and

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-TS-00854-SCT

ALPHONSO HAYDEN — APPELLANT

VERSUS
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 this Court may evaluate possible disqualification or recusal:

Alphonso Hayden, Appellant;

Michael Farrow, **Esq.**, trial attorney;

Dennie B. Mayhone, Jr., Kara Lincoln, Michael Farrow, and Phillip W. Broadhead, Esqs., Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law;

Charlie Hedgepeth, Esq., Assistant District Attorney, Office of the District Attorney;

Jim Hood, Esq. Attorney General, State of Mississippi;

Honorable James T. Kitchens, Jr., presiding Circuit Court Judge; and

Mississippi Highway Patrol/Mississippi Bureau of Narcotics, investigating/arresting agency.

Respectfully submitted,

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STATEMENT OF ISSUES

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT THE PROTECTION OF THE ATTORNEY-CLIENT PRIVILEGE WHEN, AFTER IT REMOVED THE APPELLANT'S RETAINED COUNSEL, IT REQUIRED SAID COUNSEL TO TESTIFY AGAINST HIS FORMER CLIENT AS A WITNESS FOR THE PROSECUTION THAT THE APPELLANT GAVE HIM DOCUMENTS INTRODUCED BY THE STATE.

ISSUE TWO:

WHETHER THE APPELLANT WAS DENIED HIS FUNDAMENTAL RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 3, SECTION 26 OF THE MISSISSIPPI CONSTITUTION WHEN THE TRIAL COURT REMOVED THE APPELLANT'S RETAINED COUNSEL.

STATEMENT OF INCARCERATION

ALPHONSO HAYDEN is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann § 99-35-101 (Supp. 2001)***.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case is very fact-intensive and the Appellant, through counsel, would respectfully request this Court to grant oral argument to present conflicts in the rulings of the trial court based on the evidence and testimony presented at trial that are alleged by the Appellant to be erroneous This case also presents two novel questions of law not specifically decided heretofore by Mississippi appellate courts.

STATEMENT OF THE CASE

This is a case involving a man who bought a vehicle he thought was a "good deal," and wound up with a ten-year prison sentence. (T. 261) The Appellant, Alphonso Hayden (hereinafter referred to as Mr. Hayden), was charged with possession of stolen property after a car-cloning scheme was uncovered in Columbus, Mississippi. (CP. 4, RE. 14) Mr. Hayden denied having knowledge that the vehicle was stolen, that he should have realized that it was stolen, but was prosecuted in the Lowndes County Circuit Court. Mr. Hayden's hired attorney was taken away from him and, after being identified in the jury's presence as his formerly retained counsel, forced to testify about privileged communications between himself and his client, Mr. Hayden.

Mr. Hayden retained a criminal defense attorney, Mr. Gary Goodwin (hereinafter referred to as "formerly retained counsel"), on or about the date of his original indictment. (T. 179) His formerly retained counsel served as Mr. Hayden's hired attorney for almost a year and a half, until the day that Mr. Hayden's first trial was scheduled to begin. (T. 179)

During voir dire for Mr. Hayden's first trial, his formerly retained counsel received two documents from his client: A certificate of title and a bill of sale for the vehicle in question. (T. 176-77) Formerly retained counsel voluntarily showed them to the prosecutor. (T. 12) Formerly retained counsel did not have a plan to offer them into evidence, and believed "the only way they [would] come into evidence [was] through [his] client." (T. 8) The trial judge pointed out that one of the new documents showed a different vehicle identification number (VIN) for the vehicle than was listed on the documents already in the State's possession. (T. 10, 14) The VIN on the bill of sale to Mr. Hayden showed the proper VIN for the vehicle. (T. 10, 14) As a result, the prosecutor asserted that he would want to use these new documents during trial. (T. 10) The trial judge stopped all inquiry into how Mr. Hayden's formerly retained counsel would introduce the evidence at trial.

After a break, instead of continuing the inquiry into how the defense would introduce the evidence at trial, the trial judge stated that "[t]his bit of evidence very well may be used by the State in its case to show that Mr. Hayden knew or should have known that the vehicle in question was stolen . . . " (T. 13) The trial court found that "the fact that [Mr. Hayden's formerly retained counsel] . . . turned this document

over to the state . . . has now potentially made him a witness in this case." (T. 14) Mr. Hayden's formerly retained counsel was then served with a subpoena, as the prosecutor explained that, "The only person that I could call as a witness is the person who gave me the documents, and that is [Mr. Hayden's formerly retained counsel]." (T. 15)

