IN THE COURT OF .PPEALS OF THE STATE OF MISSISSIPPI

DOUGLAS E. JAY, JR. — APPELLANT

V. — CAUSE NO. 2006-KA-01805-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

APPEAL FROM THE CIRCUIT COURT OF NEWTON COUNTY, MISSISSIPPI

CAUSE NUMBER 04-CR-044-NWG

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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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Douglas E. Jay, Jr. ---------- Appellant
2. State of Mississippi ---------- Appellee
3. Jim Hood, Attorney General
   State of Mississippi ---------- Counsel for Appellee
4. Marcus Gordon ---------- Trial Judge
5. District Attorney, Eighth District:
   Mark Duncan, Robert Brooks, Jack Thames ----- Counsel for State in Trial
6. P. Shawn Harris, Lee & Lee ---- Trial Counsel for Appellant
7. Lawyers, PLLC:
   Henry W. Palmer, Robert D. Jones -- Counsel for Appellant
8. Ross Barnett,Jr. --------- represented Appellant post-trial
9. Jason A. Mangum ---------- represented Appellant post-trial

SUBMITTED on this, the ____ day of _____, 2007.

HENRY PALMER
Lawyers, PLLC
Counsel for the Appellant

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STATEMENT OF THE ISSUES

The Appellant herein, Douglas E. Jay, Jr., hereby designates his issues to be considered by this Court. These issues are stated hereinbelow.

ISSUE ONE: THE TRIAL COURT ERRED IN NOT GRANTING THE POST-TRIAL MOTIONS OF THE APPELLANT TO SET ASIDE THE JUDGMENT OF CONVICTION AND TO ALLOW AN OUT-OF-TIME APPEAL.

ISSUE TWO: TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE TO THE APPELLANT POST-TRIAL BY NOT FILING AND PURSUING THE APPEAL OF RIGHT AVAILABLE TO THE APPELLANT.

ISSUE THREE: THE TRIAL COURT ERRED IN DENYING TO THE APPELLANT HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL BY CONDUCTING THE TRIAL IN THE ABSENCE OF THE APPELLANT.

ISSUE FOUR: THE CUMULATIVE EFFECT OF THE ERRORS AT TRIAL AND POST-TRIAL DENIED TO THE APPELLANT HIS FUNDAMENTAL RIGHT OF DUE PROCESS OF LAW AND CONSTITUTED PLAIN ERROR.

STATEMENT OF THE CASE

The instant proceeding is an appeal by Douglas E. Jay, Jr. of an adverse ruling by the Newton County Circuit Court in Cause Number 04-CR-044-NWG. (RE7-23; CP43-47;65;72; T101-110) Jay was indicted on November 1, 2004, by the Newton County, Mississippi, grand jury on a four-count true bill alleging the possession by Jay of less than 30 grams of methamphetamine, more than 30 grams but less than 250 grams of marijuana, less than 100 dosage units of alprazolam, and the possession of a firearm by a prior convicted felon. (CP3-5) The said indictment also alleged that Jay was a prior offender, having been convicted of two (2) previous controlled substances violations. (CP5)

Jay was indicted subsequent to his arrest on May 28, 2004, following the execution of a search warrant for his residence. (T32-38; Exhibits S-1 and S-2 for identification) The said search warrant had been issued by Justice Court Judge Jan Addy, upon the request of Deputy Sheriff Mark Spence. (T31-33) Spence, in turn, stated that he had been informed by an informant that Jay had on his person an illegal substance. (T32) A team of county law enforcement officers executed the search warrant, discovering the alleged contraband. (T35-38) As he was being taken into custody, Jay allegedly made a spontaneous inculpatory statement. (T38)

Prior to the trial, on September 24, 2004, Jay was assaulted and suffered severe brain damage. (CP9-11A;37-41) The cause was set for trial on April 11, 2005. (CP8) Due to Jay's condition, his trial counsel filed a motion to extend the trial

date. (CP9-11A) However, the trial judge called the case for trial on April 11, 2005.

Jay was present in the courthouse prior to the call of the case, but did not return to the courtroom by 9:00 a.m. (T2-3) His trial counsel informed the judge later that he had conferred with Jay elsewhere in the courthouse and had told Jay to go into the courtroom. (T105-106) The judge proceeded with the trial. (T2-3)

At trial, the State called three (3) witnesses in chief, namely, Mark Spence, (T30;59-70) Don Collins (T71-75), and Brandy Goodman. (T76-86) The State, in response to objections to the alleged drugs and Jay's alleged statement, called Jan Addy, Mark Spence, Don Collins, Billy Pat Walker, and Jody Pennington. (T33-53) In the absence of the Appellant, no contrary testimony was offered. (T53) The trial court overruled the objections. (T58)

When the State rested, trial counsel moved to dismiss for insufficient proof and renewed his objections to the admission of the said contraband and statement. (T87-88) The trial judge asked if Jay would be testifying. (T88) Counsel then vainly moved for a continuance, due to the absence of Jay. (T88-89) The jury heard instructions and closing arguments (T90-98) and, in 65 minutes, returned with guilty verdicts on the three possession counts. (RE12; T101) The fourth count, possession of a firearm by a convicted felon, was ordered nolle prosequi. (CP33) Judgment was entered in accordance with the verdict. (RE9-11; CP45-47)

