

In the Supreme Court of the State of Mississippi

No. 2006-KA-²⁰³~~00265~~-SCT

COPY

Willy Givens

Box
10-11-07

Appellant

Case No. 5904

State of Mississippi

Appellee

Pro, se

FILED

"Motion for a

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COURT OF APPEALS

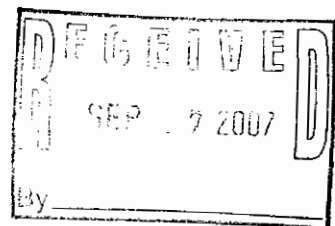
Petition for Rehearing" (Rule # 46)

Willy Givens

Unit #29 - K bldg.

Meridian MS, 38738

MOTION# 2007-2606



In The Supreme Court of the State
of Mississippi

Billy Girens

Appellant
No. # 2006-HA-00205-SC

State of Mississippi

Appellee

Motion for an
Petition for Rehearing (Rule #46)

Comes now, petitioner (I) Billy Girens (pro, se) and asks to have permission from this Honorable Court to file this motion (petition for Rehearing). (I) Billy Girens will bring forth facts from within the trial records to support this such motion.

On the date of November 2, 2005. (I) Billy Girens was tried before a Jury in the Circuit Court of Humphrey County, Judge Jannie M. Lewis presided, On the same day of November 2, 2005 a Jury return back after a forty-five minutes deliberation with a verdict of finding (I) Billy Girens guilty of murder, thereafter Judge Jannie M. Lewis sentenced (I) Billy Girens to a term of life imprisonment.

(2) Billy Givens filed a prose brief, which asserted five issues. one of which was Ineffective Assistance of Counsel. now it (2) say (2) Billy Givens would like the Opportunity to clarify these five issues, other than what Mr. George T. Holmes MSB No# 2565) of the Mississippi office of Indigent Appeals presented onto the court in my behalf, on the Supplemental brief.

Issue No# 1)

Ineffective Assistance of Counsel of one Mr. W.C. Trotter III.

Once again, from November of 2004 (2) Billy Givens was within the custody of MDOC. up until October 31, of 2005, ~~note~~ note that it was a week or two from being a full year, not counting the two times (2) return to the court (circuit) of Humphreys Co. to appear before Honorable Jannie M. Lewis, once on the 28 of February for arraignment (2005) and again on the 20 of June of (2005) ~~only now I found~~ out that Mr. W.C. Trotter III, had ~~not~~ filed a motion to have the case continue to the next regular term which was November the second of (2005) note that Mr. Trotter, did not inform me of ~~this~~ this action before He submitted (His) motion to the court nor ~~he~~ did (He) show good cause for doing so. under Mississippi rules of "professional," Conduct = effective July 1, 1987 = Rule 1.2. Scope of representation state (A) a lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (2) and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter

In a criminal case, a lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea, be entered, whether to waive jury trial and whether the client testify: ~~advising~~

Client-Lawyer Relationship Rule 1.1. Competence.

state as read.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and (preparation) reasonably necessary for the representation.

at the same time (Thoroughness and preparation is stated as, Competent handling of a particular matter includes inquiry into and analysis of the factual and legal element of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes (adequate preparation). The require ~~adequate~~ ~~adequate preparation~~ attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence

Rule 1.4

Communication

- a). A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information
- b). A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decision regarding the representation.

after (I) Billy Givens scoured and poured over the Supplemental Brief that Mr. Holmes (MSB No. # 2565) presented to the court in my behalf, the case's (He) cited dealing with my claim of ineffective assistance of counsel lead me to the Woodward v. State, 843 So. 2d 1, 18 (MS 2003). The court held, that a defendant who alleges that trial counsel's failure to investigate constituted ineffectiveness must also state with particularity what the investigation would have revealed and specify how it would have altered the outcome of trial... or how such additional investigation would have significantly aided his cause at trial..

(A). Within the (Rummel v. Estelle, 590 F. 2d 103, 104 CCA 3 1979), state that an counsel have to conducted a "reasonable substantial investigation," into the line of defense (He) Mr. Trotter presented before the court's.

