IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES BROWNLEE		APPELLANT
VERSUS		NO. 2006-KA-01399-COA
STATE OF MISSISSIPPI		APPELLEE

BRIEF OF APPELLANT
JAMES BROWNLEE

APPEALED FROM
THE CIRCUIT COURT OF COAHOMA COUNTY, MISSISSIPPI
ELEVENTH JUDICIAL DISTRICT
CAUSE NO. 2006-0007

RICHARD B. LEWIS
CHAPMAN, LEWIS & SWAN
P.O. BOX 428
CLARKSDALE, MS 38614
(662) 627-4105
ATTORNEY FOR APPELLANT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. Their representations are made in order that the Justice of this Court may evaluate possible disqualification or refusal:

Hon. Mickey Mallette
Assistant District Attorney
115 1st St., Suite 200
Clarksdale, MS 38614

Hon. Albert B. Smith, III
Circuit Court Judge
P.O. Drawer 478
Cleveland, MS 38732

Hon. Jim Hood
Assistant Attorney General
P. O. Box 220
Jackson, MS 39205

Mr. James Brownlee
115 North 5th Street
West Helena, AR 72390

This the 24th day of April, 2007.

RICHARD B. LEWIS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES BROWNLEE	**APPELLANT**
VERSUS	**NO. 2006-KA-01399-COA**
STATE OF MISSISSIPPI	**APPELLEE**

BRIEF OF APPELLANT

COMES NOW the Appellant, James Brownlee, and states the following issues concerning the appeal of his convictions in the Circuit Court of Coahoma County, Mississippi and the Lower Court's denial of Appellant's Motion for Judgment Non Obstante Verdicto Or Alternatively For A New Trial:

STATEMENT OF INCARCERATION

The Appellant is presently out on bond living in Arkansas. The Appellant was sentenced on August 14, 2006 to serve a term of 15 years with 8 years suspended with the Defendant to serve 7 years on Count I, Armed Robbery and 15 years with 8 years suspended with the Defendant to serve 7 years on Count II, Armed Robbery. The sentence in Count II was ordered to run concurrent with the sentence in Count I. (R.E.5-10)

STATEMENT OF ISSUES

I. **APPELLANT CONTENDS THE COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AND SUBSEQUENT MOTION FOR JUDGEMENT NON OBSTANTE VERDICTO OR ALTERNATIVELY FOR A NEW TRIAL SINCE THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.**

II. **APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE PRE-TRIAL, AND TRIAL STAGES OF THIS CASE.**

STATEMENT OF THE CASE

The Appellant was indicted on the 30th day of May, 2006, for two counts of armed robbery, which occurred on or about March 2, 2006, in Lula, Coahoma County, Mississippi. The Defendant was arraigned and represented by the Honorable David Tisdell. A trial was had on or about July 24-25, 2006. (R.E. 1). A jury was empaneled and a verdict returned in finding the Defendant guilty of both counts of armed robbery. In Count I, the Appellant was sentenced to 15 years with 8 years suspended, with Appellant to serve 7 years. In Count II, the Appellant was sentenced to serve 15 years with 8 years suspended with the Defendant to serve 7 years to run concurrent with Count I in an institution under the control and supervision of the Mississippi Department of Corrections. (R.E. 5-10) The Defendant filed a Motion for Judgment Non Obstante Verdicto Or Alternatively For A New Trial which was denied on or about August 11, 2006. (R. 213-218) (R.E. 6-9). It is from this conviction and denial of a new trial that the Defendant, Appellant herein, brings his timely appeal.

The State presented proof that Clarksdale residents, Jesse Green and Roger Leslie, were robbed at gunpoint by the Appellant on March 2, 2006, while attempting to purchase a vehicle in the parking lot of the Isle of Capri Casino Parking Lot.(R.96). The primary witnesses were the victims, Jesse Green and Roger Leslie, as well as Jerryco Green who was a passenger in the truck driven by Jesse Green. (R.98) Jesse Green, Roger Leslie and Jerryco Green had driven to the casino parking lot to meet with a man named Ricky about purchasing a black Camaro Z28. (R. 96-98) There was proof presented that Mr. Jesse Green had his tax return money in the amount of $4,400 in cash with him to purchase the vehicle if it was to his liking. (R. 100-101) After Jerryco Green exited the truck to make a phone call, the two victims were allegedly approached by Appellant and another individual at gunpoint demanding money from Jesse Green. (R.98-103) Allegedly as the appellant was

attempting to flee the scene, the other individual allegedly with Appellant then demanded that Roger Leslie give him the keys to the truck driven by Jesse Green. (R. 100-104). Mr. Green testified that he then reported the incident to a Casino security officer and later to Coahoma County Investigator, Fernando Bee. (R. 105-106). The State presented proof that Mr. Brownlee became a suspect after a description of the vehicle and gunman lead law enforcement to him. (R. 54-59). Both victims were able to identify the Appellant as one of the gunman in both counts of armed robbery during a photo lineup and at trial. (R. 102-103, 128-130).