Sentencing was set for April 15, 2005. (RE13; T102) The court further found that enhancement was proper, due to the prior

convictions of Jay for violations of the controlled substances laws. (RE14; T103) At sentencing, the judge stated that Jay had notice of the sentencing hearing (RE7; CP43), notwithstanding the acknowledgement that Jay was present neither at trial nor at sentencing. (RE7;16-19CP43; T105-108)

On Count One, possession of methamphetamine, Jay received a sentence of twenty-five (25) years, a $10,000.00 fine, and court costs. (RE7-8;20-21; CP43-44; T109-110) On Count Two, possession of marijuana, Jay received a sentence of six (6) years, to run consecutively to the sentence for Count One, and on Count Three, possession of alprazolam, Jay received a sentence of two (2) years, concurrent with the other sentences. (RE7-8;20-21; CP43-44; T109-110) On August 15, 2005, Jay was apprehended. (CP67)

On April 26, 2005, trial counsel filed a motion for new trial. (CP48-49) No order disposing thereof appears of record. (CPI-IV) A motion to set aside sentence and judgment was filed on Jay's behalf by Hon. Ross Barnett, Jr., on October 15, 2005. (CP50-52) This motion was denied. (RE22; CP65) A motion for out-of-time appeal was then filed on June 9, 2006. (CP67-68) It, too, was denied, on August 4, 2006. (RE23; CP72)

On September 5, 2006, the next business day following the three-day Labor Day weekend, Hon. Jason Mangum filed a notice of appeal for Jay. (CP75-76) Hon. Henry W. Palmer was substituted as appellate counsel by this Court by Order entered December 1, 2006. (CP97)

SUMMARY OF THE ARGUMENT

The Appellant would state unto this Court that the lower court proceedings were in violation of his fundamental right to a fair trial. The trial of the Appellant in his absence, without any hearing on the record to determine the cause of the absence of the Appellant, and the summary refusal of the trial court not to consider a delay within the term of court, denied the Appellant of any of the rights attendant to a fair trial. The denial by the trial judge of continuances requested by the trial counsel of the Appellant, in light of the absence of the Appellant, his brain damage, and his inability to assist in his defense, whether due to absence or mental condition, denied to him his right to fundamental fairness.

Further, the apparent failure of trial counsel to secure an order regarding his motion for a new trial and to pursue the appeal of right denied the Appellant his full and fair consideration of the issues before the lower court. There were grounds for appeal, namely, the trial in absentia, the admission into evidence of the alleged contraband and statement of the Appellant, the denial of the requested continuance due to the mental state of the Appellant, and other grounds. Pursuant to state jurisprudence, the trial counsel is to remain throughout the first round of appeals, unless excused or relieved by the trial court. No such relief exists of record.

The lower court compounded the effect of the trial in absentia by refusing to grant the motion for new trial, the

motion to set aside the sentence and conviction, and the motion for out-of-time appeal. The Appellant had valid issues for consideration on an appeal, which has been denied by the actions of the lower court.

Finally, the cumulative effect of the defects in this proceeding has deprived the Appellant of the basic rights of a fair trial and of the participation in the trial. The neglect or failure of trial counsel to pursue the appeal of right has prejudiced the right of the Appellant for any hope of a fair consideration of the issues raised by the defects below.

This Court should consider the issues raised herein and grant to the Appellant the relief required, namely, a new trial and/or the dismissal of the proceedings against him. In the alternative, this Court should find that the Appellant is entitled to a full and fair determination of an out-of-time appeal herein.

STATEMENT OF THE FACTS

On May 28, 2004, Newton County Deputy Sheriff Mark Spence appeared before Justice Court Judge Jan Addy, seeking a search warrant for the residence of Douglas Jay, Jr., the Defendant below and the Appellant herein [hereinafter cited as "Jay", "the Appellant", and/or "the Defendant"]. (T32) According to Spence, he had information from a confidential informant that Jay had on his person and under his control certain controlled substances. (T32) He supplied the justice court with a prepared affidavit, along with a handwritten statement comprising the purported underlying facts and circumstances justifying the issuance of the search warrant. (T32-33;38; Exhibit S-1 for identification)

No additional oral testimony was provided to Judge Addy by Spence. (T38-39;41-42) Other than stating in the handwritten statement that the informant was trustworthy, Spence provided no indicia of veracity or reliability concerning the alleged informant. (T54-55)

After Judge Addy issued the search warrant, a team of deputies from the Newton County Sheriff's Department descended upon the residence of Jay, at 3562 Wickware Road in Newton County. (T59) The team included Mark Spence, Billy Walker, Jody Pennington, Bill Truitt, and Don Collins, with Constable Donny [Donnie] Collins assisting. (T59) The mobile home residence was occupied at the time by two juveniles, an adult female, Teresa Chapman, and the Appellant. (T59) According to Spence, once the residence was secured and Jay was brought from the master

bedroom, Spence informed Jay of his Miranda warning, as read from a card admitted into evidence. (T59-60; Exhibit S-1)

Spence testified that he found certain items on Jay, including a film bottle containing a green leafy substance and two small bags containing an off-white substance in Jay's right front pocket. (T62-63) Spence added that he found a small bag containing an off-white substance in Jay's watch pocket. (T64) Spence stated that a green leafy substance in a bag in the night stand drawer in the master bedroom. (T65-66)

Deputy Don Collins testified that he located four (4) bags inside a metal tube in the residence. (T72-73) A green leafy substance was found therein. (T73)