According to the trial judge, "The dilemma now the Court has is [Mr. Hayden's formerly retained counsel] very well may be a witness in this case, although the rules do not allow for such, and the case law does not." (T. 15) The trial judge elaborated that in an old case, which the judge could not cite to nor name, involving two co-defendants, "the defense lawyer continued on in the representation, person was convicted, and the Supreme Court chastised the lawyer and said, basically, thou shalt not do that." (T. 15-16) Therefore, the trial judge said the formerly retained counsel would be in a "hopeless conflict":As a witness he would have to testify or stipulate that the documents were given to him by Mr. Hayden, and then "I don't see how [Mr. Hayden's formerly retained counsel] can very well make that -- that advisement of whether [Mr. Hayden should] take the stand or not." (T. 16-17) The trial judge stated that Mr. Hayden had to "hire another lawyer," unless a stipulation was made that the documents came from Mr. Hayden, his formerly retained counsel would still be a potential witness. (T. 17) Formerly retained counsel asked the trial court if he could proceed in the case if Mr. Hayden waived this conflict and entered into a stipulation as to the admissibility of the documents so that formerly retained counsel would not have to testify. (T. 20) The trial court refused this request y the

defense. (T. 20) In sum, since the prosecutor argued to the trial court that he would need Mr. Hayden's formerly retained counsel to authenticate the documents that were produced by Mr. Hayden during discovery in order to introduce them into evidence, the trial judge ruled that Mr. Hayden's formerly retained counsel must be a witness in the trial. (T. 14-18, RE. 24-28) Finally, Mr. Hayden's formerly retained counsel was removed by the trial court, and a mistrial was declared. (T. 14-18, RE. 24-28)

Mr. Hayden's second trial began about six months later, at which he was represented by Mr. Michael Farrow (hereinafter referred to as "appointed counsel"). (T. 31) When Mr. Hayden's formerly retained counsel was called as a witness for the State, the judge asked the attorneys to approach the bench, as "[he had] some concerns about attorney-client privilege." (T. 169, RE. 29) The jury remained in the courtroom. (T. 169, RE. 29) The trial court held that "where this document came from is certainly fair game, because it was given in discovery, and there's reciprocal discovery, but much - much other inquiry beyond that line of where this document came from and who gave it to [Mr. Hayden's formerly retained counsel] - I would be concerned about." (T. 170, RE. 30) The judge confirmed that his ruling was, "because [Mr. Hayden's formerly retained counsel] turned this document over . . . it's a waiver of the attorney-privilege." (T. 170-71, RE. 30-31) He elaborated that "who he got [the document] from is not privileged information . . . ." (T. 171, RE. 31) Mr. Hayden's appointed counsel objected to the ruling. (T. 171, RE. 31)

After having his counsel of choice dismissed by the trial judge, being represented by newly court-appointed public defender, and confronted by the

testimony of his formerly retained counsel, Mr. Hayden was convicted. (CP. 79, 91-92, RE. 15-18, T. 335) Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant herein timely filed his notice of appeal and perfected the review of this case before the Court today. (CP. 120-121, RE. 22-23)

SUMMARY OF THE ARGUMENT

The purpose of the judicial system is to seek the truth in the "fairest" way possible and this case revolves solely around fundamental fairness that guarantees the accused citizen of a due process of law that protects our rights under the constitutions of both the state and federal governments. The Appellant, Alphonso Hayden, appeared in court the first day of his criminal prosecution with the retained counsel of his choice. The trial judge improperly removed the Appellant's retained counsel, declared a mistrial, allowed the State to subpoena his counsel as a witness, and subsequently appointed counsel for the Appellant.

In this case, the Court must decide whether it is fundamentally fair for a trial court to remove the retained counsel of choice of a criminal defendant and then to allow the State to use said counsel as a witness against the defendant to introduce otherwise inadmissible evidence. The Appellant asserts not only is this not fair, it is constitutionally prohibited.

The lower court's *sua sponte* ruling of conflict was in error as the exchange of documents in discovery between the Appellant and his formerly retained counsel was protected by the attorney-client privilege, as was the communications surrounding the

documents. The Appellant would also assert that the trial court erred by allowing the prosecution to call his formerly retained counsel as a witness against him, thereby forcing the formerly retained counsel to testify as to the privileged communications.

Should the Court determine this exchange is not covered, it should not be reason enough to deny the Appellant his constitutional right to counsel of choice. The "chilling effect" to the attorney-client relationship is simply unfair, and the deprivation of the fundamental rights guaranteed all accused citizens is strictly prohibited.

Therefore, for the above reasons, this honorable Court should reverse and remand this case for a new trial with proper instructions to the lower court.

ARGUMENT

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT THE PROTECTION OF THE ATTORNEY-CLIENT PRIVILEGE WHEN, AFTER IT REMOVED THE APPELLANT'S RETAINED COUNSEL, IT REQUIRED SAID COUNSEL TO TESTIFY AGAINST HIS FORMER CLIENT AS A WITNESS FOR THE PROSECUTION THAT THE APPELLANT GAVE HIM DOCUMENTS INTRODUCED BY THE STATE.