(B). The Sixth Amendment

State as written, imposes on counsel a duty to investigate, because reasonable effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options.

(C). Because Mr. Trotter himself within the closing Argument on page # 146 = 5 thru. 17. Stated out of his own mouth to the Judge ~~after~~ after approaching the bench to object to the statement that (His) defense was a sham and an attempt to mislead. (He) Mr. Trotter said that an (I) quote: (I) put on no defense. (I) did not put a defense on:

(D). The Investigation, if it had been done by Mr. Trotter he would have found out these things about the cause (He) could have use to discredit not only the two-so-call eye witness but the officer's testimony as well.

1). Mr. Trotter would have learn that Mr. Foxworth was not the first to the crime scene

2). (He) would have known that it's impossible to come down Main St. (which is an one-way st.) and not see something of someone half within the st. an half out of it, or the two so-call witness there or outside of the nearby house waiting for the help of the law officers which they said that they did all,

3). If Ms. Hampton or Samuel call the police from a house phone why did Mr. Foxworth had to call for back up and not dispatch?

4). Why was there no picture of the crime ~~see~~ scene itself presented to the court to support there accusation of Mr. Cooper still being with his bike between his leg an ect. 52 or the way the police said that it looked when whoever got there first.

5). Why where neither ^{Dispatcher} ~~personal~~ of the Belzoni Police Dpt. or the Humphreys Co. Sheriff's Dpt. was subpoena to come before court to give they testimony, or better yet why this Ms. Brown wasn't subpoena to come to court to give (Her) testimony since Ms. Hampton said that was where she made the call?

The list of things could go on an on and I know these are question I should have ask him, or had him look into before all of this, But like I said in the beginning if (He) Mr. Trotter would have done an

Substantial Investigation it would have altered the outcome of trial.

(E). Counsel did not submit a motion to suppress the eye witness testimony - Copeland v. State, 423 So.2d 1333, 1335 (Miss. 1982) Callion v. State 469 So.2d 1247, 1249 (Miss. 1985) Miss. Sup. Ct. R. 6 (B); Miss. R. Evid. 103 (d).

However, in Page v. State, 495 So.2d 436 (Miss. 1986), This Court applying Miss. Const. Art. 3, § 26, held the accusatory stage began at the issuance of a warrant or "by binding over or recognizing the offender to compel his appearance to answer the offense" Id. at 439. See Miss. Code Ann. § 99-1-7 (1972); Cannaday v. State, 455 So.2d at 722. State practically, [HN10] the adversarial process begins when the law enforcement arm of the state takes the defendant into custody, and charges him with a crime. Tolbert v. State, 511 So.2d 1375 n.5 [1088] (Miss. 1987) See also Miss. Unif. Crim. R. Cr. Ct. R. 1.02 and 1.04.

also Kirby v. Illinois, 406 U.S. 682, 688, 92 S. Ct. 1877, 1881. 32 L. Ed. 2d 411, 417 (1972). = "406 U.S. at 689. 92 S. Ct. at 1882, 32 L. Ed. 2d at 417 See also Cannaday v. State 455 So.2d 713, 722 (Miss. 1984).

So by Mr. Trotter not making preparation and handling the matter, (He) Had the duty to perform to what the law of the U.S. Con. require.

(I) Billy Givens just learn that in order to prevail on my claim of ineffective assistance, (I) would need an affidavit from myself, and one from Mr. Trotter
Mack v. State = Lexis 249, 1998 WL 240123
Brooks v. State 573 So. 2d 1350
and Smith v. State 490 So. 2d 860.

With this under oath statement from Mr. Trotter
(I) Billy Givens will show the court that He did not do an Substantial Investigation in to the matter before trial.

But note that (I) just found this information to be helpful
(I) have not the time to get an affidavit from Mr. Trotter to do so, But if this court may grant me the time within a reasonable time period to have Mr. Trotter submit (his) affidavit before reviewing this motion (petition for Rehearing) then (I) will be more than willing to submit one of my own to help clarify this issue..

Thank you.

Givens Billy #66592
Unit #29 - K bldg. A zone
Parchman ms. 38738

Issue #2.

Misidentification by the two witnesses
of a one

Annie Hampton, and Samuel Forman

page #77 - #16, 25), of the trial records

first, ms. Annie Hampton testified that on the night
of October 9th early morning of Octoberth 10th, she witness
Billy Givens commit the crime in question (But note that
it was on the late night hours of October 8th, and early
morning of October 9th that the death of Mr. Cooper came
out. "Mr. Trotter did not object to the wrongful date
and time." page # (74) - 14-15. She "ms. Hampton said that
Billy Givens came and hit Mr. Cooper with an brick that
knocked (him) Mr. Cooper off of his bike. (But note), that on
her ms. Hampton Original Statement said that, that Boy
came and hit Mr. Cooper not once but twice within the
statement, only then the officer Mr. White added my
my name within the statement, a statement which
she ms. Hampton did not sign. So it's unclear if she was
even there to make the statement or if it was (her's) from
the start. on page (80) # 2-8 it was said that it was
about (5) feet from the porch, and this being so it
contradict that of Mr. Exworth testimony of coming down
Main St. in not seeing Mr. Cooper body within the streets.
So contradicting that of which Mr. Terry testified to
in, page (51) # 7-8 on page (85) # 26-29 onto page (86) # 1, 3
now it wasn't what (she) ms. Hampton testified to on
page (77) # 16-20, again on page (92) # 3-5 (she) stated
that she has glaucoma, and had it about 10 years

Same page (92) #6-11, testifying of not making a statement the same night nor the next day as Mr. White (Officer) testified to on page (67) #23-25.

In *Manson v. Brathwaite* 432 U.S. 98; 97 S. 2243; 53 L.Ed. 2d 140; 1977 U.S. (Lexis 116).

also in Kirby. *supra*. Observed: "There is surprising unanimity among scholars in regarding such a risk 'miscarriage of Justice'." 510 F.2d. at 405. He pointed out that well-known federal Judges have taken the position that "evidence of or derived from, a showup identification should be inadmissible unless the prosecutor can justify his fail to use a more reliable identification procedure." *Id.* at 406 Indeed, the ALI model code of pre-Arraignment procedure §§ 160.1 and 160.2 (1975) (hereafter model code) frown upon the use of a showup or the display of only a single photograph. There are, of course, several interests to be considered and taken into account. the driving force behind "United States v. Wade, 388 U.S. 215 (1967). *Gilbert v. California*, 388 U.S. 263 (1967) [#112] (right [##2252] to Counsel at a post-indictment lineup). and overall, all decided on the same day, was the Court's concern with the problems of eyewitness identification. Usually the witness must testify about an encounter with a total stranger under circumstance of emergency or emotional stress. the witness' recollection of the stranger can be distorted easily by the circumstance or by later action of the police. Thus, Wade and its companion case reflect the concern that the jury not hear eyewitness

testimony unless that evidence has aspects of reliability
it must be observed that both approaches before us are
responsive to this concern. The per se rule, however, goes
so far since its application automatically and
peremptorily, and without consideration of alleviating
factors, keeps evidence from the jury that is reliable
and relevant.

The second factor is deterrence.

Although the per se approach has the more significant
deterrent effect, the totality approach also has an
influence on police behavior. The police will guard
against unnecessarily suggestive procedures
under the totality rule, as well as the per se one
or fear that their actions will lead to the exclusion
of identification as unreliable.

But now in the essence what the overall due
process right protect is an "evidentiary interest".
"It is part of our adversary system that we
accept at trial much evidence that has strong
elements of untrustworthiness - an obvious example
being the testimony of witness with a bias. While
identification testimony is significant evidence
such testimony is still only evidence and, unlike
the presence of Counsel is not a factor that goes
to very heart - the integrity - of the adversary process."

moving on to the testimony of a one Samuel
Borman.

On page (98) #1-7 of the trial records
Mr. Forman stated that (X) Billy Givens committed the act
of hitting Mr. Cooper behind the head or somewhere,
but within (His) statement Mr. Forman gave to Mr. White
said that (X) Billy Givens hit Mr. Cooper with my fist.
Also note that neither was (His) Mr. Forman statement
was signed "by Mr. Forman" unlike what was said
under oath, (He) Mr. Forman said that He signed (His)
statement that Mr. White wrote for (Him). page (103)
4-5. now Mr. Forman testified that it was dark and
(he) could not hardly see, He didn't know what the
person had on, note that (He) Mr. Forman could not
hardly see. Ms. Hampton had to have some difficulty
seeing anything (Her) Having glaucoma, and not wearing
(her) glasses.

Then on page (104) #17-19
Mr. Forman testified that he had problem recognizing
~~the person~~ (X) Billy Givens or (the person that committed
the act).

The U.S. Supreme Court has identified
five factors to be considered by trial court in
determining whether the witness in court testimony
had been impermissibly tainted, "by his participation
in law enforcement investigator identification
procedures.

Those factors are:

- (1). The opportunity of the witness to view the accused at the time of the crime.
- (2). The degree of attention exhibited by the witness;
- (3). The accuracy of the witness prior description of the criminal;
- (4). the level of certainty exhibited by the witness at the confrontation; and
- (5). The length of time between the crime and the confrontation.

It was stated by James White of the Belzoni Police Dept. that both witnesses identified me from a picture that one of the law enforcement investigators showed (them) Mrs. Hampton, and Mr. Forman. (1) neither one of them gave an accurate description of who that might have been (But rule #3) state that a witness must show accuracy and give a prior description, with everything based itself on a single photograph that was shown after the fact, violate my fourteenth Amendment right of due process. now by doing so, there was more than likely coercive pressure on Mrs. Hampton, on Mr. Forman.

from what was said in court.

- (1). It was about the hours of 12:00 a.m. or 1:00 a.m.
 - (2). That it was not enough light out to see very much.
 - (3). That it was after the attack started (they) ran to a next by house to call the police.
- with that being said where is the degree of

attention exhibited by the two?

again Mr. Forman testified that when Mr. Foxworth talk with him after returning to the scene of the crime, stated to (him) Mr. Forman was (at) Billy Currens the one that had done this all on page (100) # 12-17

again within the *Manson v. Brathwaite* case.

The courts note that even so if a trained officer is und attentive to the need for making accurate identification. Never the less, both common sense and scholarly study indicate that while a trained observer such as police officer is somewhat less likely to make an erroneous identification than the average [***164] untrained observer the mere fact that he has been so trained is no guarantee that the correct in a specific case His identification testimony should be scrutinized just as careful as that of the normal witness, *Wall. Supra, n. 1, at 14*; see also *Lerine & Tapp, Supra, n. 3, at 1088*. more over "identification made by a police man in highly competitive activities, such as undercover narcotic agents... should be scrutinized with special care," *Wall Supra, n. 1, at 14*. yet it is just such a searching inquiry that the court fails to make here.

Harvey York v. State of Mississippi

413 So. 2d 1372; 1982 Miss. Lexis 1944

By the testimony of ms. Hampton, and Samuel Forman alone was enough for reasonable doubt, Because Both stated in open court of the condition of them not being able to see very well orie because it was dark an not enough light to see, and ms Hampton with (her) glaucoma an wasn't wearing (Her) glasses.

Issue. #3)

onto the testimony of a one Mickey Foxworth (Chief of police of the Belzoni police Dpt.)

(I) Billy Givens use a diagram on my prose brief but was over looked by the court's stating, that it was not of official Records when, within the trial records of my case the diagram of the one Mr. Foxworth presented before court was marked for identification as (Exhibit No. 5-1)

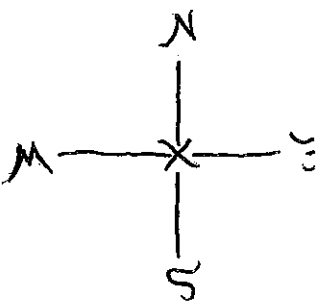
now the diagram (I) use within the prose brief should have been the same as the one Mr. Foxworth drew out, ~~because~~ because every detail of the diagram (I) drew was correct an accurate.

(I) use the diagram to show the court that it was impossible for Mr. Foxworth to come down Cain St. up onto the interchange of Lincoln St. an continue on down Cain St. to that of third St an to M.L.K. St. back down Lincoln St. to see the body of that of Mr. Cooper on the ground.

(I)

See diagram

Third street.



(D)

Mathin Luther King

(E)

Mathin Luther King

(A)

(C) Third street.

Gain street.

(B)

Gain street.

(A)

House

House

House

House

Tree

Area #2

Abandoned House's

House

House

House

House

House

House

House

House

Area #1

Commercial Home

House

House

House

House

House

House

House

House

House

House

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House

From helpful information, the (X) within the diagram is where the body of Mr. Cooper was found. now within Mr. Foxworth statement and testimony (he) stated to the court by oral, and a drawing of the way (he) Mr. Foxworth came. First from point (A), to point (B), look right and then unto (C), then (D), to (E). Back to point (B) where he then learns that the body

of Mr. Cooper was on the ground. note that the length of this one way street is about 8' ft. from east to west. so it would have been impossible for (him) to travel from point (A) to (B) can not see the body of Mr. Cooper there half within the street... also note that within Area #1 can (A), there was no light at the time of this matter.

First street.

now from page (12) thru. out page (13) and (14), (He) Mr. Foxworth came about and back to the area where the body was laying, (2) Billy Currens don't know where Mr. Foxworth place the letter (Y), indicating were (He) seen me standing but if the diagram (He) drew was correct than the jury would have seen that there was no way pass point (A) to point (B), In not see the body of Mr. Cooper there on cain st. laying as the witness said half in the street of cain again Back to the mason v. Brathwaite

Case No. 75-871

stated that Even if an officer had been unsure Initially about his statement, by the time he was called at trial to present a key piece of evidence for the state that paid his salary. It is impossible to imagine his responding negatively to such questions as to what he seen or how things took place. As the court noted in Wade: [131] witness has place in there minds as who the accused maybe is not likely to go back on his word later on", 388 us. at 229, quoting Williams & Hammelmar Identification ~~Parades~~ Parades - I, Crim. L. Rev. 479, 482 (196

now on to a one

Mr. kenny Terry of the Humphreys County Sheriff Dpt.

On page (51) #2-10 Mr. Terry stated a contradiction testimony against that of what Mr. Foxworth testified to again on page (52) #4-10, Mr. Terry testified to what happen after He made it to the scene of the crime But a one Mr. Grayson testified that (He) and a James "David, got there before Mr. Terry again Contradiction.

Mr. Terry clearly stated that when he came back the second time, at about 10 min later the only officer was at the scene was a one mickey foxworth of the Belzoni police Dpt. Contradicting Mr. Grayson's statement. This was on page ~~55~~ (55) # 12-25.

Thru. out all of the testimony of all the witness's for the state, it's plain an clear that there was too much contradicting of the testimony for the jury to come or make ~~out~~ any kind of conclusion of my guilt. "Clemmons, 473 So. 2d at 945", of murder.

Take-ing a step forward onto what Mr. Holmes presented to the court in my behalf.

Even so the court did not acknowledge (His) case's that (He) submitted to support the claim of manslaughter because of the out dated cases which was

: Dedaux v. State, 630 So. 2d 30 (Miss. 1993); and

Clemmons v. State, 473 So. 2d 943 (Miss. 1985).

Tait v. State, 669 So. 2d 85 (Miss. 1996).

The weight of evidence at best supported the fact that the crime that was comitted was that of manslaughter not murder, because the state showed evidence the the individual who comitted the crime acted out of rage. Clearly within grounds of what the court addres as

being one of the Stages or (Clements) of manslaughter.

with the testimony that Mr. Terry gave to the Court stated that (2) Because upset to a point that (2) Hit a wall or ~~beat~~ something. So Page is determine from the Webster's C.T.W. (Dictionary) as being "Violent anger"... But note: with new found information, "Mr. Terry was recently charged for or with corruption alone with other matters. His testimony on the matter (2) was charged with could have been alter from what really happen on the return to the scene of where Mr. Caper was killed.

Issue # 4).

Violation of The fourteenth Amendment (Due Process Clause).

Within the prose Brief (X) Billy Givens submitted onto the courts, (X) place from what (X) seen as being a clear violation of my due process clause (fourteenth Amendment) an AP (X) may (X) Billy Givens will state some of the few below.

On October 10, 2004 (X) Billy Givens went to the Humphreys Co. Sheriff Dpt. to clear my name of a wrong doing, but instead was arrest (with no proof of anything). Now on the 19th of October, 04, (X) was appointed a one Mr. W.C. Trotter to represent (X) Billy Givens. On or about the 26th of October⁰⁴ a preliminary hearing to see was there enough evidence to bind me over to the grand jury. (1). There was not enough evidence to legal bind (me) over because the only thing that was discuss was an single police report (that only show what happen when they came to and area, not to do with the matter of Mr. Cooper death). 2). a one James White stated at the hearing that there was two statements from two people who have claim to have seen what took place. note: that there was not a line up or a show up of me to the two people to see was there statement of Identity was correct. The state did not show good cause of not executing the procedure of Having a line up done. *Stovall v. Denno*, supra. which been decided in 1967, [**2245]. The court note that the practice "has been widely condemned", 388 U.S. at 302. even so the show up is widely condemned, there speak about Having one (line up).

with all due respect to Mr. Holmes, for taking

His time out to submit my case to the courts, (I) Billy Givens understood why (He) placed the two new issues within my brief. (1). Because every thing the court records show's, it show's the act was not premeditated nor deliberate design. MCA § 97-3-14 (1) (1972);

(2). That if the courts rebek the way it define "Heat of passion", than it would have to over turn this cause and remand it for a new trial, (for it being for

the person who comitted this crime) not me because with no evidence which could place me as being the one who comitted this crime, only to have two people to say that they seen what happen. now I'm not trying to get beside myself, but looking at the facts "these two people don't know who they seen act out the killing of Mr. Cooper. because Mr. Forman said that it was dark an (he) couldn't ~~heard~~ hardly see, and Ms. Hampton without her glasses an with (her) having glaucoma, within the darkest of areas. How could she have seen or made an accurate description of who every it might have been that cause Mr. Cooper death.

to the point of common sense, it was stated by the two people (Ms. Hampton, an Samuel Forman) that they knew me some all of my life. (1). If so being Ms. Hampton would have not said that boy on the statement Mr. White wrote for her, befor (He) Mr. White added my name. nor would (she) if knowing me not try an stop me from doing such an act. Because by knowing a person all of there life you could reason with hem better than you could with a person that you never meet

It was asked what did they Mr. Hampton Samuel Forman do, when the attack started they both said that they ran to a nearby house to call the police. neither one testimony indicated that they ask the attacker to stop or not to kill Mr. Cooper, since both Ms. Hampton and Samuel, said that they knew not only (Mr) but Mr. Cooper a long period of time. But (I) did see after reading thru out the trial records, as that they (Ms. Hampton and Mr. Forman) was not only unsure but coercive pressure was from that of not only having to say that it was (I) But also go along with How the law enforcement officer wanted.

Conclusion:

(I) Billy Givens (prose) within this matter that (I) presented before you, and that everything that (I) placed withing this motion (Petition for Rehearing) are facts that came without the trial records of the case no. #5909. and what the facts show, (I) Billy Givens respectfully ask that because of the facts that this case be overturn and Remand for a new trial.

Respectfully
Billy Givens

Certificate

(I) Billy Givens, do Hereb certify that (I) have
this the 10 day of September, 2007, mailed a
true and correct copy of the above and foregoing
motion (Petition for Rehearing), to. Hon Jannie Lewis,
Circuit Judge, P.O. Box 144, Lexington ms 39095,
Hon. James Powell, III, Dist. Attorney P.O. Box 311, Durant
ms, 39063, and to Hon. Diedre McCrory, Assistant
Attorney General, P.O. Box 220 Jackson ms 39205,
all by (I L.A.P.) u.s. mail."

Givens Billy

Billy Givens
Unit # 24 K bldg-
Pacihman, ms, 38738