Upon the conclusion of the search, Jay and Chapman were being led out of the residence. (T67;73) Jay purportedly asked why Chapman was being taken and was told that both she and Jay were found in the residence with the alleged contraband. (T68;73-74) Jay then allegedly declared spontaneously that all the materials found were his. (T68;74)

Consequently, Jay was indicted on November 1, 2004, by the reconvened December 16, 2003, grand jury of Newton County. (CP3-6) The indictment set forth that, as a part of a common design, scheme, or purpose, on May 28, 2004, in said county, Jay had in his possession and control certain controlled substances. (CP3-5) Count One alleged that Jay possessed between 10 and 30 grams of methamphetamine, a Schedule II controlled substance. (CP3) Count Two alleged that Jay possessed between 30 and 250 grams of

marijuana, a Schedule I controlled substance. (CP3) Count Three alleged that Jay had possessed less than 100 dosage units of alprazolam, a Schedule IV controlled substance. (CP5) Count Four alleged that Jay, as a prior convicted felon, was in possession of firearms. (CP5) The indictment further alleged that Jay was a second-time drug offender, for enhancement purposes. (CP5)

After the May 28, 2004, arrest of the Appellant, but before his indictment in November, 2004, Jay was assaulted and suffered a severe brain injury. (CP9-11A;37-41) Jay was hospitalized from September 24, 2004, to October 10, 2004, and was then transferred to Methodist Rehabilitation Center. (CP11A;37;40)

The capias stated that Jay was to answer the charges in the November/December 2004 term. (CP7) During the said term, an order was entered setting the cause for trial in the April, 2005, term of the Newton County Circuit Court, upon the apparent defense motion for a continuance following Jay's attack. (CP8)

During the first week of the April, 2005, term, trial counsel P. Shawn Harris (T1) moved to delay the trial from April 11, 2005, to a later date, due to the mental and physical state of the Appellant. (CP9-11A) The motion was supported by a report from Dr. Stuart Yablon, Jay's treating physician, who stated that Jay was unable to assist his attorney, make competent legal or medical decisions, and participate in his trial. (CP11A)

The trial court entered an order on April 6, 2005, directing a psychiatric evaluation of Jay, with Dr. Mark C. Webb to perform said examination on April 7, 2005. (CP12-13) On April

13, 2005, a report dated April 7, 2005, from Dr. Webb indicated that Jay was able to stand trial, assist his attorney, know right from wrong, and to assess the nature of his actions in May, 2004. (CP37-41) This report directly contradicted the analysis from Dr. Yablon, Jay's treating doctor. (CP9-11A; 37-41) Further, there appears of record no order disposing of this motion. (CPI-IV)

On April 6, 2005, trial counsel filed a motion seeking the recusal of the trial judge. (CP14-16) A record of the hearing apparently was not made. (Ti-iii) However, an order denying the motion and containing no findings was entered by the court; no file stamp appeared thereupon and the date recited was "April 7, 2004" an apparent error. (CPI; 17)

Trial counsel met with the Appellant in the Newton County Courthouse about 8:30 a.m. on Monday, April 11, 2005, the morning of the trial. (RE16; T105) They retired to a jury room, discussed some matters pertaining to the case, and exited the room, with counsel directing Jay to have a seat in the courtroom. (RE16-17; T105-106) Just before the trial judge entered the courtroom, counsel stated that he noticed the absence of the Appellant from the courtroom and asked of Jay's whereabouts. (RE17; T106) When told that Jay was downstairs smoking, counsel directed the son to fetch Jay to the courtroom. (RE17; T106) However, Jay was nowhere to be found. (RE24-25; 16-17; T2-3; 105-106)

According to trial counsel, Jay knew of the court date, having conferred with counsel and having been in court a couple

times previously. (RE24; 17; T2; 106) He was aware of the trial date, as per counsel. (RE17; T106)

At 9:00 a.m. on Monday, April 11, 2005, the trial court called the case for trial, with the State announcing that it was ready. (RE24; T2) The defense informed the lower court that the Appellant was not present. (RE24; T2) A fifteen-minute recess was declared, after which the trial commenced. (RE24-25; T2-3) There appears of record no pretrial determination by the trial judge as to whether the Defendant was absent for any reason, voluntary or otherwise. (RE24-25; T2-3) There was an unrecorded bench conference, (RE24; T2) but the only account of record about Jay's absence was held immediately preceding the sentencing of the Appellant on Friday, April 15, 2005. (RE16-18; T105-107)

The trial court made its preliminary remarks to the jury, informing the jurors that they were not to hold the absence of the Appellant against him and instructing the jurors as to the procedures in the trial to follow. (T3-7) The voir dire then ensued, (T7-25) with jury selection following. (T25-30) Without any opening statements, testimony started forthwith. (T30)

During voir dire, trial counsel immediately broached the subject of Jay's absence, stated to the potential jurors that "My client has a presumption of innocence. Of course, as all of you have recognized, ***I don't have a client right now*** ..." (T18) (emphasis added) Trial counsel inquired whether any of the venire would be influenced by Jay's absence, observing that "[i]t would ***be unnatural for you not to question why my client might not be***

here." (T18) (emphasis added) One (1) man answered and approached the bench; no record of the discussion was made. (T18-19)

Testimony began with the State's calling of Deputy Sheriff Mark Spence, who started to discuss the events of May 28, 2004. (T30) Upon defense counsel's objection, the trial judge directed the removal of the jury, (T31) after which the court considered the suppression of the evidence and statements obtained by Spence and the law enforcement team. (T31-58)