The question before this honorable Court today asks whether it is proper for a trial judge to not only preemptively remove the defense counsel for an accused citizen, but to then require that attorney to violate the attorney-client privilege by forcing him to testify against his client as to the origin of a document obtained from the Appellant during the course of his representation. As this issue involves the

proper application of the attorney-client privilege, a mixed question of law and fact is presented, and the appropriate standard of appellate review is also mixed. ***Nester v. Jernigan***, 908 So. 2d 145, 147 (Miss. 2005). The application of the law is reviewed *de novo*, while a clear error standard of review applies to the trial court's findings of fact. ***Id.***

A. The Attorney-Client Privilege Protects Knowledge Obtained During Representation, Including that the Client was the Source of Documents Produced by the Defense.

Under general attorney-client privilege law, it has been asserted that, "[a] confidential communication may be made by acts as well as by words." ***C. McCormick, Evidence*** § 89, at p. 183 (1972). Further, it is recognized that under general attorney-client privilege law the privilege "include[s] physical evidence that the client 'communicates' to the lawyer," and a lawyer should not be "compell[ed] as a witness to testify about the evidence." ***Norman Lefstein,*** *Incriminating Physical Evidence, The Defense Attorney's Dilemma, and the Need for Rules*, 64 N.C.L. Rev. 897, 922 n.139 (1986). Therefore, even where the evidence itself is not privileged, "the prevailing view forbids the prosecution from disclosing that the attorney was the source of the evidence." ***Id.*** at 922. Indeed, "[t]he privilege also precludes an abusive litigation practice of calling an opposing lawyer as a witness." ***Restatement (Third) of the Law Governing Lawyers,*** *Attorney-Client Privilege: Rationale Supporting the Privilege*, § 68 cmt. c (2000).

In Mississippi, the attorney-client privilege is governed by ***Mississippi Rule of Evidence (MRE) 502***, which clearly states: "A client has a privilege to refuse to

disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself . . . and his lawyer." ***MRE 502(b)***. "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." ***MRE 502(a).*** The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby to promote broader public interests in the observance of law and administration of justice. That purpose, of course, requires that clients be free to make full disclosure to their attorneys." ***Williamson v. Edmonds***, 880 So.2d 310, 318 (Miss. 2004)(citations omitted). The scope of the privilege has been interpreted broadly in Mississippi: "The privilege relates to and covers all information regarding the client received by the attorney in his professional capacity and in the course of his representation of the client." ***Id.*** at 319 (citation omitted). Information is privileged if it "would facilitate the rendition of legal services or advice," and is not required to be "purely legal analysis or advice." ***Id.***

While no Mississippi appellate court has yet addressed the specific issue of whether the source of evidence obtained by an attorney from his client should fall within the privilege, it is clear that if it was "received by the attorney in his professional capacity" it is protected under ***MRE 502***. At least three other state supreme courts have been faced with this specific issue and have found such

information to be privileged.

This issue first came up in Washington, and their decision has been followed by Arkansas and California. As the Supreme Court of Washington recognized:

> We think the attorney-client privilege should and can be preserved even though the attorney surrenders the evidence he has in his possession. The prosecution, upon receipt of such evidence from an attorney, where charge against the attorney's client is contemplated (presently or in the future), should be well aware of the existence of the attorney-client privilege. Therefore, the state, when attempting to introduce such evidence at the trial, should take extreme precautions to make certain that the source of the evidence is not disclosed in the presence of the jury and prejudicial error is not committed. By thus allowing the prosecution to recover such evidence, the public interest is served, and by refusing the prosecution an opportunity to disclose the source of the evidence, the client's privilege is preserved and a balance is reached between these conflicting interests. The burden of introducing such evidence at a trial would continue to be upon the prosecution.

State v. Olwell, 394 P.2d 681, 685 (Wash. 1964). At least two state supreme courts have, more recently, cited ***Olwell*** with approval. ***Dyas v. State***, 539 S.W.2d 251, 256 (Ark. 1976)(finding that where defendant's wife was the source of the evidence and defendant's attorney introduced the source of the evidence, ***Olwell*** did not apply); ***People v. Meredith***, 29 Cal. 3d 682, 691-93 (Cal. 1981)(finding that "[t]he foregoing decisions demonstrate that the attorney-client privilege is not strictly limited to communications, but extends to protect *observations* made as a consequence of protected communications")(emphasis added). In ***Meredith***, the court went on to find that, "[i]n offering the evidence, the prosecution should present the information in a manner which avoids revealing the content of attorney-client communications or the original source of the information." ***Id.*** at 695 n.8.

In this case, it is undisputed that Mr. Hayden gave the documents to his formerly retained counsel during the course of that attorney's representation. The documents pertained to the crime charged, and were turned over to the State of Mississippi in reciprocal discovery. The district attorney then wanted to use the documents at trial, and argued that, "The only person that I could call as a witness is the person who gave me the documents, and that is [Mr. Hayden's formerly retained counsel]." (T.15) The trial judge found that, "[t]his bit of evidence very well may be used by the State in its case to show that Mr. Hayden knew or should have known that the vehicle in question was stolen." (T. 13) And therefore, Mr. Hayden's formerly retained counsel was subpoenaed by the prosecution to testify, removed by the trial court from the case, and a mistrial was declared. (T. 14-18, RE. 24-28)

At the second trial, amid the trial court's stated "concerns about the attorney-client privilege," it was again held by the trial judge that, although received from the client, "where this document came from is certainly fair game, because it was given in discovery." (T. 169, RE. 29) The trial judge found that, "because Gary - Mr. Goodwin turned this document over . . . it's a waiver of the attorney-privilege. . . who he got [the document] from is not privileged information." (T. 170-71, RE. 30-31) As the trial judge implied, the attorney-client privilege protects the source of the documents, and the Appellant contends that the privilege was not waived by their production.