SUMMARY OF THE ARGUMENT

Appellant contends that the verdict was against the overwhelming weight of the evidence and based on the suggestiveness of the photo lineup whereby said defendant was the only suspect in the lineup with dreadlocks out of the six photos shown to the eyewitness. (R.E. 33). The eyewitnesses identified the Appellant as the robber based on the suggestive out of court photo lineup. (R. 100, 102-103, 128-129, 130). Appellant further alleges that the eyewitnesses description of the robber was totally different from the actual appearance of the Appellant in that Appellant was clearly not stocky, chubby-faced nor did he have a gold tooth. (R. 100, 102, 105-106, 109, 113, 115, 117). Further, the getaway car driven by the perpetrators was not noticed to have tinted windows while the Appellant's white Cadillac actually had tinted windows (R. 115, 117, 139). Appellant also contends that the verdict is the result of ineffective assistance of counsel, based on Appellant's trial attorney failing to investigate and failing to subpoena or have present the witnesses needed to establish the Appellant's alibi. (R.E. Motion for New Trial and Affidavits and Exhibits pg 6-26) Appellant asks that the jury's guilty verdict be vacated on grounds related to the weight of evidence, so that he might be re-tried in order to allow the Appellant to present the alibi witnesses that will place the

Appellant at a different location than the Casino at the time of the alleged robbery which his previous attorney failed to do. (R.E. Motion for New Trial Affidavits and Exhibits pg 6-26). Appellant contends his conviction should be reversed and he be granted a new trial.

ARGUMENT

I. APPELLANT CONTENDS THE COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AND SUBSEQUENT MOTION FOR JUDGMENT NON OBSTANTE VERDICTO OR ALTERNATIVELY FOR A NEW TRIAL SINCE THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.

Appellant contends that the verdict is against the overwhelming weight of the evidence. Taking the testimony of all the witnesses as a whole, Appellant asserts that his Motion For Directed Verdict and Subsequent Motion for Judgment Non Obstante Verdicto should have been sustained because in taking all the evidence into light, the most favorable to the State, the State has failed to meet his burden of proof in this case. The basic standard of review of the sufficiency of evidence to support a criminal conviction is set out in **Jackson v. Virginia**, 443 U.S. 307, 99 Supreme Court 2781, 61 Lawyers Ed. Second 560 (1979).

Based on **Jackson v. Virginia**, the critical inquiry is not simply whether the jury was properly instructed, but also whether the record of evidence can reasonably support a finding of guilt beyond a reasonable doubt. This inquiry does not, in preserving the fact finder's role as a weigher of evidence, require a Court to ask itself whether it believes that the evidence in trial establishes guilt beyond a reasonable doubt. The relevant question, as pointed out in this case, is whether after reviewing all the evidence in light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

It is Appellant's contention that the Judge, at the Lower Court level, must require acquittal by

sustaining a Motion For Directed Verdict or at least requiring a new trial if reasonable jurors would necessarily have reasonable doubt as to his guilt in this case.

This Court pointed out in **May v. State**, 460 So.2d 778 (Mississippi 1984) as follows:

> In other words, once the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the Defendant be discharged short of a conclusion on our part, that given the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror, could find a reasonable doubt that the Defendant was guilty **Pearson v State**, 428 So.2d 1361, 1364 (Miss., 1983).

The Motion for New Trial is a different animal. While the Motion for Judgement of Acquittal Not Withstanding A Verdict presents to the trial court a pure question of law, the Motion For A New Trial is addressed to the Trial Court's sound discretion **Neal vs. State**, 451 So.2d 743, 760, (Miss. 1984) when he moves for a new trial, a Defendant in a criminal case necessarily invokes **Rule 10.05** of our **Circuit and County Court Rules** which in pertinent part provides:

The Court on written notice of the Defendant may grant a new trial on any of the following grounds:

(1) If required in the interest of justice;
(2) If the verdict is contrary to law or the weight of the evidence;...