During this hearing, Spence stated that a confidential informant had advised him that Jay had controlled substances on his person. (T32) From this information, he sought the search warrant for Jay's residence from Justice Court Judge Jan Addy. (T31-32) He added that neither his written "underlying facts and circumstances" nor any oral testimony from him to Judge Addy included any assertion that the informant had provided to him in the past any information leading to any arrests or convictions. (T39;41-42) The only corroborative factor regarding the informant was that the information proved, post-search, to be correct. (T31-40)

Both Deputy Spence and Deputy Billy Walker testified that Jay made a spontaneous statement claiming that the alleged contraband seized by the officers was his, and not that of Teresa Chapman. (T36-38; 44-47) Both testified that Jay was not threatened, was not promised considerations, and was aware of his actions at the time of the making of the inculpatory statement. (36-38; 45-47) Also, Deputy Spence stated that he personally gave

to Jay the required ***Miranda*** warning from a card kept in his wallet. (T35; Exhibit S-1)

Deputy Walker stated that Jay might have been under the influence of something, due to his nervousness. (T44-45) However, Deputy Walker was certain that Jay knew what he was doing. (T45)

Deputy Jody Pennington testified that he witnessed the ***Miranda*** warning, but not the statement. (T49-50) Deputy Don Collins stated that he was present for the statement, but not the ***Miranda*** warning. (T52-53)

Trial counsel argued that the search warrant was invalid, noting that the "underlying facts" merely informed the issuing judge that the informant was trustworthy because he/she had given reliable information in the past. (T54) No indicia of veracity or credibility were provided in either the application for the search warrant or in the "underlying facts", and no testimony supplied the deficiency. (T54-55) No record of arrests and/or convictions obtained via this informant was provided to Judge Addy. (T55) Counsel noted that only hearsay testimony, without any corroboration, was given to Judge Addy. (T55)

As to the statement, trial counsel asserted that Deputy Walker's observation that Jay might have been under the influence of something would have impacted upon the understanding by Jay of his ***Miranda*** rights. (T56) He also called into question the forty-five (45) minute passage of time between the reading of the rights and the alleged statement made by the Appellant. (T56) Both time and influence would favor suppression. (T56)

The trial judge concluded that the search warrant was valid and that the resultant statement and alleged contraband were properly obtained from the Appellant. (T58) The jury was recalled and Deputy Spence returned to testify. (T59)

During the testimony of Deputy Spence, he recounted for the jury the events regarding the search of the Jay residence and the results of the search, including the seizure of substances and the statement of the Appellant. (T62-70) Defense counsel was permitted to enter a continuing objection to this testimony. (T61) After the reading to Jay of his ***Miranda*** warning, (T61) Spence searched Jay's person, finding bags of an off-white substance, a container with pills, and a small bottle containing a green, leafy substance. (T62-64) According to Spence, he personally carried these items to the crime laboratory. (T63-65) He added that Deputy Don Collins had found a substantial amount of a green leafy substance in the night stand, which was also taken by Spence to the crime laboratory. (T66-67)

Deputy Spence also testified that, when Jay and Chapman were being arrested, Jay declared that all the contraband was his. (T67-68) A continuing objection was also permitted to this testimony. (T68)

Deputy Don Collins testified that he found four bags of a green leafy substance in the night stand from the master bedroom of the Jay residence and that Jay stated that all of the seized substances were his, not Chapman's. (T72-74) He also stated that

he was the officer who transported from the crime laboratory to court all the alleged controlled substances. (T75)

Brandi (Brandy) Goodman from the Meridian Regional office of the Mississippi Crime Laboratory next testified as an expert in drug analysis and identification. (T76-87) She identified the various items seized by the officers and submitted by Deputy Spence for the court. (T78-85)

The whitish crystalline substance in one evidence bag was identified as 27.85 grams of methamphetamine. (T80) Ms. Goodman identified the pills as sixteen (16) dosage units of alprazolam. (T81) Another container held 1.3 grams of a substance identified as marijuana. (T81) She identified the substance contained in another evidence package as 0.96 gram of methamphetamine. (T83) Another package was found to contain 9.3 grams of marijuana, (T84) and a final package held what was identified as 106.1 grams of marijuana. (T85)

The State rested after Ms. Goodman's testimony. (T87) Defense counsel then moved for a directed verdict, based upon the grounds urged in the earlier suppression hearing. (T87-88) The motion was overruled. (T88)

The trial court asked defense counsel if he would be calling the Defendant to testify. (T88) Counsel stated that he would not be doing so and rested. (T88) Counsel moved for a continuance after resting, objecting to the trial in absentia and stating that he was continuing a motion "made earlier at the bench" regarding Jay's absence. (T88) Counsel noted that at least

one venireman could not overlook Jay's absence and that others apparently could not put it out of their minds. (T88-89)

In reply to this late motion for a continuance, the trial judge stated that Jay had voluntarily left the courthouse, knowing since December, 2004, that his trial was set for that day. (T89) Further, he had appeared at the opening of the term on the previous Monday and had appeared on his motion on the preceding Thursday. (T89)

The judge noted that, if Jay had been harmed, then he had caused it. (T89) Defense counsel did not contradict this conclusion, instead assenting and stating, "***Can't -- can't argue that fact***, Your Honor." (T89) (emphasis added)

The court subsequently provided instructions to the jury, including a directive that the jury was not to consider the absence of the Defendant as an indication of guilt. (T91; CP30) Closing arguments were presented. (T94-99)

In his closing argument, trial counsel focused in part on the absence of the Defendant, notwithstanding the instruction not to consider the matter. (T91;97; CP30) Counsel declared:

> Uh -- ladies and gentlemen, ***I'm in a predicament here*** -- uh -- that I've never been in before, ***having to represent somebody that's not here***. And, of course, that limits my case. It limits my ability to put on witnesses to -- uh -- for Mr. Jay to refute any of these statements that are made, so I'm kind of hand strung, [sic] and I ask that you give me the benefit of the doubt ..."