B. The Attorney-Client Privilege Was Not Waived by the Production of Documents.

Although the trial judge held that the attorney-client privilege was waived when Mr. Hayden's formerly retained counsel produced the documents that were given to him by his client, as ***MRE 502*** and the law from other states show, the ruling of the trial judge was incorrect. The attorney-client privilege was not waived by the production of the documents, and the State should not have been allowed to introduce this evidence through Mr. Hayden's formerly retained counsel.

While it is true that disclosure to third parties may lead to waiver of the privilege, disclosure "made in furtherance of the rendition of professional legal service to the client" does not violate the confidential nature of the communication and therefore does not waive the privilege. ***MRE 502(a)(5); United Investors Life Ins. Co. v. Nationwide Life Ins. Co.,*** 233 F.R.D. 483, 487 (N.D. Miss. 2006). Further, the privilege was timely asserted at the subsequent trial and a timely objection made, as Mr. Hayden's appointed counsel objected to the trial judge's ruling denying Mr. Hayden the protection of the privilege when Mr. Hayden's formerly retained counsel was called to testify. (T. 171, RE. 30-31)

Here, the documents were surrendered by the defense during discovery, but it is the communication surrounding the documents that is claimed in this assignment of error as privileged under the Mississippi Rules of Evidence. Even if the documents were being claimed as privileged, its disclosure would not waive the communication surrounding it, as it was disclosed to the trial judge and the prosecuting attorney "in furtherance of the rendition of professional legal service to the client." As stated above, the Supreme Court of Washington has held that, "the attorney-client privilege

should and can be preserved even though the attorney surrenders the evidence he has in his possession." ***State v. Olwell***, 394 P.2d 681, 685 (Wash. 1964) (emphasis added). As such, the *source* of the evidence is still protected, and the prosecution is free to attempt to introduce the evidence at trial, as long as he can do so without divulging its source in violation of the attorney-client privilege. ***Id.*** Therefore, this Court is urged to hold in this case, as it has been found in Washington, Arkansas, and California, that the production of documents does not waive the attorney-client privilege as to the substance of any communications between the client and the attorney surrounding those documents or their transfer, namely that the client was the source of the documents.

Clearly, the privilege was not waived in this instance, and the ruling of the trial judge forcing the Appellant's formerly retained counsel to testify as to the source of the documents was an abuse of discretion.

C. To Hold Otherwise Is Contrary to Public Policy.

If this ruling, which permits the source of produced documents to be introduced as evidence is allowed to stand, it would be contrary to the public policy of promoting full disclosure between attorneys and clients in an effort to achieve the fair administration of justice, as embodied in ***Miss. Code Ann. § 73-3-37*** (Supp. 2005), ***MRE 502***, and ***Model Rule of Professional Conduct 1.6.*** The situation here arose during reciprocal discovery, when the defendant produced documents that might be used for trial. The problem arose once the prosecutor wanted to use them in the State's case-in-chief. It can be assumed that this occurs in many trials, and to allow

this ruling limiting the scope of the attorney-client privilege to stand - contrary to existing Mississippi law - would have far-reaching effects. ***Miss. Code Ann. § 73-3-37*** (Supp. 2005) states that, "It is the duty of attorneys: To maintain inviolate the confidence and, at every peril to themselves, to preserve the secrets of their clients." ***MRE 502*** protects the confidentiality of such communications in court proceedings, in order to promote full and frank disclosure to ensure justice. ***Rule 1.6 of the Model Rules of Professional Conduct*** states that an attorney has an ethical obligation of confidentiality, and "shall not reveal information relating to the representation of a client" absent specific limited circumstances.

This ruling by the trial court violated the confidentiality of the communications between the Appellant and his hired formerly retained counsel, and as such, is in direct opposition to the stated public policy of encouraging full and frank communication between clients, especially criminal defendants, during the course of their representation. This would, in effect, provide a disincentive for defendants to produce potentially incriminating documents for fear their attorneys would be forced to identify them as the source of those documents.

As will be explained below, a further disincentive to produce relevant evidence would be present if this ruling is allowed to stand and, in turn, the defense counsel is removed from the case in order to present such evidence, as happened here.

D. Finally, the Formerly Retained Counsel Should Not Have Been Compelled to Testify as to Information Protected by the Attorney-Client Privilege

As the Washington Supreme Court and this Court have recognized, the State should not have been allowed to subpoena Mr. Hayden's formerly retained counsel to testify about this document, nor the privileged communications surrounding the document. Forcing him to testify further exacerbated the trial court's erroneous evidentiary ruling concerning these documents and ultimately resulted in the removal of the Appellant's formerly retained counsel. As Mr. Hayden's former attorney, his presence and testimony as a witness for the prosecution was highly prejudicial to the defense and ultimately denied him a fundamentally fair trial. *See* ***Turner v. State,*** 721 So. 2d 642, 649-50 (Miss. 1998) (suggesting that prosecutor's use of defense counsel as a witness can give the appearance of impropriety and cause "public criticism, distrust of the judicial system").

This Court has unequivocally stated that, "[p]rosecutors should refrain from using a prior attorney for a defendant as a witness against the defendant, regardless of the circumstances." ***Turner v. State***, 721 So.2d 642, 649 (Miss. 1998). In ***Turner***, although it was found that the attorney-client privilege was not implicated because the former attorney testified as to facts about familial relationships learned through his personal - rather than professional - relationship with the defendant in that case, it was stated by this Court that this practice "should always be avoided." ***Id.*** at 649-50. In addition, the parties did not conclusively identify the testifying attorney in ***Turner*** as the defendant's former attorney during his testimony.

Here, however, the formerly retained counsel was identified by the prosecution as Mr. Hayden's former defense lawyer in front of the jury and he was required by the

trial court to testify about knowledge clearly obtained through his professional relationship with Mr. Hayden. Because the Appellant's formerly retained counsel was required to testify against him as to knowledge obtained clearly within the scope of the attorney-client relationship, and therefore covered by privilege, the trial court clearly erred in its findings of fact and conclusions of law regarding the attorney-client privilege as applied to the facts of this case.

Further, to allow this ruling to stand, when it causes the defense attorney to be forced to testify against his current or former client, would violate public policy for several reasons. First, it contravenes the public policy of promoting full disclosure, as it provides a disincentive for the defendant to produce documents if that in turn allows the State to use his attorney as a witness against him to introduce those documents. Second, forcing a current or former defense attorney to testify against their client is in direct opposition to the public policy that lawyers should be zealous advocates for their clients, embodied in the ***Model Rules of Professional Conduct,*** which demand the attorney's total loyalty, fidelity, and dedication to the client. Third, if prosecutors are allowed to steal defendants' hired attorneys and force them to testify against their former clients, the appearance of impropriety within the judicial system is increased.

Precedent shows that attorneys should not be witnesses, particularly if called by the opposing counsel. Although prosecutors are free to introduce evidence obtained from opposing counsel, they should not rely upon defense counsel, whether current or former, to testify as to its chain of custody. There could be an extreme

situation where the compelling need for evidence and the lack of other sources necessitates the use of opposing counsel's testimony, but prosecutors must exhaust all other reasonable alternatives before being allowed to use the defense counsel against the defendant. Where the State has not shown extreme circumstances and the exhaustion of alternatives to the trial court, they should not be allowed to use Appellant's chosen counsel as a witness for the prosecution.

If this ruling is allowed to stand, ethical problems will be created for attorneys on both sides. Defense attorneys will be faced with the dilemma of producing the document at the risk of being called to testify, and possibly being removed, or withholding the document from the State. Faced with their professional responsibilities, they may be forced to choose between their obligations as an officer of the court and their loyalty to the client, which they should never have to do. Prosecutors may strategically decide to use documents produced by the defense solely for the purpose of requiring such testimony from the defendant's current lawyer, in order to present the appearance of disloyalty on behalf of the defendant's lawyer, or worse yet, in hopes that the required testimony will create such a conflict that the lawyer's removal is necessary.

Here, the erroneous privilege ruling led to the subpoena of defendant's counsel, even absent a showing of extreme circumstances, which in turn led to the removal of defendant's formerly retained counsel. This result cannot possibly be permissible, for the reasons listed above, and further, the United States Supreme Court has held that wrongful removal of hired defense counsel violates a criminal

defendant's Sixth Amendment right, as will be explained below. The trial court clearly abused its discretion in requiring the Appellant's formerly retained counsel to testify as to privileged and confidential matters learned within the scope of the attorney/client relationship, and, therefore, this honorable Court should reverse the verdict of the jury and the sentence of the trial court, and remand this case with proper instructions to the lower court for a new trial.

ISSUE TWO:

WHETHER THE APPELLANT WAS DENIED HIS FUNDAMENTAL RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 3, SECTION 26 OF THE MISSISSIPPI CONSTITUTION WHEN THE TRIAL COURT REMOVED THE APPELLANT'S RETAINED COUNSEL.

The second question before this honorable Court ask, regardless of the decision as to Issue One above, whether it is proper for a trial court to remove retained counsel of choice of an accused citizen in order to assist the State in presentation of its case-in-chief. This issue involves the deprivation of a fundamental right found in the Constitutions of the United States and the State of Mississippi. As such, the appropriate standard of review for constitutional issues is *de novo*. ***Baker v. State***, 802 So. 2d. 77, 80 (Miss. 2001).