As distinguished from the J.N.O.V. Motion, here the Defendant is not seeking final discharge. He is asking that the jury's guilty verdict be vacated on grounds related to the weight of the evidence, not it's sufficiency, and may be retired consistent with the double jeopardy clause, **Tibbs v. Florida**, 457 U.S. 31,39, 102 S.Ct. 2211, 2217, 72 L. Ed. 2d. 652, 659-60 (1982).

That, as a matter of law, the motion for judgment of acquittal, not withstanding the verdict, must be overruled and denied and in no way affects and little informs the trial judge regarding his disposition of the motion for new trial. Cases are hardly unfamiliar wherein the Court holds that the evidence is sufficient so that one party or the other was not entitled to judgment not withstanding the verdict but, nevertheless, that a new trial in the interest of justice should be ordered. **Hux v. State** 234 So.2d 50, 51(Miss. 1970), **Quarles v. State** 199 So.2d 58, 61 (Miss. 1967); **Mister v. State** 190 So.2d 869, 871 (Miss. 1966); **Yelverton v. State** 191 So.2d 393,394 (Miss. 1966); **Heflin v. State** 178 So.2d 594 (Miss. 1938); **Conway v. State**, 177 MS. 461, 469, 171 So. 16, 17 (1936).

A greater quantum of evidence favoring the State is necessary for the State to

> withstand a motion for a new trial as distinguished from a motion for J.N.O.V. Under our established case law, the trial judge should set aside a jury's verdict only when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence **Pearson v. State** 428 So.2d at 1364.

Appellant contends that the verdict is against the overwhelming weight of the evidence, due to the testimony of the prosecution witnesses' inaccurate identification of the Appellant, and due to the suggestiveness of the photo lineup used to identify the robber. The testimony was that the robber had "dreadlocks" as a hairdo and the only person in the photo lineup with dreadlocks was the Appellant. (R. 100, 102, 105-106, 109, 113, 115, 117, 120, 128, 129). (R.E. 33).

Appellant also contends that the verdict is contrary to the law and evidence, based on the suggestiveness of the photo lineup whereby said defendant was the only suspect in the lineup with dreadlocks out of the six photos shown to the eyewitness. The eyewitnesses identified the defendant as the robber based on the suggestive out of court photo lineup and gave an inaccurate description during trial. (R. 100, 102, 105-106, 109, 113, 115, 117, 120, 128, 129). According to **Dennis v. State of Mississippi**, 904 So.2d 1134, 1135 (2004), the Mississippi Court of Appeals stated that "a photographic lineup is impermissibly suggestive when the accused is conspicuously singled out in some manner from others. *Id* at 1135. The Court went on to state that the U.S. Supreme Court set out five factors to be considered in determining whether a lineup is impermissibly suggestive: (1) The opportunity of the witness to view the criminal at the time of the crime, (2) The witness's degree of attention, (3) The accuracy of the witness's prior description of the criminal, (4) The level of certainty demonstrated by the witness at the confrontation, and (5) The length of time between the crime and the confrontation. *Id.* The Court then indicated that the picture stood out like a "sore thumb" from the rest of the pictures used in the photographic identification process and was

impermissibly suggestive. *Id* at 1136. In Mr. Brownlee's case, his photo stood out like a "sore thumb" due to his photo being the only suspect in the lineup having dreadlocks. (R.E. 33). The witness that identified the defendant had stated prior to the lineup that he was robbed by a person with dreadlocks. (R. 113).

Appellant also contends that the verdict is not based on sufficient evidence, based on the fact that the eyewitnesses description of the robber was totally different from the appearance of the defendant. At trial, in their identification of the robber the prosecution witnesses described the robber as having a gold tooth, having a chubby face, and being heavy set and stocky. (R.102-106, 113, 115, 120, 128, 129) The said Appellant does not have a gold tooth now nor did he at the time of the alleged robbery. (See R. E. Motion for a New Trial Exhibit D-2 (a-f) pg 15-20). The Appellant has neither a chubby face, nor is he heavy-set or stocky and is actually 5'6" and weighs 150 pounds. The prosecution witnesses also stated that the robber's car had more or different letters and numbers than the standard lettering for Arkansas tags, and was different than those on the Appellant's car. (R. 111) Further, the video tape played at trial showed a white car that had no tinted windows as the car used in the robbery. (R.E. Motion for a New Trial Exhibit D-3 (a-e) pg 21-25.) (Also, see video tape Exhibit D-4 in original record sent by Clerk). However, the Appellant's car had dark tinted windows pursuant to the testimony of Officer Carl Vann and picture. (R. 139) (R.E. Motion for New Trial Exhibit D-3 (a-e), pg 21-25). Officer Vann was a Helena police officer who was very familiar with Appellant's car.

When testing the legal sufficiency of the State's evidence, the standard of review is as follows: "the court must review the evidence in the light most favorable to the State, accept as true all the evidence supporting the guilty verdict and give the prosecution the benefit of all favorable

influences that may reasonably be drawn from the evidence." See **McClain vs. State**, ***625 So.2d 774, 778 (Miss. 1993)***. The court will only reverse when fair-minded jurors could find the accused not guilty. **Weltz vs. State**, ***503 So.2d 803, 808 (Miss. 1987)***. It has long been a rule that the jury "may give consideration to all inferences flowing from the testimony." **Magnum vs. State**, ***762 So.2d 337 (Miss. 2000)***. In reviewing the proof as alleged above, Appellant should be granted a new trial.

II. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE PRE-TRIAL AND TRIAL STAGES OF THIS CASE.

To prove ineffective assistance of counsel, a Defendant must prove: "(1) counsel's performance was defective, and (2) the defect was so prejudicial that it prevented [Defendant] from receiving a fair trial." **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This standard has been adopted by the Mississippi Supreme Court. **Moody v. State**, 644 So. 2d 451, 456 (Miss. 1994). In order for a defendant to show prejudice, it is necessary that he prove that the outcome of the trial would be different were it not for counsel's errors. **Strickland**, 466 U.S. at 699. The issue of ineffective assistance of counsel may be resolved on direct appeal if both parties (Appellant and Appellee) stipulate that the record is sufficient to determine whether the Appellant received ineffective assistance of counsel; or the record affirmatively shows ineffective assistance of counsel; if no other error is found in the record, then the Court of Appeals should "affirm without prejudice to the defendant's right to raise the ineffective assistance of counsel issue via appropriate post-conviction relief filings." **Wash v. State**, 807 So. 2d 452, 461 (Miss. Ct. App. 2001). An appellate court should reach the merits of an ineffective assistance of counsel claim on "direct appeal only if (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the

parties stipulate that the record is adequate to allow the appellate court to make the findings without consideration of the findings of fact of the trial judge." **Colenburg v. State**, 735 So.2d 1099, 1101 (Miss. Ct. App. 1999). "If the issue is not examined because of the state of the record, and assuming the conviction is affirmed, the defendant may raise the ineffective assistance of counsel issue in post-conviction relief proceedings." **Pittman v. State** 836 So.2d 779, 787 (Miss. Ct. App. 2002).

Appellant recognizes the case law precedent from the Mississippi Supreme Court and the Mississippi Court of Appeals regarding the necessary stipulations for such an appellate court to review a claim of ineffective assistance of counsel on direct appeal. However, counsel for Appellant in his Motion for New Trial proffered for the record what evidence the Appellant was prepared to show as evidence of ineffective assistance of counsel. (R. 213-218) (R.E. Motion for New Trial; Exhibits D-1 - D-4, pg 6-26) Current counsel for Appellant would be remiss in his duties not to zealously advocate Appellant's case by not including this issue in Appellant's Brief. Appellant's trial counsel absolutely failed to prepare to represent Appellant at his trial and, furthermore, failed to preform any sort of pretrial work on his case, thus, Appellant contends the proffered testimony clearly shows ineffectiveness and that with this alibi testimony coupled with bad identification the outcome would have been different.

Appellant was tried and convicted of two counts of armed robbery. The verdict is the result of the ineffective assistance of counsel, based on Appellant's attorney failing to investigate and determine the witnesses to establish the Appellant's alibi and by failing to subpoena and/or call to testify four alibi witnesses to testify at trial that said Appellant Brownlee was at Champ's Health and Fitness Club on 953 Highway 49 West Helena, AR, assisting his quadriplegic cousin in exercises during the time of the robbery at 3:30 p.m. on March 2, 2006. (See R.E. 6-14, Motion for a New

Trial; Exhibit D-1 Collective Exhibit of Affidavits, pg 11-14) (R. 213-218). The witnesses that Appellant was prepared to call at his Motion for a New Trial hearing to establish that he was at another place at the time of the alleged robbery were:

(1) Richardo Hervey, (2) Demitrius Tate, (3) Adrian Horteson and (4) Ashante Hart. (See R.E. 6-14 Motion for a New Trial; Exhibit D-1, pg 11-14) Appellant proffered their testimony by Affidavit at the hearing on the Motion for New Trial and J.N.O.V. (R. 213-218).

Appellant's trial counsel's performance was deficient and that the said Appellant was clearly prejudiced by trial counsel's performance in failing to investigate and call said alibi witnesses at trial. That but for the Appellant's trial attorneys failing to call said four alibi witnesses to testify at trial and establish the Appellant's alibi combined with the inaccurate description of the robber given by the witness and the suggestive photo lineup, the verdict would have resulted in a not guilty verdict. Further the attorney was deficient in not filing a pretrial motion to suppress the out of court photo lineup identification of the defendant as the robber due to it suggestiveness of said lineup which lead to the jury's verdict based on a suggestive photo lineup. Appellant was obviously the only person in the six (6) man pretrial photo lineup with dreadlocks. (See R.E. 33 Photo Lineup, Exhibit D-1). Under the totality of the circumstances and evidence presented, trial counsel's performance was deficient.

CONCLUSION

Appellant argues that the State did not have a greater quantum of evidence favoring their version of the facts as elicited due to the testimony of the prosecution witnesses as to the identification of the Appellant as well as the robbery vehicle, and due to the suggestiveness of the photo lineup used to identify the robber. The State's case should not have been allowed to withstand

a Motion For New Trial as distinguished from a Motion For J.N.O.V., under our established case law. (R. 213-218). The Trial Judge should have set aside the jury's verdict in this case when considering all the evidence as a whole combined with the Appellant's trial attorney's ineffective assistance in preparing his defense. The Court in exercising his sound discretion, and in the interest of justice, should have ruled that the verdict was contrary to the weight of the evidence and only allowed the Appellant to proffer the Affidavits rather than hearing the testimony of the witness at the Motion for New Trial (R. 213-218). **Pearson v. State** 428 So.2d 1364, Miss. 1983).

As stated in **Hawthorne vs. State, *835 So.2d 14 at 21 (Miss. 2003)*** the standard for review of a Motion for a J.N.O.V., as well as a motion for a directed verdict and a request for peremptory instructions is all the same in that it challenges the legal sufficiency of the evidence. As stated in **Hawthorne, 835 So.2d at 21 ¶31 (citing McClain vs. State, 625 So.2d 774, 778 (Miss. 1993)**, on the issue of legal sufficiency, reversal can only occur when evidence of one or more of the elements of the charged offense is such that reasonable and fairminded jurors could only find the accused not guilty. Here, that element is erroneous eyewitness identification of the Appellant.

There is reasonable doubt as to the element of identification in this case due to the inability of the victims to properly identify his assailant or the robbery vehicle immediately after the incident. It was not until the victim was given a photo lineup with only one photo with a man with dreadlocks, the Appellant's, that the victim was able to identify the Appellant, James Brownlee. Further, the State's witnesses were unable to accurately describe the robber in comparison to the Appellant's actual appearance and features (i.e. chubby, stocky, gold tooth). Further, the description of the robber's vehicle did not match the Appellant's vehicle due to the tinted window on Appellant's car and due to only a partial tag identification of the getaway vehicle. Due to that tainted identification,

the element of identity of the robber/assailant, as well as the vehicle used, is in serious doubt.

Appellant argues that his trial counsel's performance was deficient and that the said Appellant was prejudiced by trial counsel's performance. That but for the Appellant's attorney failing to call said four alibi witnesses to testify at trial and establish the Appellant's alibi the verdict would have resulted in a not guilty verdict. Further the trial attorney was deficient in not filing a pretrial motion to suppress the out of court photo lineup identification of the defendant as the robber due to the suggestiveness of said lineup which lead to the jury's verdict based on a suggestive photo lineup and erroneous eyewitness identification.

Appellant beseeches this Court, after a thorough review of the record, to conclude that the Appellant should be granted this new trial in the interest of justice.

CERTIFICATE OF SERVICE

I, Richard B. Lewis, Attorney for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to the following persons:

Hon. Mickey Mallette
Assistant District Attorney
115 1st St., Suite 200
Clarksdale, MS 38614

Hon. Albert B. Smith, III
Circuit Court Judge
P.O. Drawer 478
Cleveland, MS 38732

Hon. Jim Hood
Assistant Attorney General
P. O. Box 220
Jackson, MS 39205

Mr. James Brownlee
115 North 5th Street
West Helena, AR 72390

This the 24th day of April, 2007.

Richard B Lewis
RICHARD B. LEWIS