(T97) (emphasis added) The jury then retired at 2:10 p.m. and returned with a verdict at 3:15 p.m. (T99)

The jury returned with verdicts of guilty on all three counts presented to them. (RE12; CP32; T101) The jurors were polled and agreed as to the unanimity of the verdicts. (T100-101) A judgment of conviction was thusly entered. (RE9-11; CP45-47)

On Tuesday, April 12, 2005, the State presented to the court a certified copy of a judgment of conviction based upon a guilty plea previously entered by Douglas Jay, Jr., in Cause Number 4,619 of the Circuit Court of Newton County, Mississippi. (RE13; T102) In said cause, Jay had been sentenced in November, 1996, to serve two and a half (2½) years concurrently on two (2) counts of possession of controlled substances, namely, marijuana and methamphetamine. (RE13; T102; Exhibit S-7) After having the Defendant called three times and determining his absence, the trial judge admitted the said judgment as an exhibit to the request of the State to enhance punishment. (RE14; T103; Exhibit S-7) Sentencing would be enhanced and set for a time to be set by further announcement. (RE14; T103)

Later on April 12, 2005, the trial court set sentencing for Friday, April 15, 2005, at 9:00 a.m. (CP34) The court further entered its Judgment Nisi and Forfeiting Bond, ordering the forfeiture of Jay's bond and his arrest. (CP35)

Prior to sentencing, the lower court had Jay called three times and then asked trial counsel for an explanation of Jay's absence. (RE16-18; T105-107) Counsel informed the court that Jay had been informed of court, had been in the courthouse and courtroom prior to the commencement of trial, and had left the

courtroom ostensibly to smoke a cigarette. (RE16-18; T105-107). Counsel also again objected to the proceeding in the absence of the Appellant. (RE18; T107)

The trial judge stated that the Mississippi Supreme Court permits the trial of a defendant who voluntarily, knowingly, and freely is absent from trial, and, further, permits the sentencing of such defendants. (RE20; T109) As to Count One, possession of methamphetamine, the court sentenced Jay to a sentence of twenty-five (25) years to serve with the Department of Corrections as a second offender. As to Count Two, possession of marijuana, the Appellant was given a sentence of six (6) years, to run consecutively to the sentence assessed for Count One. As to Count Three, possession of alprazolam, Jay was given a sentence of two (2) years, to run concurrently with the other sentences. (RE20-21; T109-110) A sentencing order followed. (RE7-8; CP43-44)

Trial counsel filed a Motion for New Trial on April 26, 2005. (CP48-49) Issues raised in the motion included the trial and the voir dire in the absence of the Appellant. (CP48-49) No order disposing thereof appears of record. (CPI-IV)

Jay was subsequently apprehended on August 15, 2005. (CP67) Post-trial counsel, Hon. Ross Barnett, Jr., was retained by the Appellant to present to the trial court his "Motion to Set Aside Judgment of Conviction and Sentence". (CP50-55) A "Memorandum Brief" in support of the said motion was also filed, (CP58-62) and the court set the hearing for May 11, 2006. (CP63-64) The lower court overruled the motion, entering its order dated May

24, 2006. (RE22; CP65) There apparently was no record of the hearing, and the order cited no factual findings or conclusions of law, other than the ultimate decision. (RE22; CP65)

Post-trial counsel then filed a motion seeking permission for an out-of-time appeal. (CP67-68) The State responded, opposing the grant of such permission. (CP70-71) On August 4, 2006, the trial court entered an order summarily overruling the motion for an out-of-time appeal. (RE23; CP72)

On the next business day following the Labor Day holiday, on September 5, 2006, Hon. Jason Mangum filed a notice of appeal in the instant cause on behalf of the Appellant. (CP75-76) Subsequently, Hon. Henry Palmer assumed the role of appellate counsel on behalf of the Appellant. (CP78-79; 89-90; 97)

ARGUMENT

ISSUE ONE: THE TRIAL COURT ERRED IN NOT GRANTING THE POST-TRIAL MOTIONS OF THE APPELLANT TO SET ASIDE THE JUDGMENT OF CONVICTION AND TO ALLOW AN OUT-OF-TIME APPEAL.

ISSUE TWO: TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE TO THE APPELLANT POST-TRIAL BY NOT FILING AND PURSUING THE APPEAL OF RIGHT AVAILABLE TO THE APPELLANT.

Due to the linkage of these matters, this Brief will address these two issues together. Further, there will be greater exploration of the above-cited matters subsequent to this portion of this Brief.

A. Post-Trial Motions

To be frank with this Court, the procedural status of this case is a shambles. At least two (2) motions filed below by trial counsel, Hon. P. Shawn Harris, have no corresponding dispositive orders contained in the record. Neither the Motion for Extension of Time filed April 4, 2005 (CP9-11A) nor the Motion for New Trial filed April 26, 2005, (CP48-49) was followed by orders in this record. (CPI-IV)

A key point in this analysis is that the trial counsel, Hon. P. Shawn Harris, did not file a notice of appeal and appears not to have pursued the Motion for New Trial. But for the said deficiencies on the part of Mr. Harris, the resultant tumult in the state of affairs would have been avoided and the appellate rights of Douglas Jay, Jr., would have been protected.