One of the purposes of defense counsel at trial is to assist and guide the accused citizen through the intricate maze of the criminal justice system. The need for this guidance is to ensure as fair a process as humanly possible so that the procedure does not result in an outcome that "seriously affects the fairness, integrity or public reputation of judicial proceedings." ***Porter v. State***, 749 So.2d 250 (Miss.

Ct. App. 1999). The Constitution does not guarantee a perfect trial, but it does entitle a defendant in a criminal case to a fair trial. ***Clark v. State***, 891 So. 2d 136, 141 (Miss. 2004) (citing ***Delaware v. Van Arsdall***, 475 U.S. 673, 681 (1986)).

From the time of independence from the crown of England, our forefathers and new states legislated and constitutionalized the right to counsel. From these early beginnings, the right has been understood to prevent the government from unjustifiably denying an accused the representation of counsel of his choice. In the rare instances where a trial court has deprived an accused of this right, the proper remedy has been a reversal of conviction and a new trial. "In sum, the right at stake here is the right to counsel of choice . . . and [when] that right [i]s violated because the deprivation of counsel [i]s erroneous . . . the violation is complete." ***United States v. Gonzalez-Lopez***, 126 U.S. 2557, 2562 (2006). The violation in this case is a "structural defect" requiring a new trial. ***Id.***

Both the United States Constitution and the Mississippi Constitution guarantee a person accused of a crime due process of law. To accomplish that end, the Sixth Amendment and Article 3 guarantee every criminal defendant the right "to Counsel." **U.S. Const. amend. VI, XIV; Miss. Const., Art. 3, Section 26.** An important component of this right to counsel is the presumption that citizens may retain counsel of the their choice to represent them at trial, especially in a criminal prosecution. *See* ***Wheat v. United States***, 486 U.S. 153, 159 (1988). It is understood that a defendant should be allowed "a fair opportunity to secure counsel of his own choice." ***Powell v. Alabama***, 287 U.S. 45, 53 (1932). While there are exceptions to retained counsel

of choice, such as conflicts arising from representation of multiple defendants, courts are aware that "the government may seek to 'manufacture' a conflict in order to prevent a defendant from having a particular able counsel at his side." ***Wheat***, 486 U.S. at 163. It is a fundamental principle of our system of justice that the courts are charged with protecting the rights guaranteed by our Constitution. ***Rose v. Lundy***, 455 U.S. 509, 518 (1982) (citing ***Ex parte Royall***, 117 U.S. 241, 251(1886)).

In this case, the trial court failed in this obligation when it removed the retained counsel of choice of the Appellant as the attorney of record at the first trial. The trial court cited no authority to do so and further misapprehended the fundamental rights protected by both the United States Constitution and the Mississippi Constitution when it stated:

> Mr. Goodwin very well may be a witness in this case, although the rules do not allow for such, and the case law does not. There's an old case from -- in the early 200s of the Southern Reporters, I can't remember the exact page now, but I can find it, or the case.
>
> It involved a couple of co-defendants in a - - in a drug case, and - - and as I recall, the defendants were two ladies. . .
>
> But in that case, the defense lawyer continued on in representation, person was convicted, and the Supreme Court chastised the lawyer and said, basically, thou shall not do that.

(T. 15-16, RE. 25-26)

While trial courts are given wide discretion in balancing the needs of fairness and the right to counsel of choice, trial courts are charged with an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." ***Gonzalez-Lopez***, 126 U.S. at 2566 (quoting ***Wheat***, 486 U.S. at 160). Here, the trial court's ineffectual attempt at this balancing only included (1) asking the Appellant's formerly retained counsel how he intended to introduce the documents (the trial court was informed that the defense was not even sure the documents would be offered at trial by the defense) and (2) allowing the State to serve the formerly retained counsel with a subpoena to be a witness in the case. (T. 8-15) The trial court further stated its "concern is excluding any evidence." (T. 11) This was the full extent of the trial court's limited inquiry into the admissibility of the documents as evidence.

The actions of this trial court cannot be seen to give anything recognizable to the fundamental fairness guaranteed every defendant in a criminal prosecution. The balancing performed by the trial court amounted to one question to the defense and then how the prosecution's case could include the introduction of the documents and how that could be accomplished:

> BY THE COURT: Therefore, I would be in the position of putting Mr. Hayden's attorney in a hopeless conflict. I think, because either Mr. Goodwin would have to be called to the stand, which would result in an immediate mistrial, or Mr. Goodwin would have to stipulate that these documents were given to him by Mr. Hayden.

Then, in the same case, Mr. Goodwin would have to try to advise Mr. Hayden whether it would be in his best interest to take the stand or not take the stand. Prior to those documents, it may very well have been in Mr. Hayden's best interest not to take the stand.

