COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIAM LOGAN JR. — APPELLANT

v.

NO. 2006-KA-01790-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

WILLIAM LOGAN JR. #K3694
C.M.C.F 3B-1
P.O. Box 88550
Pearl, MS 39288

Attorney for William Logan JR.
pro se

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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 disqualifications or recusal.

1. State of Mississippi
2. William Logan JR.

William Logan

William Logan JR., Atty. pro se

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of the Thirteenth Judicial District of Covington County, Mississippi, and a judgment of conviction for the crime(s) of Burglary of a Dwelling(s) in cause no. 2004-44K, against William Logan Jr. and resulting in two concurrent sentences of twenty-five (25) years, following a trial held July 24, 2006, Honorable Robert G. Evans, Circuit Judge, presiding. William Logan Jr. is presently incarcerated with the Mississippi Department of Corrections, located in Pearl, MS.

FACTS

On January 5, 2004, a 911 call came in to the Covington County Sheriff's Dept at 11:27 A.M. that a black male was seen coming from the residence of Ruby Benson, carrying a cash box that belonged to them, suspect then entered his vehicle described as a brown Honda Accord bearing Warren County, Mississippi license plates. The suspect was followed by Mr. Earl Benson. The Cov. Co. deputies upon responding to the call, saw a vehicle that matched the description.

After a brief stop, the suspect then fled the scene and the officers gave chase, later stopping him on the exit ramp to Hwy. 495. The suspect was then arrested and taken to jail. On January 6, the car was inventoried and a large array of evidence was siezed including: $2300 in large bills, (2) piggy banks, various coins, (1) gold and diamond ring, (1) wedding band, (1) gold watch.

On July 6, 2004, defendant was indicted for 2 counts of Burglary of a Dwelling, but was alleged to have occured on June 5, 2004, but was served on the defendant until January 11, 2005. The defendant then signed an Affidavit of Indigency and Waiver of Arraignment Entry of Plea On Non-Capital Cases and Trial Setting form on the 14th day of January, without the benefit of an attorney. The Court then appointed Oby T. Rogers on the 19th of January.

On June 20, 2005, the court signed an "Agreed Order Amending The Indictment" which was agreed to by Richard W. Webb, ADA, and Atty Oby Rogers. On July 12, 2005, the appointed Atty Oby Rogers filed an undated "Motion to Withdraw" due to lack of contact with the defendant, but the Court never entered an order on the same. Three days later on July 15, 2005, a "Bench Warrant" was issued for the defendant for failure to appear under bond. The defendant had never been placed on bond, but was on probation and reporting to Hinds County Probation Office every month.

Defendant was served with the "Bench Warrant" on January 20, 2006 and was held in Covington Co. Jail. On February 24, 2006, Logan was taken to Court with retained Attorney Dan McIntosh that was hired on February 12, 2006 in an attempt to get the Bench Warrant lifted, but never made it to the Judge. He was then told that Warren County had a "hold" on him and would be held for them. Logan was then transported to Warren County on March 15, 2006 to await possible revocation of probation. The Court in Warren County was held in abeyance because Logan was in prison on the day that was on the original indictment and could not have committed the crimes.

On July 5, 2006, appellant was transported back to Covington Co. from Warren Co. to await trial.

On July 24, 2006, appellant was tried and convicted of two counts of burglary and subsequently sentenced to 25 years as a habitual offender. Then on August 18, 2006, a hearing was held on defendant's JNOV motion and same was denied. Defendant is now appealing this decision.

Summary of The Argument

The defendant was denied due process throughout the entire course of the proceedings, defendant's car was not searched according to policy and procedure. Also there was no identification of defendant as the perpetrator of the crimes. The state relied heavily on questionable evidence gained through inadequate procedure. Defendant was ambushed by amended inductment with out notice of change and without proper presentation of the court. The procedural defects in this case are prejudicial and constitute gross negligence.

ISSUE NO. 1: Whether the trial court erred in allowing the indictment to be amended twice to correct the date of crimes.?

The appellant contends that these amendments were very material and prejudicial particularly due to the manner in which they were allowed. In trying to keep seperate the issue at hand from merging into another, I apologize, but they are so intertwined it would be impossible to explain one with the other.

On January 11, 2005, defendant was served with an indictment [T. 5-8] which reads just as shown here. Let this court be advised that the defendant was incarcerated on June 5, 2004 at C.M.C.F. On January 14, 2005, defendant signed a "Waiver of Arraignment" form without an attorney being appointed and after signing an "Affidavit of Indigency" on the same day. Now the "Affidavit of Indigency" was filed immediately, but the "Waiver of Arraignment" form was not filed until January 19, 2005, which coincidentally was the same day Atty. Oby Rogers was appointed, [T. 12-13]. His signature appears there as if he were there when defendant signed. The record reflects otherwise. On June 20, 2005, Ass. District Atty. Richard W. Webb and Oby Rogers agreed to amend the indictment with the specific purpose to correct the date from June 5, 2004 to January 5, 2005, [T. 15]. Defendant fully acknowledges that amendments of form are permitted by the court as stated in Rhymes v State 638 So.2d 1270: [T. 10-11]

"Courts may amend an indictment to correct a defect in form, but defects of substance must be corrected by the grand jury."

Also Rule 7.09 U.R.C.C.P says:

"Amendments shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised."

Then surprisingly, Atty Rogers files an undated "Motion to Withdraw" on July 12, 2005, which is not accompanied by the required certificate of service. The substance of this motion was "after numerous attempts to reach the defendant the attorney has had no contact with the defendant." [T. 16] He had an address and phone number which has not been changed in years. This amendment was allowed without the required guarantees of the 14th Amendment of Due Process of law of notice of the charges. The defendant neither knew or was given a fair opportunity to agree or disagree to a critical decision such as this and coupled with the fact of no contact with the court-appointed lawyer. The defendant was was on probation under the supervision of Off. Ted Rogers in Hinds County and reporting monthly and never missed an appointment and also gainfully employed. [T. 219] As stated by defendant in JNOV hearing [T. 221-222], the defendant called Mr. Rogers and he never told me that any decisions had been made or anything about the case although he lied and said the M.D.O.C. told him I was locked up. The defendant is attempting to show that opportunity was there to be advised of any material decisions made without defendant's consent.