Nevertheless, once Mr. Harris failed to file and pursue the appeal of right of the Appellant in a timely fashion, other counsel was brought in to take corrective action. Given the

circumstances before the lower court, it should have given more consideration than the summary nature of the dismissal orders would indicate. (RE22-23; CP65;72)

Despite the then-absence from the record of both a notice of appeal and an order disposing of the Motion for New Trial, Hon. Ross R. Barnett, Jr., filed a Motion to Set Aside Judgment of Conviction and Sentence on October 17, 2005. (CP50-52) That motion was overruled by the trial court by order entered May 27, 2006, (RE22; CP65) after which, on June 9, 2006, Mr. Barnett filed his Motion for Permission to Appeal Conviction and Sentence of the Court Out of Time. (CP67-68) The motion also was overruled by the trial court, by order entered August 4, 2006. (RE23; CP72)

Another change of counsel followed. (CP75-76) Hon. Jason Mangum filed a Notice of Appeal on September 5, 2006. (CP75-76) He designated the entire record, except summonses and subpoenas. (CP73-74) However, the Notice of Appeal declared that the appeal was being taken from the April 20, 2005, Judgment entered by the lower court herein, apparently intending to appeal the order entered on August 4, 2006, within the appeal period. (CP75)

"A convicted defendant who believes that the weight of the evidence favored a not guilty verdict may assert that belief by filing a new trial motion with the trial court." **Brown v. State**, 764 So. 2d 463, 466 ¶5 (Miss. App. 2000). "If the court denies the motion, the defendant may seek appellate review of that decision." **Id**. at ¶6. This, of course, presupposes that the motion is overruled and an order doing so appears of record.

The motion for a new trial "must be made within ten days of the entry of judgment." Rule 10.05, *Uniform Rules of Circuit and County Court Practice*. The disposition of such motions affect the appealability of the order disposing of the motion. ***Cf***. Comment, Rule 50(c), *Mississippi Rules of Civil Procedure* (appealability and the appellate court's power depend upon the course taken with the motion).

Notions regarding post-trial motions and out-of-time appeals differ between the civil context and the criminal context.

> If a defendant makes a timely motion . . . for a new trial under Rule 5.16 [Uniform Rules of Circuit and County Court Practice], ***the time for appeal for all parties shall run from the entry of the order denying such motion***. Notwithstanding anything in this rule to the contrary, in criminal cases ***the 30 day period shall run*** from the date of the denial of any motion contemplated by this subparagraph, or from the date of imposition of sentence, ***whichever occurs later***. A ***notice of appeal filed*** after the court announces a decision sentence, or order but ***before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding***, or until the date of the entry of the judgment of conviction, whichever is later.

Rule 4(e), *Mississippi Rules of Appellate Procedure*. (emphasis added) While it is possible to obtain relief in the lower court, the notice of appeal should follow the disposition of all post-trial motions still outstanding. Comment, Rule 4(e), *Mississippi Rules of Appellate Procedure*.

Even where there has been a dispositive order entered, the time frames directed by Rule 4 of the appellate rules are subject to waiver. "In criminal cases, ***the Court may*** suspend this Rule 4 to ***permit out of time appeals***." Comment, Rule 4(g), *Mississippi*

Rules of Appellate Procedure. (emphasis added) Rule 4(g) and 4(h) provide mechanisms for late appeals, which may be suspended. ***Id***.

This policy has been extended to the Supreme Court and the Court of Appeals.

> In the interest of expediting decision, or for other good cause shown, the Supreme Court or the Court of Appeals may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its discretion . . . .

Rule 2(c), *Mississippi Rules of Appellate Procedure*. Further, notwithstanding the mandatory dismissal provisions of Rule 2(a)(1), regarding untimely appeals, "Rule 2(c) provides for the suspension of Rule 2(a)(1) in criminal cases." Comment, Rule 2(a), *Mississippi Rules of Appellate Procedure*. This provision fits with *Mississippi Code Annotated* §99-39-25 (1972) as amended and revised, by which post-conviction relief matters may be appealed "on such terms and conditions as are provided for in criminal cases."

The appellate courts of this State have also addressed the matter of out-of-time appeals. "[T]his Court may suspend Rule 4, for good cause shown, and allow out-of-time appeals in criminal cases but not civil." **Andrews v. State**, 932 So. 2d 61, 62 ¶5 (Miss. App. 2006). "The party seeking an out of time appeal carries the burden of persuasion regarding the lack of a timely notice." Id.

The "Supreme Court has allowed the suspension of Mississippi Rules of Appellate Procedure Rule 4 for out of time appeals. However, these instances are limited in scope." **Denton**

v. State, 762 So. 2d 814, 817 ¶7 (Miss. App. 2000). Among instances cited by the **Denton** decision are the lack of notice of the denial of the defendant's motion for post-conviction relief, excusable neglect, and the lack of fault of the defendant. **Id**. ***See*** **Jones v. State**, 355 So. 2d 89, 91 (Miss. 1978)(notice of appeal not timely perfected due to no fault of defendant).