But if these documents are stipulated to, and that they came from Mr. Hayden, then I don't see how Mr. Goodwin can very well make that - - that advisement of whether to take the stand or not.

As I've said, Mr. Goodwin has done everything that the law requires of him. This is not of Mr. Goodwin's making.

This is one of those rare cases when the Court believes that manifest necessity requires that I mistry this case.

Also, Mr. Hayden, I think that I'm going to have to inform you that you are going to have to hire another lawyer. Because Mr. Goodwin, unless you stipulate at some future trial that these documents came from you, Mr. Goodwin is still going to be in that same position of being called as a witness.

You have now made your lawyer a witness in this case, or in this case and in the future. Mr. Goodwin cannot continue his representation.

. . . .

Accordingly, I believe that I have no choice but to, one, declare a mistrial in this case, and two, remove Mr. Goodwin in this case because he is a potential witness in this case.

(T. 16-18, RE. 26-28)

This attempt at balancing fairness against the rights of the accused by the trial court was not enough to even minimally protect the constitutional rights at stake. The United States Supreme Court has stated that the Sixth Amendment "commands . . . a particular guarantee of fairness." ***Gonzalez-Lopez***, 126 U.S. at 2562. The trial court further compounded the unjust denial of this constitutional right when it allowed the State to then use the Appellant's formerly retained counsel as a witness to introduce otherwise inadmissible evidence against him at the subsequent trial.

The trial court clearly misunderstood the applicable rights involved and to whom they belonged as evidenced by the following colloquy between appointed counsel for the Appellant at the subsequent trial and the trial judge:

> BY MR. FARROW: So is the Court ruling that because Gary - - Mr. Goodwin turned this document over in discovery that it's *his* - - it's a waiver of the attorney-client privilege?
>
> BY THE COURT: Sure. It's - - it was reciprocal discovery, and he had to give it, and he did.

(T. 170-171, RE. 30-31) (emphasis added)

It is well-established in law that the right to waive the attorney client-privilege belongs to the client. ***Barnes v. State***, 460 So. 2d 126, 131 (Miss. 1984)(citing ***Bennett v. State***, 293 So.2d 1, 5 (Miss.1974); ***Jones v. State***, 65 Miss. 179, 183, 3 So. 379, 380 (1887); **Caraway & Currie**, *Privileges*, 48 Miss. L.J. 989, 1028-1031 (1977)). "Only the client may invoke the privilege . . . the attorney has no standing

to invoke the privilege if the client does not wish to." ***Barnes v. State***, 460 So. 2d at 131. The trial court then allowed the prosecution to call Mr. Goodwin to testify in front of the jury that he was the formerly retained counsel of the Appellant in the first trial and that the Appellant had handed him the documents in question. (T. 171-180) The documents were then admitted into evidence by the trial court over the timely objection of the defense. (T. 178)

The trial court conducted no inquiry into the admissibility of the evidence nor the purpose for which it was being offered. The trial court apparently assumed, *sua sponte*, that the purpose was to assist the prosecution in meeting one of the elements of the charge against the Appellant:

> BY THE COURT: Part of the proof in receiving stolen property or being in possession of stolen property is that you knew or should have known that the property was stolen.
>
> As we were going through the *evidence*, and I believe it was a bill of sale, a certificate of title, and a bridge and road - - basically a tag receipt, showing that you had paid your taxes on the vehicle, there are two different VIN Numbers on this vehicle.
>
> One is - - one set of numbers is on the State of Mississippi Road and Bridge Privilege Tax and registration receipt, and the certificate of title, and there is yet a totally different VIN number on the bill of sale that has Mr. Alphonso Hayden's signature on it.

> This bit of *evidence* very well may be used by the State in its case to show that Mr. Hayden knew or should have known that the vehicle in question was stolen.

(T. 13) (emphasis added)

The use of his former retained counsel at trial for the sole purpose of introducing these otherwise irrelevant and inadmissible documents was erroneous not only procedurally, but was also a deprivation of the Appellant's constitutional guarantees as set out hereinabove.

There were, of course, alternatives for the trial court other than simply removing the Appellant's formerly retained counsel so that he may testify against his former client. First, the defense does not have the obligation to help the State present evidence in its case-in-chief. The trial court could have at a minimum conducted a balancing of the probative value versus the prejudicial effect that the Appellant contends would have dictated the exclusion of the evidence. *See* ***MRE 403***; ***Hammons v. State***, 918 So. 2d 62, 64 (Miss. 2005). These documents were clearly inadmissible under any interpretation of the rules of evidence. If the formerly retained counsel was truly the only witness available, as the State claimed, then the trial court should have excluded the evidence.

Second, the State could have called other witnesses to attempt to authenticate or to debunk the documents as being genuine or forgeries. For example, the State's own witnesses testifying in essence as experts on the issuance and character of automobile titles stated that the normal person looking at the documents in question

would not know the documents were false. (T. 156-157, 234-245) Surely, if the assessor could accurately remember the Appellant several months after the transaction, she could have authenticated the documents that she recognized. (T. 146-147) The State could have and did call the investigating officer to testify about the documents and their importance in his investigation. (T. 197-213, 225-245) So for the trial court to assert, "this case should be mistried and that Mr. Goodwin will, by law, be removed from this case, because he is a potential witness, and he has been served as such" (T. 20) was clearly erroneous and an abuse of the trial court's discretion. As this Court has stated: "For a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party." ***Holladay v. Holladay,*** 776 So. 2d 662, 672 (Miss. 2000). The procedural error of admitting the documents in question in this case only compounded the original error of removing the Appellant's formerly retained counsel from the case and forcing him to become a witness for the prosecution at trial. The Appellant's constitutional right to retained counsel of choice surely rises to the level of a "substantial right" where there were less drastic alternatives available to the trial court. Therefore, when taken as a whole, the admission of these documents was used by the prosecution for the substantive purpose to prove guilty knowledge and also as impeachment evidence to prejudice the Appellant in the eyes of the jury at the expense of his constitutional guarantees.

This ruling depriving the Appellant of his constitutional right cannot be allowed to stand because it is fundamentally unfair. The right to counsel of choice

serves three important functions in the search for fairness in the judicial system. One function served is that a defendant's choice of counsel ensures "equality between the Government and those it chooses to prosecute." ***Caplin & Drysdale, Chartered v. United States***, 491 U.S. 617, 646 (1989)(Blackmun, J., dissenting). This right gives all people input into how their liberty is to be taken by the State in a criminal prosecution. Denying the government supervisory veto power over the counsel a defendant chooses also ensures the equality of the system. If the government is allowed to disqualify the chosen counsel, the accused would be justifiably suspicious of any lawyer that the government would approve, appoint, or allow to stay in the case. Forbidding the government from interfering with the defendant's right to choose and retain counsel avoids this type of inequality. In addition, it fosters the trust needed for an attorney to be the guiding advocate for his client. When the trial court removed the Appellant's formerly retained counsel so that he could testify against his client, the equality between the government and the citizen it chose to prosecute was undermined and the goal of fairness disregarded.

A second function the right to choose counsel serves is control. When a defendant is allowed to choose the counsel that will represent and guide him through the process, the defendant is given control over his defense. ***Wheat***, 486 U.S. at 165-66 (Marshall, J. dissenting). Being accused of criminal charges brings with it multiple decisions that may cumulate to affect the end result. Choosing which counsel will assist in making these decisions gives the defendant some control in the process of vindicating his interests. As in this case, it is the defendant "who suffers the

consequences if the defense fails." ***Faretta v. California***, 422 U.S. 806, 819-20 (1975); *see also,* ***United States v. Curcio,*** 694 F.2d 14, 25 (2d Cir. 1982).

A third and final function is faith. When a defendant is allowed to choose the counsel that will represent him, faith in the criminal justice system is nourished, sustained, and encouraged. When, however, the government unjustifiably interferes with the right to choose one's own counsel for the defense, the government "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system." ***Young v. United States ex rel. Vuitton et Fils S.A.***, 481 U.S. 787, 811 (1987)(plurality opinion). A defendant's choice of counsel implicates the interest in ensuring that trials are conducted in a manner that appears fair. ***Wheat***, 486 U.S. at 160. This function is injured, if not exterminated, when a trial court, as here, bars a defendant from choosing the counsel that will represent and guide the client through the criminal justice process for no legitimate reason. Under these circumstances, not only does the defendant "believe that the law contrives against him," ***Faretta,*** 422 U.S. at 834; but it naturally calls into question the fairness, legitimacy and impartiality of the jury's verdict and the integrity of the accused's conviction. Faith in the fundamental fairness of the process is essential for the continued viability of the criminal justice system.

A trial court's erroneous deprivation of a criminal defendant's choice of counsel without just cause entitles him to reversal of his conviction and the grant of a new trial. ***Gonzalez-Lopez v. Unites States,*** 126 S. Ct. 2557, 2562-63. The trial court here erroneously removed Mr. Hayden's counsel of choice, thus depriving him

of his constitutional guarantees under the Sixth and Fourteenth Amendments of the United States Constitution and Article 3, Section 26 of the Mississippi Constitution. Therefore, the Appellant would respectfully request that the jury's verdict be set aside, the case be reversed, and remanded to the trial court with proper instructions for a new trial.

CONCLUSION

Every citizen has the right to expect their counsel of choice in the criminal justice system to be a competent, proficient lawyer, and also to have confidence in the loyalty of his representative. When this right is taken away without just cause, the rights of all are diminished. This honorable Court has an opportunity to correct a grievous wrong of constitutional proportions in this case: The removal, without just cause, of the Appellant's retained counsel of choice who was then forced by the trial court to become a witness for the prosecution. The Appellant herein submits that based on the propositions cited and briefed herein above, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on a charge of possession of stolen property, with instructions to the lower court. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental and constitutional in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

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This the 6th day of November, 2006.

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