In addressing the first criteria set forth in Rhymes 638, the amendment clearly altered a defense to the indictment as it originally stood as to prejudice the defendant's case. It is clear that defendant would have relied on an alibi for the defense knowing he was incarcerated that day and to change it took away that claim of defense. At the time of plea of not guilty, there was only the prosecutor Richard Wiley Webb, Dep. Circuit Clerk Melissa Duckworth and the defendant William Logan JR., no judge, no appointed attorney to advise and prevent the defendant from making an uninformed decision or protect his rights. Rule 8.01 Arraignment says

> "In all cases of waiver of the reading of the indictment may be permitted if the defendant is represented by an attorney"

In the record of this present case, it is obvious that there was no attorney appointed to represent the defendant at this time, which is a "critical stage" of the proceedings as stated in Powell v. Alabama 287 U.S. 45 (1932)

> "period from arraignment ~~the~~ to trial is "perhaps the most critical period of the proceedings" during which defendant requires the guiding hand of counsel."

this was done in violation of the rights of the defendant declared by the 6th and 14th Amendment to the U.S. Constitution and the Mississippi Constitution Art. 3. Sec. 26 and also Rule 3.8(c) of Rules of Professional Conduct which states that:

> "A prosecutor in a criminal case shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights."

In this present case, the original indictment had a wrong date, then without due process of law and lack of notice to the defendant, the prosecutor and court appointed lawyer presented an "Agreed Order" to the court and was purportedly signed by the court without neither party knowing the date was still wrong. The defendant did not have any knowledge to this amendment.

On February 12, 2006, while in Covington Co. Jail defendant then consulted Atty Dan McIntosh about representation and paid a partial retainer, defendant then showed up at court to get the "Bench Warrant" [T. 17-18] lifted and while the retained attorney and defendant waited to see the judge a warrant for revocation of probation from Warren County was given to the defendant by Asst. D.A. Richard W. Webb and he told defendant the he would be going to Warren County and there would be no hearing, this happened February 24, 2006. On July 13, 2006, another "Agreed Order" [T. 26] was filed to change the date of occurance from June 5, 2004 to January 5, 2004. Which completely left out the January 5, 2005 date that was agreed to in the first amendment, also this was done without notice to the defendant and while he was in jail in Covington County. Attorney Oby Rogers never even attempted to confer with his "client" on the matter. Then coincidentally filed another "Motion to Withdraw" the same day [T. 27-28] in which he again stated that there was no contact with the

defendant, but then says the defendant states that Hon. Dan McIntosh is his hired attorney [T. 27]. If he had no contact with the defendant then how could the defendant tell him about the retained attorney. This is to show this court of his prior knowledge of retained attorney. At trial during the jury instructions is when the defendants attorney objected to S-2 and S-3 because they had a date different from original indictment and also the first "Agreed Order" [T. 129-134] It is evident that the defense was clearly surprised by this amendment. The record reflects that even the court was surprised by this event as evidenced by the court's response [T. 129-130, 132]. MS Code 99-17-15 reads

> "The order of the court for amendment of the indictment, record or proceedings provided in Section 99-17-13 shall be entered on the minutes, and shall specify precisely the amendment, and shall be a part of the record of the said case, and shall have the same effect as if the indictment or other proceedings were actually charged to conform to the amendment; and wherever necessary and proper for the guidance of the jury, or otherwise, the clerk shall attach to the indictment a copy of the order for amendment."

In the case at bar, none of these procedures were followed and directly violates the very essence of its purpose which is to give notice to all parties involved to enable the defense to sufficiently prepare for trial and make knowingly decisions to the evidence. The court in this case erred in allowing a second amendment to the indictment to show a correct date. Rule 7.06(5) reads in part:

> "Failure to show a correct date shall not render an indictment insufficient."

Also, Miss. Code Ann. 99-17-15 states:

> "The order of the court for amendment of the indictment, record or proceedings provided in Section 99-17-13, shall be entered on the minutes, and specify precisely the amendment, and shall be part of the record of said case, and shall have the same effect as if the indictment or other proceedings were actually changed to conform to the amendment; and wherever necessary or proper for the guidance of the jury, or otherwise, the clerk shall attach a copy of the order for amendment to the indictment.

It is obvious this procedure was not followed, (1) On [T. 132] the state said, "They may have it ready to go to the minutes or something." Then the trial court said that it will put a copy in the file and mark it himself [T. 132], but if you look at [T. 26] this order is stamped filed, but not marked filed by the court. (2) These amendments were not attached to the indictment as required by the above statute [T. 132]. Neither were they presented to the jury for guidance. These amendments were not properly before the court without oral and written motions, thereby violating due process. Also prejudice must be presumed because amendments were done without notice to the accused and were not determined by the court to see if they prejudiced or change a defense. It was even said by Asst. D.A. Webb at [T. 205, 206] that "use" considered it to be a typographical error. That determination is required to be made by the court, not the state. The test for whether an amendment would prejudice the defense is whether the defense as it originally stood would be equally available after the amendment is made.

Issue No. II: Whether the trial court erred in allowing evidence seized during an invalid inventory search?

The appellant alleges that the evidence seized during the inventory search was in violation of his 4th Amendment Constitutional Rights. Appellant intends to show that the search was unreasonable and not done in accordance to established policy and procedure.

First we must look at the reason for an inventory search. It is the production of an inventory and has a non-investigatory nature. Our high Court has developed three distinct needs: The protection of police against claims or disputes over lost or stolen property. U.S. v Kelehar 470 F. 2d 176, 178 (1972), protection of owner's property while it remains in police custody U.S. v Mitchell 458 F. 2d 960, 961 (1972), protection of police from potential danger. California v Cooper 386 U.S 58 (1967). It is clear from this present case that Investigator Newman's intent and purpose was not to satisfy neither one of the required purposes. At trial during cross examination, Newman stated in response to why he didn't get a search warrant "Because I used the Impounded Vehicle Inventory Form," [T. 120]. Also during Jury Instructions it was mentioned by D.A. Bowen that when you do an inventory search, you don't need a search warrant" [T. 127]. Further strengthening the appellant's contention of the Investigator's intent and motive.

In this case the appellant was taken into custody on January 5, 2004, and according to the Inventory Vehicle Form [Ex. D-4] the search was done on January 6, 2004. The time of the inventory was a hotly disputed topic, because it shows that there was no safe keeping of property motive involved. Look at the inventoried items on [Ex. D-4] and compare to [Ex. S-6, S-10] and it becomes clear certain item were not inventoried to wit: CD holder, wallet with I.D, debit card, S.S. card, cap, cigarettes among other items. This exposes the true nature of the search. There were no pictures of the inventoried $300, gold watch, ring, wedding band, various coins, except the ones generally kept in the car, no silver dollar in a necklace mount, no blue jewelry box/w coins. In Marshall v. U.S. 986 F.2d 1171 the court stated:

> "Police may no conduct a search solely for investigation purposes."

Again this shows the motive for the search of the vehicle.

Inv. Newman stated at [T. 120] that the search was conducted instead of getting a warrant, "I used the inventory sheet.

In Florida v. Wells, 495 U.S. 1.

> "If our cases establish anything it is that an individual police officer cannot be given complete discretion in conducting an inventory search. The exercise of discretion by an individual officer, especially when it can't be measured against objective, standard criteria, creates the potential for abuse of Fourth Amendment rights our earlier cases

were designed against."

In the case at bar, numerous times was it said by Newman that he was "alone" during his search, [T. 115, 120-121]. Also in Wells 495, the court said:

> "Under the Federal Constitution's 4th Amendment, an inventory search must not be a ruse for a general rummaging by the police in order to discover incriminating evidence; the policy or practice governing the search should be to produce an inventory, and an individual police must not be allowed so much latitude that searches are turned into a purposeful and general means of discovering evidence of crime."

The investigator went so far as to prepare an underlying facts and circumstances report which is generally prepared to secure a search warrant, but then decided to just do an inventory. Also the evidence seized from inventory report [Ex. D4] and what was recovered on [Ex. D-1] differs, some things are not mentioned. How can this court be sure this "phantom evidence" even existed without it physically being produced at trial or even pictures of it? Taking a complete look at [Ex. D-4], the so-called officer who done the inventory never even signed the form to verify he even conducted the search and Dep. Wayne Harvey signature is in the witness box, but again Newman stated repeatedly that the other deputy (Harvey) was not there. Also Newman was not present when Harvey "processed for prints" [Ex. D-4] [T. 114] but Inv. Newman said during cross, that that equipment (fingerprinting) was not issued or available at that time., [T. 114]. M.R.E. 901(a)(comment) says:

"The authentication and identification aspects of

evidence are central to the concept of relevancy. Unless it be satisfactorily shown that an item of evidence is "genuine," the item is irrelevant and should be excluded."

The officer's selective attitude of what to photograph, what to give back to victims, even though certain items he testified that he gave to victims, and some he put in the evidence vault, even though victims testified that they never recieved those items and he didn't produce them at trial. [T. 107-111], [T. 73]. We are dealing with a case here, where you have one officer who purportedly conducted a invalid inventory search, "alone", photographed some evidence, but not all, didn't sign the form, didn't verify or couldn't verify what he ~~[illegible]~~ released to the victims, processed for fingerprints without equipment, and further purjered himself when he said that dispatch were or would have been relaying updated information to them over radio. [T. 88]. See Ex. 1 which is a dispatch report provided in discovery. Wayne Harvey (Cov. 17) & Investigator Newman (I-1). There never was anything over the radio that disclosed what was missing, except a cash box, which appellant never had or was never recovered.

The appellant has shown that the statements were knowingly or intentionally false, or made in reckless disregard of the truth, and upon these premises search must be voided and the fruits excluded. Also again the inventory cannot be used as a pretext concealing a police investigatory motive. In South Dakota v. Opperman, 428 U.S. 364, the searching officer's intent was revealed at the trial in response to why did he inventory the car?

"Mainly for safekeeping, because we have had a

a lot of trouble in the past of people getting into the compound lot and breaking into cars and stealing stuff out of them."

You can clearly see from page 3 of [Ex. D-1] he stated he later learned that the piggy banks were missing. From [Ex. 2] you can see what time Newman arrived on the scene of the Wise burglary, 1432 hours on January 5, 2004. So how could the dispatcher give him the information over the radio during the pursuit. Also there was a blue jewelry box [Ex. S-8] entered into evidence at trial that should have been excluded because the officer never recovered it from the appellant. Mrs. Benson's testimony was that the coins were not in that box [T. 59-61]. To allow that box over counsel's objections were highly prejudicial and allowed the jury to infer that it came from appellant. Also, this was entered over objections on discovery, this was never furnished to the defense and the fact that there was a blue jewelry box reported missing from the Benson burglary, see [Ex. D-2]

A so called search is not an independent legal concept but rather an incidental administrative step following arrest and preceeding incarceration. To determine whether such a search of a defendant's belongings was unreasonable, a court must balance its intrusion on defendant's Fourth Amendment interests against it promotion of legal governmental interests. The only gov. interest in this case was to make sure Inv. Newman, first day Inv., got his "feet wet" so to speak and secure an arrest. Newman never testified that his motive to satisfy neither purpose set forth in numerous

Supreme Court cases. It is obvious that the police policy in this case is non-existent and if procedures had been followed this would not resulted in a conviction. An inventory should be done incident to incarceration, U.S. v Robinson 414 U.S. 218 (1973) and not after as this present case was. In Lafayette at the concurrance of Justice Marshall says:

> "I agree that the police do not need a warrant or probable cause to conduct an inventory search prior to incarcerating a suspect.... A very different case would be presented if the State had relied on the fact of arrest to justify the search of respondent's shoulder bag. A warrantless incident to arrest must be justified by a need to remove weapons or prevent the destruction of evidence.

In the present case the inventory is trying to be justified on the fact of arrest and can't be held correct. The inventory is an administrative step and not an investigatory step and to be treated otherwise is held constitutionally "unreasonable" and can't be excepted by warrant requirements.

Revisiting the introduction of [S-5], the court also erred in allowing this material over objection which was overruled on discovery, [T.47] but in Robinson v State, 508 So.2d 1067 (1987) the court said:

> "Under the procedural guidelines set out above it is imperative that the defense attorney object, as he did here. After the objection, the court's initial response should be that the defense be given a reasonable opportunity to examine the newly produced documents, photographs, etc."

The trial judge should have immediately allowed the defense an opportunity to examine the physical evidence and make a

should have excluded the evidence, because there was too many inconsistencies in the testimony. The timing of the search also was not incident to the arrest, once police gain exclusive control over the arrestee's property a later search cannot be justified as incident to arrest. Although Inv. Newman never testified that he saw piggy banks in plain view, the D.A. at [T.127] tried to add to the testimony by saying what Inv. Newman saw, the appellant was never confronted with any evidence at the time of arrest. The state also on [T.152] said Inv. Newman said the door was open, Newman never said this. Regardless of that in Arizona v. Hicks, 480 U.S. 321 (1987) says:

> "To establish the incriminating character of an item, the police must show that after an inspection of "what is already exposed to view" they are able to determine that it is evidence or contraband."

Also the court held in Hicks, an officer lawfully on the defendant's premises moved stereo components, which he had reasonable suspicion, but not probable cause to believe were stolen, to view their serial numbers. Concluding that this movement was a search, the Court held the plain view doctrine could not justify the search or seizure of the components because the police lacked probable cause to believe they were stolen. Inv. Newman's own testimony confirms that the items were not immediately apparent, from

[Ex. D-1], Underlying facts and Circumstances report, Newman stated that he later learned the the banks were missing, although trying to justify in testimony at [T. 88] that updated information was being dispatched to them over the radio. See [Ex. 2] dispatch report of January 5, 2004 provided in discovery. Not one time does dispatch tell them what was missing from either burglary.

OR Michelle Lopez ON DUTY 0700 OFF DUTY 1500 DATE 01-05-04

FROM UNIT - STATION	TO UNIT-STATION	TIME ON	TIME OFF	TRANSMISSIONS	CANCELLATION
Cov 17	SO	0700		11-98	
D8	SO	—	0717	11-97	
Cov 14	SO	0720		enroute to Plup Juv Jones Co. Juv. Det. Center to take to Court in Lawrence Co. Beg. Mil. 239644	
—	—	—			
A5	SO	0732		CA 10-27 8773685466 not on file	
Cov 1	SO	0749		11-98	
Cov 17	SO	0758		out @ Collins P.D. giving Medication	
Cov 9	SO	0806		Advise Marion Co SO he is on Hwy 44 in Marion Co. behind 11-55 and advised Marion Co SO.	
—	—	—			
Cov 17	SO	0807		10-8 Collins P.D. From giving Medication	
14	SO	0808		Back in County	
M+5	SO	0836		10-8	
Cov 14	SO	0845		Out of County	
Cov 17	SO	0850		Out @ Chancery Building	
Cov 17	SO	0907		10-8 Back in Car from Chancery	
Phone	SO	0917	#18373	Coaco McLaurin advised Boy Came to Res and took Somethings that did not belong to him #72 Virgil Rd 765-9354 advised Cov 17	
—	—	—			
Cov 5	SO	0925		enroute to Pearl Lawenforcement Training Academy in POV mil. 114042	
—	—	—			
Cov 17	SO	0935		10-23 #72 Virgil Rd.	
Cov 1	SO	0937		Out @ Chancery Building	
Phone	SO	0952		Greg Graves for Cov 9 606-3236	
Cov 17	SO	0952		10-8 I Report enroute to Another Res to Speak w/ Subj.	
Cov 17	SO	0955		10-24 Neg. Cont w/ Subj.	
1 2 in	SO	1007	#18374	William H. ~~Knight~~ Freeman for Report spoke w/ Cov 17	
911	SO	1024	#18375	Hang up Call from Barbara Crosby Res #15 Angie Rd Mt. Olive 797-4742 Called Res Back advised Kids playing on Phone advised Cov 17 to Check Res.	
—	—	—			
—	—	—			
Cov 17	SO	1045		10-23 #15 Angie Rd	
Cov 17	SO	1049		10-8 10-2 @ Res Juv. arguing	
Cov 8, I2	SO	1049		10-8 J1 to Jasper Co. Jail plup B Gatlin for Court	
Walk in	SO	1056	#18376	Wilmetta Newsome #38 Bob Jones Dr. Vandelism to Veh wants Report	
—	—	—			
Cov 8	SO	1102		Out of County mil. 39072	
Cov 14	SO	1103		Back in County	
911	SO	1127	#18377	Ruby Benson advised B/M Broke in to Res #785 Hwy 35 765-8430 Mr. Benson Called back Subj. left in late model Honda Accord warren Co	
—	—	—			

TOWER LIGHTS OBSERVED BURNING

OR Michele Lopez ON DUTY 0700 OFF DUTY 1500 DATE 01-05-04

FROM UNIT - STATION	TO UNIT-STATION	TIME ON	TIME OFF	TRANSMISSIONS	CANCELLATION
I2	SO	1135		10-15 J3/X from Jasper Co. Jail to Justice Court mil. 39090	
911	SO	1138	#18378	[illegible] advised [illegible] #1733 Hwy 35 [illegible]	
Cn17	SO	1149		Attempting to stop [illegible] Store	
I1	SO	1151		10-94 Hwy 84 E. Subj. taking Lake Mike Conner Rd.	
I1	SO	1153		Subj headed Lake Mike Conner Rd headed Back towards Hwy 84	
I	SO	1159		out on veh Hwy 84 off Ramp to Hwy 49 SB	
Cn14	SO	1159		Subj. in Custody	
Cn17	SO	1200		Neat 10-57 Rpt advised Vics	
I2, Cn8	SO	1201		10-8 in County + out @ Justice Court mil. 39123	
Cn17, I1	SO	1208		10-15 J3/X mil. 67880	
Hw 625	SO	1210		MS 10-28 663 CVS	
Cn17	SO	1212		End mil. @ SO w/ 10-15 67881 mil.	
Phone	SO	1218		Ronald J. Coulter for Cn1 901 216 6811	
Mt5	SO	1219		10-64 Hi Band.	
Phone	SO	1238	#18379	Tammy Blanks #217 ORA Williamsburg Rd Subj. in a Burgandy Stanza Poss 11-55 Headed towards Hwy 84 advised Cn14 765-0394	
Cn1	SO	1245		out @ Justice Court	
Cn1	SO	1246		10-8 Back in Car.	
C	SO	1251	#18380	Cell Phone Caller advised 10-50 Hwy 590 Just out of Seminary 1 veh JI. advised Hatt MHP	
911	SO	1253	#18381	Cell Phone Caller advised 10-50 Hwy 49 NB Between Mt. Olive and Collins Veh verse Animal advised Hatt MHP	
Mt5	SO	1257		10-8 10-64	
J10	SO	1303		10-23 10-50 Hwy 49 NB Just out of Mt. Olive	
Phone	SO	1305		W.E. Magee for Cn1 765-8143	
Phone	SO	1334	#18382	Cell Phone Caller advised Wht Tk 10-50 Bethel Ch. Rd. On Sanford end advised Cn17	
Cn17	SO	1357		10-23 10-50	
Mt2	SO	1358		10-8 Mt. Olive.	
Phone	SO	1429	#18383	Cell Phone Caller advised Horses in Road Bethel Ch Rd / Old Hwy 49 advised Cn17	
[illegible]	[illegible]	[illegible]		10-[illegible] #1733 Hwy 35	

Issue No. III : Whether the defendant's Sixth Amendment and Article III, Sec. 26 of MS Constitution right to counsel was violated?

Defendant contends that his right to counsel was violated when the state persuaded him to waive arraignment and enter a plea and agree to a continuance and also waive rights to a speedy trial without appointment of counsel. The 6th Amendment to the U.S. Constitution says:

> "The accused has/shall enjoy the right... to have assistance of counsel. The right to counsel attaches at the initiation of adversarial proceedings whether by way of formal charge, preliminary hearing, indictment, information or arraignment and no request for counsel need be made by the accused."

Under MS law, the right to counsel attaches earlier than does the 6th Amendment. Williamson v. State, 512 So 2d 876, the right attaches at the point in time when the initial appearance 'ought to have been held'. The right to counsel at such point is available as a safeguard against self-incrimination. Clearly this present case is of the magnitude to require reversal. On July 6, 2004, the appellant was indicted, but was not served the indictment until January 11, 2005, a period of six months. Self v. Collins, 973 F. 2d 1198 (5th Cir. 1992) says:

> "right to counsel attached after indictment and remained in force, whether or not defendant was in custody."

The state did not attempt to inform appellant of indictment or lodge a detainer against him, knowing full well of the whereabouts.

Asst. D.A. Webb at [T. 200] stated that appellant was at M.D.O.C. at the time of indictment. He was erroneous on one point though, the appellant was not transported to Covington Co. arraigned and transported back to M.D.O.C. On August 23, 2004 was released from M.D.O.C. on Earned Released Supervision. M.D.O.C. policy states in Chapter V of Inmate Handbook says in subsection IV(C):

> "If a detainer exists, MDOC will be responsible for holding the inmate until the inmates can be picked up by the agency holding the detainer."

Appellant at the time of release did not know about the indictment, neither did M.D.O.C. or else the appellant wouldn't have qualified for release from custody. This is the beginning of the cover-up of the state's attempt to gain a tactical advantage over the appellant. On January 11, 2005, the appellant was contacted by probation officer Ted Rogers, and turned himself in. On January 14, 2005 appellant was taken to court in Covington Co. and was [T. 12] [T. 9] requested to waive arraignment and signed the affidavit of indigency. The affidavit was filed immediately, but the waiver was not filed until "coincidentally" the same day the order [T. 14] appointing counsel was given.

Rule 8.01 says:

> "In all cases of waiver of the reading of the indictment may be permitted if the defendant is represented by an attorney.

Rule 3.8(d) of Professional Conduct:

> "The prosecutor in a criminal case shall not seek to obtain from an unrepresented accused a waiver of important

pretrial rights, such as the right to a preliminary hearing.

The state took advantage of this situation in that there was no judicial official present to inform the appellant of his rights and also no lawyer present, only Asst. D.A. Webb, Dep. Circuit Clerk Melissa Duckworth, and appellant William Logan. The state deliberately held [T. 12] without filing until counsel was appointed to give the appearance that this was a legitimate act. Then Obie Rogers signature is on the form as if he was there five days before he was appointed. This conspiracy severely damaged the appellant's position and violated due process and created an unconscionable injustice and infected the proceedings. This was a "critical stage" as defined in the 6th Amendment. In Powell v. Alabama, 287 U.S. 45 (1932) states:

> "Period from arraignment to trial is "perhaps the most critical period of the proceedings" during which defendant requires the guiding hand of counsel."

Critical stages are those points in a criminal proceedings when an attorney's presense is necessary to secure the defendant's right to a fair trial. The reason no bond was set was because the judge was not present. This Sixth Amendment violation pervaded the entire proceedings and violated the Fourteenth Amendment Due Process Clause. Thereby undermining the confidence in appointed Attorney.

Issue No: IV Whether the indictment was deficient and couldn't properly support a conviction or bar future prosecutions?

Appellant contends that the present indictment was defective and impermissably vague and therefore could not support a conviction of burglary. To explain the reasoning for this contention, the appellant requests this court to look at the indictment on [T. 5], being that burglary is a crime against property and not person, it is therefore necessary to describe the property with certain specificity in order to put defendant on notice of the charges against him.

(i) The indictment in either count 1 or count 2 does not contain an address to sufficiently notify what dwelling is alleged to been burglarized. In Pool v. State, 764 So 2d 440 (Miss. 2000), The Court of Appeals affirmed the convictions by a vote of 4-4, with two judges not participating. Presiding Judge King dissented, saying:

> "allowing the indictment to be amended to show the correct address amounted to reversible error and warranted a new trial."

Even though the case at bar, deals not with a change of address but an omission, the same reasoning should apply. This indictment seems to say that the prosecution can convict on any property owned by the victims in the jurisdiction, this is not correct. This indictment doesn't show what, better yet, where

the alleged burglary happened. One would have to ask, what if these victims owned multiple houses in said jurisdiction? This indictment also is not sufficient enough to bar future prosecutions under a different set of facts. Under the Fifth Amendment of the U.S. Constitution, indictments returned by grand jury must meet two basic tests:

(1) to apprise accuse of crime charged with sufficient specificity to enable him to prepare his defense

(2) to delineate offense with sufficient specificity to protect against future jeopardy.

This indictment leaves the accused in a position to ask questions and guess what the Grand Jury really meant. U.S. v. Duncan, 598 F.2d 839 (1979) states:

> " ◉ indictment be plain, concise and definite written statement of essential facts constituting offense charged mandates that each essential element of offense be alleged together with sufficient additional facts to allow indictment to be used as proof in bar of subsequent prosecution of same offense."

Appellant acknowledges the fact that the charge of burglary is understood, but contends that if the state decides that it wanted to prosecute again with the same indictment, the appellant couldn't plead double jeopardy under ~~a different~~ the same set of facts. Indictments not only requires accusation, but also requires protection for the accused from multiple prosecutions for the same offense. This indictment does nothing to bar that.

Also, challanges to the sufficiency of an indictment are not waivable. Thus, they may be first raised at anytime, including on appeal. Berryhill v. State, 703 So.2d 250 (Miss 1997). The address in a burglary indictment goes to the very substance of the charge and to omit it is colorable grounds for dismissal. This keeps an overzealous prosecutor from widening the scope of the indictment and restricts the state prove what the grand jury intended. An indictment not framed to apprise the defendant with reasonable certainty of the nature of the nature of the accusation against him is "defective" although it may follow the language of the statute. It is not sufficient that the indictment shall charge in the same generic terms as in the definition; but it must state the species, it must descend to particulars. This indictment goes in contrast to "sufficient notice of charges", there are no additional facts to support the allegations charged in the indictment. The omission of the address allows the state so wide a latitude on what it wants to prove that the appellant couldn't possibly guess on what it expects to defend. Russell v. U.S., 369 U.S. 749 (1962) expresses the specificity issue directly:

> "A cryptic form of indictment in cases of this kind where guilt depends so crucially upon specifics identification of facts requires the defendant to go to trial with the chief issue undefined... To allow the prosecutor, or the court, to make a subsequent guess as to what was in the of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand

jury was designed to secure. For a defendant could be convicted on the basis of fact not found by, and perhaps not even presented to the grand jury which indicted him."

This indictment should be dismissed with prejudice for vagueness because it does nothing to protect the appellant from future jeopardy.

Issue No. V : Whether the trial court erred in not sustaining the objection to admission of certain evidence?

Appellant alleges that the state introduced evidence that was not presented to the defense during discovery. During the direct examination of Ruby Benson, the prosecution entered into evidence over objections a blue jewelry box with coins [Ex. S-5]. This blue box contained coins that was allegedly recovered from the appellant's car. Entering this blue jewelry box into evidence caused the jury to believe it was recovered from the appellant. This was prejudicial and could only serve to inflame or mislead the jury. There was a blue jewelry box reported missing from the Benson home and to allow this box as a "replacement" could only mislead the jury. See [Ex. D-2]. Mrs. Benson clearly stated at [T. 55] that a blue jewelry box was reported missing and was not recovered. What other purpose could there be but to prejudice the jury. This allowance violated Rule 9.04 U.R.C.C.P. and evidently it was in possession of the state and not included in the discovery. Jones v. State, 481 So.2d 798 (1985) states:

"Discovery is properly done before trial."

Under the procedural guidelines of Box v. State, 437 So.2d 19[1983), it is imperative for the defense to object, as he did in this case at bar. After the objection, the court's initial response should be that the defense be given reasonable opportunity to

determination as to whether he wished to move for a continuance. Here that opportunity was not afforded defense counsel. On the question of prejudice to the appellant it is difficult to imagine what could be more prejudicial than the introduction of this jewelry box with coins alleged recovered from appellant on direct examination. The victim claimed to have a blue jewelry box missing and [S-5] is "blue" and a sneak introduction of this could only only have made the jury believe that appellant "stole" it. This court on several occasions ruled that a showing of prejudice is not always required when there has been a discovery violation by the prosecution. Morris v State, 436 So 2d 1381 (1983), specifically states its reversal of conviction on the fact that the state "failed" to produce required discovery material," not because (the defendant) was prejudiced. Box v State, 437 So 2d 19, 21 (1983) says:

> "A rule which is not enforced is no rule."

Also in Coates v. State 495 So 2d 464 (1986) this court issued the following reminder:

> "The practice of trial by ambush, however savored by the skillful advocate, has long since been discredited. A trial - particularly a criminal trial where one's liberty is at stake - is not a game. It is a purposeful effort to achieve justice, its possibilities of success enhanced in no small measure by a fidelity to procedural fairness. It is in this context that this Court has been required time after time in recent years to reverse criminal convictions because at trial the prosecution was allowed to use evidence which in discovery it was obligated to disclose to the defense but for whatever reason withheld."

Appellant is of the opinion, as this court should be, that the trial judge

erred in allowing the evidence over objections of the defense without following the required guidelines that this court mandated.

Furthermore, this is the only physical evidence offered at trial from the Benson Burglary, the 3300 dollars was never photographed, the wedding band [T. 110] that was returned to Mrs. Benson was also never photographed or brought to trial. Without this evidence the state could not have secured a conviction. The essential purpose of Rule 9.04 is the elimination of trial by ambush and surprise. Disclosure is the hallmark of fairness and the quest for justice that should be the goal of criminal justice system.

Issue No. VI: Whether the State erred by not eliciting eyewitness testimony concerning identification of defendant.

On January 5, 2004, Mr. Leslie Benson (deceased at time of trial) and Ruby Benson alleged to have seen a black male come from their home with their property (cash box). In this case there was never a pretrial lineup or any kind of identification procedure conducted by officers of Covington County Sheriff's Dept. Subsequently at trial, Ruby Benson on direct testified that her husband, Earl Benson chased suspect in car and gave police the "complete description of car. [T. 45] On cross, she stated at [T. 50], "her husband is the one who talked to the 911 operator." Also she didn't know what he told the Sheriff's office [T. 50]. Further on cross she stated that her husband made the report to the police on what was taken [T. 52]. Again on direct, she stated "I don't pay all that much attention to cars, [T. 42]. The Supreme Court of MS said in Passons v. State, 124 So 2d 847 (1960)

> "Proof of identity, as any other element of the crime, had to be proved beyond reasonable doubt."

In this case there never was an identification out of court or in court and this violates the Confrontation Clause of 6th Amendment of the U.S. Constitution because this clause serves to facilitate the truth seeking function of a trial by ensuring the reliability of the evidence against defendant by subjecting it to rigorous testing

in an adversarial proceedings. The State denied the defendant the right to be identified by the only person who could place defendant at the scene of the crime. Knowing full well that the memory of a 87 year old witness who wears glasses, in the rain [T. 42] and two and half years from time of crime to trial (January 5, 2004 to July 24, 2006) without any intervening confrontations would not stand to the testing adopted in Neil v Biggers 409 U.S. 188 (1972). The State refered to the defendant all through the trial as the perpetrator of the crimes, but stopped short of asking the key question of whether this man at the defendant's table is the same man who you saw at your home? Thus leaving the defendant and counsel in a predicament to self-incriminate by having to "fish" for a way to ascertain how she (victim) could know defendant without ever pointing him out. In U.S. v Wade 388 U.S. 218 (1967) the court analyzed in considerable depth the problem of accurate identification and the fallibility of human perception:

> "But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identity.

The suggestive elements in this case made it all but inevitable that defendant would be identified by eyewitness whether or not he was in fact "the man." The record is replete with suggestions

of such nature, and that practice was condemned in Foster v California 394 U.S. 440 (1969). There is no way in the case at bar to weigh the factors of Biggers, Id at 200 without any pretrial identification to weigh the substantial liklihood of irreparable misidentification, thus denying due process of law. Also on cross, Mrs. Benson stated in response to defense counsel question of what she saw or what the police ask her, she said "I don't remember." [T. 59] As stated before there never was any kind of identification of the defendant and the liklihood of a misidentification is great to let this conviction stand.

Also the State did not prove that William Logan Jr. broke and entered either dwelling, they may have proved that the dwellings were invaded, but without eyewitness or confession, the most that could be proven was larceny.

ISSUE No. VII : Whether the court-appointed attorney Oby T. Rogers' conduct was or constituted ineffective assistance of counsel?

The trial court appointed Oby Rogers to represent the appellant by order dated January 19, 2005 [T. 14]. I think it is important to note how the appellant met Mr. Rogers, even though it doesn't appear of record to enable this court to understand this issue. The day after appointment Mr. Roger's secretary came to Covington Co. Jail to show appellant and several other defendants to whom he was appointed to represent a film on how to plead guilty and also had forms for us to sign saying that I was satisfied or actually I feel that he has represented me to the best of his ability. I refused to sign because I had never met Mr. Rogers. After she left, he came about 2 hours later. We never even discussed the details of my case, [T. 220]. The next day I was released (Jan. 21, 2005) without bond and I continued being on probation in Hinds County until July 5, 2005. During the time between release and completion of probation there was no contact between attorney and appellant. (appellant was in the hospital from July 4, 2005 to July 9, 2005 and upon release appellant then called Mr. Rogers [T. 221-222] and after this conversation is when he filed his first motion to withdraw as he stated on [T. 213]. There was no notice to the appellant as evidenced from the undated motion and no certificate of service, [T. 116].

This motion was deficient and did not conform to the standards set out in Rule 1.16 in that it didn't have the required notice to the client and Rogers didn't take the necessary steps to mitigate the consequences to the client. An attorney is not free to disregard requirement of court permission for withdrawal, this is true regardless of circumstances under which the representation of that client may be terminated. This improper motion was filed to find out where in the system the appellant was according to the testimony presented by Atty Rogers [T. 213]. This motion was filed July 12, 2005. Three days later on July 15, 2005 a bench warrant was issued for the appellant for failure to appear under bond, but two points are significant to this "bench warrant, (1) Appellant was released without bond and can't point to any sureties to secure the presence of appellant, (2) the warrant was issued six days before appellant was scheduled to appear for trial. These defects can't be contributed to the appellant, but to the state.

Also, if this court would look at Mr. Rogers testimony [T. 209-217] not one time does Rogers mention the second motion to withdraw which was purportedly filed July 14, 2006. This point is very significant because it shows the misconduct of the state and whoever else is involved. Keep in mind that this testimony was given August 18, 2006 and not on person at the hearing mentions this alleged second motion to withdraw nor the order purportedly entered on July 18, 2006 [T. 29] but

was signed July 14, 2006. Also if the court would look at the trial court ruling [T. 226-227], not one time does the court mention the second motion to withdraw nor the order entered just a month previous. The court only mentions the July 05 motion and what the ruling would have been had it been called up. Also the court mentions the July 14, 2006 entry of appearance of McIntosh and the continuance granted by the court, but neither of these instances appear of record [T. 3]. Also if this court would look at [T. 134], during trial which was on July 24, 2006, the court stated:

> "There's still no order in here (court file) allowing him to withdraw."

Finally, look at the docket sheet on [T. 3] and go to July 14, 2006 and see how this could only be viewed as later addition, because as stated above, the court said there was no order in there. Appellant believes this was a bad faith act on the part of the state and a halfhearted attempt to cover-up the violations. These acts point specifically to this attorney's fitness to practice law. The magnitude of this conspiracy is of criminal proportions and a total disregard of the due process procedural requirements afforded to every citizen of our country. The appellant is also of the opinion this court, being ably experienced in the law, will readily recognize this for what it is. Appellant believes Rule 8.4 of Professional Conduct encompasses all the alleged violations shown here.

To give a short overview of this attorney's performance, Rogers violated DR 7-101 (A)(1-3) [failure to seek the lawful objectives of his client, carry a contract of employment, and prejudice and damage a client.], Also DR 2-110(A)(1-2) [Failure to obtain required permission to withdraw from employment, failure to take steps to avoid foreseeable prejudice.]. Myers v. State Bar Misc. No. 50(1985) states:

> "Attorneys withdrawal from representation of client may be accomplished only by filing a motion with the court with proper notice to client."

Mr. Rogers seemed to self-exonerate himself from the in violation of DR 6-102(A) self-exoneration. His motion and testimony claims after numerous attempts to contact the appellant, he can't point to any specific attempts to contact the appellant. The appellant's address and phone was provided to Rogers and he never uses either one. The only specifics in the record that point to Rogers are two orders amending the indictment and two withdrawal motions. These only served prejudice to the appellant's cause. Rogers in this case also neglected all the duties entrusted to him and "adequate preparation contrary to DR 6-101(A)(2-3). Rogers also stated in his testimony at [T. 215] that, "I do not know what the amendments were." The attorney's actions or inactions can not be viewed as "effective" in any sense of the word. The appellants case was again prejudiced by these errors and had it not been

for these errors there is a substantial liklihood the outcome would have been different.

Issue No. VIII : Appellant alleges that he was denied the effective assistance of counsel by trial counsel Hon. Dan McIntosh.

Appellant contends that he was denied the effectiveness of counsel in accordance with standards provided in Strickland v. Washington, 466 U.S. 668 (1984). Furst appellant intends to show that through deception and dishonesty that counsel led appellant to believe that he was being represented and technically really wasn't.

On or about February 13, 2006, appellant met with Hon. Dan McIntosh at Covington County Jail along with appellant's fiancee Lolita Banks to inquire about representing appellant on present charges. Appellant then and there paid a partial retainer to McIntosh after verbally agreeing to the specific amount. Assuming, after McIntosh returned a few days later that he was now my attorney, because he informed appellant that appointed Attorney Oby Rogers had withdrawn in July 05. McIntosh then accompanied appellant to court on February 24, 2006, but we never made it in front of the judge because ADA Richard Webb presented us with warrants from Warren County for possible revocation of probation. Appellant then requested McIntosh to represent him at revocation hearing because his office is in Vicksburg and it seemed to be convenient for both of us. On June 23, 2006, appellant's fiancee Lolita Banks wrote McIntosh another check for the remainder

of the retainer, the same day appellant was represented by McIntosh at revocation hearing. Again assuming that he was my attorney, I didn't find out that he hadn't made an appearance on my behalf until after or at appellant's hearing for motion for new trial held On August 18, 2006, not really understanding what the judge was saying about the order of appearance on July 14, 2006, which does not appear of record [T. 3] neither does the request for a continuance by McIntosh. Appellant was told that the continuance was because "they weren't ready" (state) so I accepted what McIntosh said. The day prior to his appearance appointed attorney Oby Rogers, who hadn't been heard from nor seen in over a year suddenly signs as "attorney for defendant" without any notice to defendant and then the same day files another "Motion to Withdraw" citing no contact with the defendant and that defendant stated McIntosh was now his lawyer. How could he possibly have known that? This left the appellant in a position where he was working with an attorney who was not on his case, and unknowingly depending on effective representation when there was no representation. This caused the indictment to be "changed again" thereby leaving appellant unable to be ambushed by the change of date. Had McIntosh entered on properly back in Feb. 06, then none of this would not have happened, an unproffessional error as this should not be allowed to go unaddressed. Also, appellant believes

an evidentiary hearing is required about this matter because at trial the denfense counsel said that the prosecution did know that he represented and an exchange of words between the two ensued which caused the court to admonish them [T. 132-134], this all served to prejudice the appellant with trial by ambush. Coates v. State 495 So.2d 464 (1986). This is also in direct violation of Rule 1.3 of Professional conduct of diligence which specifically states in comment:

> "Perhaps no professional shortcoming is more widely resented than procrastination. A clients interests often can be adversely affected by the passage of time or change of conditions; in extreme instances, as when a lawyer over looks a statue of limitations, the clients legal position may be destroyed. Even when the clients interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyers trustworthiness."

It was this attorney's duty to inform the court and appointed counsel of his retainment and his failure to do so was prejudicial to the appellant through dishonesty, deceit, and misrepresentation.

There are issues that should have been brought to the courts attention before trial that were subsequently raised at hearing for new trial or JNOV. [T. 109-111] specifically paragraphs (1-5). Attorney McIntosh couldn't even file a pretrial motion or litigate any matter on the appellant's behalf until properly entered on the record and Atty Rogers properly excused from the cause.

During trial, counsel specifically stated the defendant's past criminal history in violation of M.R.E. 404(b) in that it was highly prejudicial to the appellant and was tantamount to reading the habitual indictment to the jury which is not allowed. This comment was fatal to the defense and very detrimental to the appellant. On [T. 10-11] the defense counsel stated:

> "I want you to consider this. You've had two burglaries; you stop a man. And when you phone in his description, you find out --- and let me readily admit my client, sitting at the end of that table, William James Logan, is not a BOY SCOUT. He has been ARRESTED for several BURGLARIES in Warren County and one GRAND LARCENY. He had also PLED GUILTY to those FELONIES, been SENTENCED and was in the processe of SERVING his Time when he was driving through Covington County on Highway 84."

At that point he ceased to be an adversary and became a "friend of the court", by no stretch of the imagination can this be construed as legitimate strategy for any competent criminal defense attorney. Counsel in this case introduced in his opening statement such evidence that the "reasonable probability" was such to undermine confidence in the outcome of the trial. This fundamental error alone was of the magnitude contemplated by Strickland and requires this court to analyze the probable impact on the fairness of the trial. In Mississippi State Highway Commission v. Deavours, 251 Miss 552, 564-65., Judge Robert Jones, writing for the court, stated:

> "Everybody, including the Highway Commission is entitled to a fair trial."

The Supreme Court paraphrased in Waldrop v State 506 So.2d 273

> "Everybody, including an habitual offender

is entitled to a fair trial."

This was compounded by the fact that one of the potential jurors No(11) Jimmie McDuffie stated on [T. 14] that:

> "I stay right by Ms. Wise (victim), and my house was broken into the same day. They never did find out who did it."

Hon. court on its own motion should have declared a mistrial in accordance to Rule 3.12(1), this trial could not proceed in conformity with law. The jury should have been polled to ascertain whether they could disregard that remark. The prejudicial effect substantially outweighs the probative value of any relevancy, if any, that could be possibly found. The integection of evidence tending to show guilt of another crime, unrelated to the offense charged is inadmissible, Campbell v State, 750 So 2d 1280 (1999). However, even if the evidence is admissible under M.R.E. 404 (b) there must be a determination of whether such evidence is prejudicial under M.R.E. 403.

When the determination is made that the evidence is more probative than prejudicial, a limiting instruction is appropriate.

Later on in opening statement [T. 13] trial counsel stated:

> "He's not on charge for what he did six or seven years ago."

Again, it can't be said this is trial strategy, this could only be said to paint a picture to the jury that the appellant is a habitual offender, a bad person, not a boy scout, but a person who

does this for a living. Any competent attorney would not open a door as this against his client.

In U.S. v Cronic, 466 U.S. 648 (1984) the Supreme Court stated:

> "The exception to the Strickland standard for ineffective assisstance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assisstance of counsel is presumed."

This circumstance is so likely to prejudice the appellant that the cost of litigating their effect is unjustified. Mr. McIntosh's conduct so infected the trial's integrity that applying the Strickland test is misplaced. This opening statement was not merely a negligent misstep in an attempt to champion the accused cause. The admittance of past convictions of burglary and grand larceny was an abandonment of the defense of his client at a critical stage of the proceedings.

Further along in closing arguments, McIntosh informed the jury that in his opinion: [T. 151]

> "I know I listen to some things today and looks like he did it. I guess all us lawyers do that, tit for tat."

This seems to go in concert with, U.S. v Swanson 943 F.2d 1070 (1991) where Swanson's attorney conceded to the jury that there was no reasonable doubt. The attorney abandoned his duty of loyalty which is a important piece of the puzzle of representation. The lawyer in the case at bar, as well as

the lawyer in Swanson, failed to note that his obligation is not to be an independent observer and factfinder but, instead an advocate for his client.

And in U.S. v Young, 470 U.S. 1, 8-9 (1984) the condemned the practice of interjecting personal opinions by stating:

> "Defense counsel, like the prosecutor, must refrain from interjecting personal beliefs into the presentation of his case."

This is exactly what he did in the statement on [T. 151]:

> "I know I listen to some things today and said looks like he did it."

This is improper and universally condemned. He is just as much invading the province of the jury. He, in effect, bolstering the prosecution's case.

In review of the first point of this issue, allowing this statement that the appellant committed similar crimes in the past and may have a propensity to committ similar crimes is an abuse of discretion. The policy behind these rules, and the danger the rules seek to prevent, is that the jury may rely on this evidence to determine that the appellant should be convicted because he/she has a character trait or propensity to commit burglary. The appellant was not in the position to object to his own "attorney". This attorney's conduct all makes sense now, because he couldn't do anything on my behalf until he entered on the record, which contrary to the court's remark on [T. 225-227] it still never does appear of record. Also counsel stated on

[T. 151]:

"They've certainly shown that he could be, and it will be left up to y'all as to whether that could become an is guilty."

These statements are damaging and contradictory to an effective defense strategy and has to question the loyalty to the client and the truth-finding process.

This attorney severely damaged the appellant's position and now understands why he never interviewed my witnesses; D'Army Jones (roommate), Ursula Flagg (casino worker who actually paid the appellant the money allegedly stolen), Katie Jones (roommate's grandmother). Also never filed the pretrial motions I requested ie., speedy trial, suppress evidence. The defense was compromised by his inactions which were intentional [T. 224] when he said he understood that he should have put the court on notice. This is gross negligence and undermines the integrity of lawyers and jeopardizes not only clients, but the public's view on our system of justice. This violates Rule 8.4 of professional conduct, which encompasses most of the disciplinary rules.

This conduct by trial counsel violates 14th Amendment of due process and also denied 6th Amendment right to counsel.

Conclusion

William Logan is entitle to have his conviction reversed and rendered, or to have his case remanded for a new trial.

Respectfully Submitted

William Logan JR.

By: William Logan
William Logan JR.
Appellant, prose

Certificate

I, William Logan JR., do hereby certify that I have this the 10th day of July, 2007, mailed a true and correct copy of the above and foregoing Brief of Appellant to:

Supreme Court Clerk
Betty W. Sephton
P.O. Box 249
Jackson, MS 39205-0249

OFFICE OF Attorney General
P.O. Box 220
Jackson, MS 39205

All by U.S. Mail, first class postage prepaid.

William Logan

Sworn to me 10 of July, 2007.

JENNIFER AYERS RANKIN NOTARY PUBLIC COUNTY MS My Commission Expires April 30, 2011

Jennifer Ayers
Notary Public