B. Failure of counsel to perfect appeal

Of course, the issue of an out-of-time appeal would not have arisen had trial counsel filed a timely notice of appeal. The trial counsel below, immediately preceding the trial, during the trial, and immediately following the trial, continued to act on behalf of the Appellant, notwithstanding his absence from the courtroom. He conducted cross-examinations, moved to suppress evidence, and moved to dismiss the proceeding. He also urged the trial judge, prior to the deliberations of the jury, to continue the cause due to the absence of Jay.

However, once the Motion for New Trial was filed, the record seems to indicate that trial counsel stopped acting for Jay. Pursuant to Mississippi practice, this was an improper tactic for trial counsel to have taken, with potentially devastating consequences for the rights of the Appellant.

Court-appointed counsel is considered in by the Mississippi Rules of Appellate Procedure. "Appointed trial counsel shall continue as defendant's counsel on appeal ***unless relieved by order of the trial court***, or, if appeal has been perfected, by order of the Supreme Court or the Court of Appeals." Rule

6(b)(1), *Mississippi Rules of Appellate Procedure*. There appears of record neither an order denying the Motion for New Trial nor any order relieving or substituting trial counsel within the time for the filing of the notice of appeal. The entry of appearance of Hon. Ross R. Barnett, Jr., was filed on October 17, 2005, (CP53) almost six (6) months after the entry of the judgment of conviction. (RE9-11; CP45-47) Even then, no order of substitution was entered.

Defendants convicted in the circuit courts of this State have a right to appeal to the Supreme Court, or Court of Appeals, depending upon the designation of the case. *Mississippi Code Annotated* §99-35-101 (1972), as amended and revised. Consistent with this policy is the provision that such defendants shall be represented at every critical stage in which substantial rights may be affected. *Mississippi Code Annotated* §99-15-15 (1972), as amended and revised.

This right to counsel in an appeal is not unlimited. In cases in which the defendant has received "a full appellate review by the Court of Appeals on the record and briefs of counsel", the defendant is "entitled to . . . appellate counsel before that court." **Harris v. State**, 704 So. 2d 1286, 1288 (Miss. 1997). Whereas appellate counsel is a matter of right on the first tier appeal, court-appointed counsel for subsequent levels of appeals is not a matter of right. **Id**. at 1289.

In the proceeding below, there were several issues which might have been raised on appeal. The trial of the Appellant in

absentia is foremost. Further, the trial court overruled requests for continuances due to Jay's absence and mental condition. Also, the trial court overruled the request for suppression of the fruits of the search warrant issued by Justice Court Judge Jan Addy to Deputy Sheriff Mark Spence, based upon his mere statement that a confidential informant was trustworthy, without any indicia of veracity. Whether enhancement of punishment was proper was also at issue. These were all crucial to the defense of Jay at trial, and these matters were meritorious issues for review by an appellate court.

The dereliction of the filing of the appeal on behalf of the Appellant denied to Jay a fundamentally fair review of the issues on appeal. The failure to file a timely notice of appeal constitutes an ineffective assistance of counsel on appeal.

Where fundamental rights of the defendant are compromised by deficiencies of counsel, a valid argument may be made that counsel inadequately assisted the defendant. **Strickland v. Washington**, 466 U.S. 668, 687-696 (1984). The failure of prior counsel to preserve issues for appellate purposes and to take steps to insure the filing of a proper appeal may rise to the level of inadequate assistance. **Holland v. State**, 656 So. 2d 1192, 1198 (Miss. 1995).

The seminal case on this point is **Triplett v. State**, 579 So. 2d 555 (Miss. 1991), in which the Supreme Court rendered a decision granting an out-of-time appeal. In **Triplett**, retained counsel at trial apparently had agreed with the defendant to

appeal the conviction, despite lack of payment of the fee. No appeal was filed, and the trial court denied the motion for an out-of-time appeal.

The Court, quoting **Myers v. Mississippi State Bar**, 480 So. 2d 1080, 1092-93 (Miss. 1985), ***cert. denied***, 479 U.S. 813 (1986), noted that:

> any time an attorney undertakes to represent a client in any court of record in this state that there attaches at that moment a legal, ethical, professional and moral obligation to continue with that representation until such time as ***he is properly relieved by the court*** of record . . . . This ***withdrawal may be accomplished only by the filing of a motion*** with the court with proper notice to the client.

Triplett, 579 So. 2d at 557-558. (emphasis added) Further, the Court cited that counsel's appearance "assures that court that that ***client's rights are being protected***" and that "when those rights are no longer to be protected by that particular member of the bar he has an ***immediate duty to notify both the court and the client*** so that ***the court may***, if necessary, ***take steps to see that valuable rights are not thereby lost***." **Id**. at 558 (**quoting Myers**, 480 So. 2d at 1092-1093). (emphasis added)

The Court also discussed situations in which counsel has to decide the course to take.

> It is true that subsequent to trial and conviction of their clients, trial counsel may find themselves on the horn of a dilemma, unsure whether or not to appeal. But the answer lies in the cloak of responsibility adorned by every criminal trial attorney when employment is accepted or appointment is made by the court. ***Unilateral withdrawal is manifestly not the solution.*** The problems of withdrawal may be more difficult than the British Army from Dunkirk but the requirements prerequisite to termination of attorney/client relationship remain paramount. ***Our rules and caselaw mandate written court permission to withdraw***

> ***from representation prior to completion of the contract. Nothing less will suffice.***

Id. (emphasis added)

An earlier case illustrated that counsel could protect the rights of the appellant, fulfill the obligation to bar, bench, and public, and not go bankrupt in the process. In **Allison v. State**, 436 So. 2d 792 (Miss. 1983), trial counsel retained by the defendant had not made an agreement to handle the appeal. However, due to an impending deadline, counsel perfected the appeal for the defendant. After filing the notice of appeal and having the record prepared, counsel could not make an acceptable arrangement with the defendant, and, thus, counsel took no further action in the cause. Id. at 794-795. For this dereliction, counsel was found in contempt by the Supreme Court.

The Supreme Court noted with approval trial counsel's act to perfect the appeal of the defendant. According to the Court:

> Nothing said here should deter attorneys from doing what Taylor did back in May of 1982. ***Because time was short, he acted properly in taking the necessary steps to perfect Allison's appeal to this Court.*** Nothing said here should give any attorney grounds for believing that, if he takes these procedural steps on behalf of his client, he will be trapped into handling the entire appeal without fee. When good cause exists for allowing an attorney to withdraw from representation of a client before this Court, ***upon proper motion, such withdrawal will be allowed.*** To be sure, in many circumstances the failure of the client to pay a reasonable fee may be a good and valid reason for withdrawal.

Id. at 796. (emphasis added)

Even in cases in which no inadequacy has been found, there were distinctions. Although one decision held that counsel had not been hired to appeal the case, the lower court did allow an

out-of-time appeal as part of the post-conviction collateral relief action, with court-appointed counsel to address the issues raised by the appellant. **See Howard v. State**, 785 So. 2d 297, 299-300 ¶¶4-8 (Miss. App. 2001). **See also Dickey v. State**, 662 So. 2d 1106, 1108-1109 (Miss. 1995)(failure to obtain appeal at fault of defendant, who then provided sham affidavits to court).

Court rules have echoed the need for withdrawal with court permission, upon notice to the client and, where appropriate, opposing counsel. **See** Rule 1.13, *Uniform Rules of Circuit and County Court Practice*; Rule 1.08, *Uniform Rules of Chancery Court*; Rule 46(c), *Mississippi Rules of Appellate Procedure*; Rule 1.16, *Mississippi Rules of Professional Conduct*.

Counsel is also subject to more sensitive diligence when a client is, or may be, suffering from a disability, especially a mental state which calls into question the reasoning ability of the client. Rule 1.14, *Mississippi Rules of Professional Conduct*. "If a client under disability has no legal representative, his lawyer may be compelled to make decisions on behalf of the client." Code Comparison, EC 7-12, Rule 1.14, *Mississippi Rules of Professional Conduct*.

Trial counsel below filed a motion to continue the case, due to the mental impairment of Jay. (CP9-11A) "The Defendant is unable to participate in court proceedings and to assist his attorneys in preparation of trial as he suffers from cognitive, motor, functional, and sensory deficits and is at increased risk for seizures and DVT." (CP9) His doctor, Stuart Yablon, urged the

court to reset the trial in hopes that Jay would improve. (CP11A) Counsel thus suspected that his client had a mental deficiency.

Although Jay was absent from the trial, his counsel pressed forward, as noted above. Vested with knowledge of the issues which could be raised, counsel then did not raise them. Just as Jay did not have to be present for the trial to be conducted in his absence, Jay's presence for the filing of a notice of appeal, designation of record, and preparation of briefs would have been superfluous. His not being present would not have proscribed the preparation by the court clerk of the record or by the court reporter of the transcript. As stated in **Jones**, the lack of a timely-filed notice of appeal was not caused by Jay's absence.

Trial counsel asserted Jay's lack of mental capacity on April 4, 2005, a week before trial. (CP10) Counsel surely did not file a sham motion; therefore, the defect would have continued for the thirty days following the entry of the judgment of conviction on April 20, 2005. (RE9-11; CP45-47) The absence of Jay from his trial should have made this disability more acutely aware to trial counsel.

Further, both Mr. Harris and Mr. Barnett failed to preserve for appeal a record of the hearings, if any, of the post-trial motions filed below. The fundamental right of review on appeal was thus compromised. The meritorious issues arising from the trial itself are barred by rule from consideration by this Court, absent an out-of-time review of the proceedings. A thirty-one year sentence constitutes steep prejudice for an appellant who

quite simply could have had a one-sentence notice of appeal filed on his behalf by counsel.

C. Meritorious issues for appeal

1. Trial in absentia

As asserted hereinabove, there were meritorious issues to be raised upon a properly-perfected appeal. First and foremost is the issue of whether the trial judge erred in putting Jay to trial in absentia. This issue will be more particularly addressed hereinbelow, but such argument is incorporated herein by this reference thereto.

2. Suppression of statement and evidence

Further, the suppression of evidence and statements which were obtained as a consequence of the search warrant issued by Judge Jan Addy should have been granted. Trial counsel correctly urged suppression, due to the failure of Deputy Spence to assert any corroborative data or any indicia of reliability concerning the alleged confidential informant. Such information is required to lift the informant's story from mere hearsay to a dependable basis for the issuance of a warrant.

Counsel argued that **Roebuck v. State**, 915 So. 2d 1132 (Miss. App. 2005) was controlling. The **Roebuck** case is almost dead on point with the instant matter, with the former case involving a search warrant request bearing corroborative matter or other indicia of the credibility or veracity of the alleged informant. **Id.** at 1138 ¶16. In the instant proceeding, