COPY

**IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI**

**JOHN A. WILLIAMS** **APPELLANT**

**vs.** **Case No. 2006-KA-00418**

**STATE OF MISSISSIPPI** **APPELLEE**

**APPELLANT'S SUPPLEMENTAL OPENING BRIEF**



**RESPECTFULLY SUBMITTED,**

William C. Stennett

**WILLIAM C. STENNETT**
**ATTORNEY FOR THE APPELLANT**

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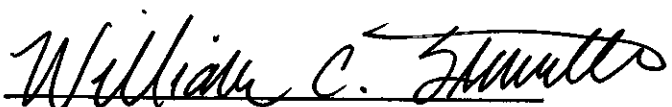

**WILLIAM C. STENNETT**
**ATTORNEY FOR THE APPELLANT**

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN A. WILLIAMS — APPELLANT

VS. — CASE NO. 2006-TS-00418

STATE OF MISSISSIPPI — APPELLEE

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

Judge Sharion Aycock
Circuit Court Judge
P.O. Drawer 1100
Tupelo, Mississippi 38802

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, Mississippi 39205-0220

Honorable Dennis Farris
Assistant District Attorney
P.O. Box 7237
Tupelo, Mississippi 38802

THIS THE 17th DAY OF Jan, 2007.

William C. Stennett

WILLIAM C. STENNETT
Attorney for the Appellant

## STATEMENT OF INCORPORATED REFERENCE.

Appellant John A. Williams, hereby states that he incorporates by reference the previously filed Appellant Brief including all issues raised therein. This supplement supports the previously filed brief and Appellant Williams asks this Court to consider the previously filed brief and this brief as one and the same.

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(a) WHETHER COUNSEL ERRED BY NOT ASKING THE TRIAL COURT TO BIFURCATE THE TRIAL THEREBY SEPARATING THE POSSESSION OF A FIREARM BY A FELON COUNT FROM THE MANUFACTURING OF MARIJUANA COUNT.

(b) WHETHER COUNSEL WAS INEFFECTIVE BY NOT INVESTIGATING THE CASE, CALLING WITNESSES OR PRESENTING A DEFENSE DURING TRIAL.

(c) WHETHER COUNSEL WAS INEFFECTIVE BY NOT ASKING THAT THE TRIAL JUDGE BE RECUSED FROM THE TRIAL BECAUSE OF A CONFLICT OF INTEREST.

(d) WHETHER COUNSEL WAS INEFFECTIVE BY NOT ALLOWING THE DEFENDANT TO TESTIFY.

I. (a) WHETHER COUNSEL ERRED BY NOT ASKING THE TRIAL COURT TO BIFURCATE THE TRIAL THEREBY SEPARATING THE POSSESSION OF A FIREARM BY A FELON COUNT FROM THE MANUFACTURING OF MARIJUANA COUNT.

Appellant Williams maintains that the defense counsel erred by not asking the trial court to bifurcate his trial into two sections, the manufacture of marijuana charge separated from the felony possession of a weapon charge.

In order to prove ineffective assistance of counsel, Williams must prove by a preponderance of the evidence that (1) counsel's performance was defective, and (2) the defect was so prejudicial that it prevented Williams from receiving a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984); Moody v. State, 644 So.2d 451, 456 (Miss. 1994). The proper standard that is required to show prejudice requires Williams to prove that there is a reasonable probability that, but for counsel's errors, the trial court's result would have been different. Strickland, 466 U.S. at 669. In order to successfully claim ineffective assistance of counsel, the defendant must meet the two-pronged test set forth in Strickland. Id. at 687. The Strickland test requires a showing of (1) a deficiency of counsel's performance (2) sufficient to constitute prejudice to the defense. McQuarter v. State, 574 So.2d 685, 687 (Miss. 1990). In levying sentence on a criminal offender, a trial judge may proceed pursuant to Rule 5.13, Uniform Criminal Rules of Circuit Court Practice

(1979), which provides as follows:

There may be bifurcated trials in all felony cases. In all felonies in which the defendant is not subject to receive the death penalty the procedure may be as follows:

(1) There shall be a jury trial according to the constitution and law unless the jury is waived by the defendant

(2) Upon conviction, or after a plea of guilty, there shall be a hearing before the trial judge as follows:

a. A presentence investigation shall be conducted and a report thereof shall be made, consisting of a complete record of the offender's criminal history, educational level, employment history, and when required by the court, his psychological condition, and such other information as the judge shall deem necessary. A copy of said report shall be delivered to the defendant for use by him and his attorney.

b. The state may introduce evidence of aggravation of the offense to which the defendant has been convicted or pleaded guilty.

c. The defendant may introduce in evidence any evidence he deems necessary to contradict or supplement any information contained in the presentence

investigation report.

d. The defendant may introduce any evidence of extenuation or mitigatio

e. The state may introduce evidence in rebuttal of evidence of the defendant.

f. A record shall be made of the above proceedings. This record shall not be a part of the record on appeal but shall be maintained in the office of the circuit clerk of the trial court as a part of the record in that court.

Williams in his supplemental issue concedes that he had been previously convicted of a felony offense, but maintains that the trial court erred and that this prior conviction should not be introduced during the trial of the manufacture of marijuana because of the prejudicial effect that it would have upon the jury. Instead, Williams maintains that his trial counsel erred by not requesting the elements of felony possession of a weapon should be decided in a bifurcated trial. Williams contends on appeal that this was error and that the proper way to handle the matter of prior conviction of felony possession of a weapon was to bifurcate the trial with the trial court making the necessary determinations regarding the felony possession of a weapon as a separate trial from the manufacture of marijuana trial. He also argues that permitting the jury to learn of his prior conviction hopelessly prejudiced him in the eyes of the jury and raised the possibility that the jury would convict upon reaching the conclusion that his prior conduct had demonstrated a

propensity for such criminal activity. Williams claims that this constituted a violation of Mississippi Rule of Evidence 404(b), which prohibits the admission of evidence of prior bad acts for that purpose. The record evinces that counsel's performance was not reasonable. Counsel should have filed a motion to try separately the issues of manufacture of marijuana from felony possession of a weapon. Williams could have offered to concede his prior convictions to the State, but he did not want to concede them in front of the jury'. Williams asks that this Court consider Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), for the assertion that if he had stipulated to his prior felony convictions, then this evidence should not have gone to the jury. Therefore, the State would not have been required to prove these convictions beyond a reasonable doubt. *Old Chief* held that "a district court abuses its discretion if it spurns [an offer to stipulate to a prior conviction] and admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction." *Id.* at 174, 117 S.Ct. 644. *Old Chief* notes that "[i]n this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the

discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available." *Id.* at 193, 117 S.Ct. 644. Williams suggests, following the general concept of *Old Chief,* that it is better to bifurcate the proceedings so as to disallow prejudicial convictions to be put before the jury prior to a verdict on the current charge. Appellant Williams prior assault conviction is irrelevant to the charge of manufacture of marijuana. *Old Chief* is essentially the Supreme Court's interpretation of the Federal Rules of Evidence. Thus, in the very specific instance of a defendant charged as a felon in possession of a firearm, the Court found that the underlying felony, while an element of the crime, was irrelevant. Likewise, in a felony manufacture of marijuana case, the nature of the underlying felonies is also irrelevant. The evidentiary rules which safeguard a defendant's right to a fair trial, Rule 403 of the Mississippi Rules of Evidence instructs courts to weigh the probative value of evidence against its prejudicial effect. Rule 404 ensures that a defendant is tried for the offense he allegedly committed, not for the type of person that he may be. Therefore, the impact of the evidence of prior bad acts must be lightened as much as possible.

(b) WHETHER COUNSEL WAS INEFFECTIVE BY NOT INVESTIGATING THE CASE, CALLING WITNESSES OR PRESENTING A DEFENSE DURING TRIAL.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense." (*Sixth Amendment to the United States Constitution).*

The framers of the United States Constitution were compelled to insure that each American citizen be afforded the rights described in the Sixth Amendment, namely, that each citizen be allowed in all criminal prosecutions, to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense. The Appellant will unequivocally demonstrate that his Sixth Amendment guarantee was violated and his due process rights as outlined in the Fifth and Fourteenth Amendments was denied. The Supreme Court has stated, "the right to counsel is a fundamental right of criminal defendants, it assures that fairness, and thus the legitimacy of our adversary process. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). Furthermore, the Supreme Court has

recognized that "the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 (1970), and this representation must be effective, Teague v. Scott, 60 F.3d 1167, 1170 (5th Cir. 1995). The Supreme Court has also discussed the duties of counsel during direct appeal. "In preparing and evaluating the case, and in advising the client as to the prospects for success, counsel must consistently serve the client's interest to the best of his or her ability." McCoy v. Court of Appeals of Wisconsin, Dist. 1, 108 S. Ct. 1895, 1902 (1998). In performing this duty, counsel has the duty to search for the strongest arguments possible, and must be zealous and must resolve all doubts and ambiguous legal questions in favor of his client." Id. at 1905. In the case at bar, the Defense Attorney was constitutionally ineffective in her representation, in that ineffectiveness occurred at pre-trial, trial, and sentencing proceedings when counsel failed to raise said constitutional and fundamental defects that have substantially affected the Appellant's rights and have had an injurious effect in determining his conviction and sentencing. Recently, the Supreme Court in O'Neal v. McAminch, 513 U.S. ____130 ____, L. Ed 2d 947, 115 S. Ct. (1995), held that a Appellant alleging that constitutional error occurred at his trial, is entitled to the writ if the court finds that such error did occur and the court is in "grave doubt" as to whether the error was harmless or, instead, had a substantial

and injurious effect in influencing the verdict. Moreover, courts have reversed for new trials when finding cumulative prejudice which undermines the confidence of the outcome of the proceedings. See Blackburn v. Foltz, 828 F.2d 1177 (6th Cir. 1987). Appellant Williams avers that the issues that are advanced substantiate ineffective assistance of counsel. Appellant John Williams was constructively denied the right to effective assistance of counsel when his defense counsel failed to subject the prosecution's case to a meaningful adversarial testing. Although Williams was adamant about his innocence in this case, his counsel never put on a defense and rested when the State rested. Even more important was Williams' request that his wife, Cynthia Williams, be called as a defense witness to rebut the charges of felony possession of a firearm. Previously, Ms. Williams had asserted that the firearms in the home belonged to her, not to the Appellant. Despite these statements, Defense counsel did not call Cynthia Williams as a witness. Undoubtedly if Cynthia Williams had been called as a witness she could have testified that the weapons in the home were hers, thereby placing reasonable doubt as to Count II in the jury's mind. As the Supreme Court has stated, "[A]lthough counsel is present, the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. United States v. Cronic, 466 U.S. 648, 80 L.Ed 2d 657, 104 S. Ct (1984). The defense counsel failed to investigate all the

information that was provided regarding the Appellant's innocence. Nonetheless, this duty to investigate derives from an attorney's basic function, which is "to make the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690, 104 S. Ct. 2052. See Stewart v. Nix, 31 F.3d 741 (8th Cir. 1994). The Stewart Court determined that he was entitled to an evidentiary hearing to introduce additional evidence 'if he can show cause for his failure to develop the facts in state court proceedings and actual prejudice resulting from that failure."" In the case at bar, it was not only through the discovery process that counsel failed to perfect her representation, but practically the entire investigation of the case. Counsel has a duty to make a reasonable investigation based on the information provided by a defendant. In Eldridge v. Atkins, 665 F.2d 228 (1981), the court determined "a competent lawyer's duty is to utilize every voluntary effort to persuade a witness who possesses material facts and knowledge to an event to testify and then, if unsuccessful to subpoena him to court...." Appellant John Williams concurs with the Eldridge decision. It is not enough to assume that defense counsel thus precipitated into the case thought there was no defense, and exercised her best judgment in proceeding without trial preparation and that the defense rests its case without calling any witnesses. Neither defense counsel nor the court could say what a prompt and thorough investigation might have disclosed

as to the facts. No attempt was made to investigate. Appellant John Williams was not thoroughly interviewed before trial to obtain his knowledge of the facts. Under these circumstances, defendant John Williams was not afforded the right to counsel in any substantial sense.

(c) WHETHER COUNSEL WAS INEFFECTIVE BY NOT ASKING THAT THE TRIAL JUDGE BE RECUSED FROM THE TRIAL BECAUSE OF A CONFLICT OF INTEREST.

The law surrounding the recusal of a judge in Mississippi is well settled. Under Canon 3 of the Code of Judicial Conduct, an appellate court, in deciding whether a judge should have disqualified himself from hearing a case uses an objective standard. "A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." Jenkins v. Forrest County Gen. Hosp., 542 So.2d 1180, 1181 (Miss. 1988). "The decision to recuse or not to recuse is one left to the sound discretion of the trial judge, so long as he applies the correct legal standards and is consistent in the application." Collins v. Joshi, 611 So.2d 898, 902 (Miss.1992). When a judge is not disqualified under the constitutional or statutory provisions the decision is left up to each individual judge and is subject to review only in a case of manifest abuse of discretion. Buchanan v. Buchanan, 587 So.2d 892, 895 (Miss.1991).

Appellant John Williams avers that trial judge Sharion Aycock should have

been asked by defense counsel to recuse herself from his trial because of a conflict of interest. Cynthia Williams, the wife of the appellant, sued the brother of Judge Aycock, Darrel Harp, Jr., and won a judgment shortly before the Appellant's trial. Williams further maintains that Judge Aycock knew of this civil judgment against her brother, and that defense counsel knew of the conflict also. However, after Williams expressed his uncertainty about whether Judge Aycock would be unbiased as trial judge, defense counsel refused to motion for recusal.

Moreover, Defense counsel failed to object or file a motion asking for Judge Aycock to recuse herself. Defense counsel should have known that her refusal to ask for recusal during trial could bar Williams from raising this issue in the future. Foster v. State, 716 So.2d 538, 540 (Miss.1998); Banana v. State, 635 So.2d 851, 853 (Miss. 1994)(where trial judge disclosed previous service as District Attorney for appellant's indictment and arraignment, the appellant "waived this issue by entering his voluntary plea of guilty"). *See also* Wells v. State, 698 So.2d 497, 514 (Miss.1997)("Any claim is waived for failure to raise a contemporaneous objection."). The aforementioned cases support the Appellant's contention that counsel's conduct affected his right to a fair and impartial trial.

The legal authority upon which this Court's decision must rest is contained in constitutional and statutory directives. Ruffin v. State,481 So.2d 312 (Miss.1985).

The Mississippi Constitution of 1890, Article VI, Section 165 speaks to the issue at hand and reads in applicable part:

No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties....Except for minor differences in wording and punctuation, the same language is used in Mississippi Code Annotated, § 9-1-11 (1972).

On October 25, 1974, the Mississippi Conference of Judges adopted the Code of Judicial Conduct. Canon 3 C(1)(d) states:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) is acting as a lawyer in the proceeding.

In Ruffin v. State, 481 So.2d 312 (Miss.1984 [sic], we said, "When a judge is

not disqualified under § 165 of the Mississippi Constitution, or § 9-1-11, the propriety of his or her sitting is a question to review only in case of manifest abuse of discretion." *Id.* at 317. *See also,* Coleman v. State, 378 So.2d 640 (Miss.1979)

The issue is not any wrongdoing on the part of Judge Aycock, but the potential for such and moreover, how this situation appears to the general public and the litigants whose cause comes before this judge. Without question defense counsel should have filed, as requested by Williams, a motion asking that the trial judge be recused from participating in the trial based upon the obvious conflict of interest consisting of her brothers' involvement in a lawsuit with the Appellant's wife.

WHEREFORE, PREMISES CONSIDERED, the Appellant prays that this Court will enter an Order reversing the conviction and sentence in the case at bar, ordering a new trial, and any further relief that justice may require.

Respectfully Submitted, on this the 17th day of Jan, 2007.

William C. Stennett

## CERTIFICATE OF SERVICE

THIS IS TO CERTIFY, that I, William C. Stennett, have this day served a true and correct copy of the above and foregoing **APPELLANT'S SUPPLEMENTAL OPENING BRIEF**, by placing a true and correct copy of same in a U.S. Mailbox, addressed as follows, on this the 17th day of Jan, 2007.

Judge Sharion Aycock
Circuit Court Judge
P.O. Drawer 1100
Tupelo, Mississippi 38802

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, Mississippi 39205-0220

Honorable Dennis Farris
Assistant District Attorney
P.O. Box 7237
Tupelo, Mississippi 38802

William C. Stennett