 - 2002 Appeared Y/N
resting Officer CRAIG HUNT Badge Number RP7 Agency PRV
nstable
ocation SPILLWAY Hwy. CMV Y/N Hazardous Y/N
ex M Race B Date of Birth 10 - 30 - 1976 SSN
eed Zone Alcohol Remarks
ead Found (Guilty/Not Guilty) Represented Jail Time
ine Amount 86.00 Amount Paid Amount Due 86.00

lease press PF3 For next record

CERTIFICATE OF SERVICE

This is to certify that I, J. Christopher Klotz, have provided a true and correct copy of the Appellant's Brief to the following by US Mail:

1. Honorable Judge Tommie Green, Hinds County Circuit Court Judge, Post Office Box 327, Jackson, MS 39205

2. Faye Peterson, Office of the Hinds County District Attorney, Post Office Box 39225, Jackson, MS 39225

3. Phillip Weinberg, Office of the Hinds County District Attorney, Post Office Box 39225, Jackson, MS 39205

4. Michael Knapp, Counsel for Appellant during the trial court proceeding while at Hinds County Public Defender, now in private practice, 405 Tombigbee Street, Jackson, MS 39201

5. Sharon Witty, Office of the Hinds County Public Defender, Post Office Box 2916, Jackson, MS 39056

6. William LaBarre, Office of the Hinds County Public Defender, Post Office Box 23029, Jackson, MS 39225

7. Jim Hood, Attorney General, State of Mississippi
450 High Street, Fifth Floor
Jackson, Mississippi 39201

This the 8th day of February , 2006.

J. CHRISTOPHER KLOTZ

J. CHRISTOPHER KLOTZ (MB[redacted]
COXWELL & ASSOCIATES, PLLC
Post Office Box 1337
Jackson, Mississippi 39215-1337
Telephone: (601) 948-1600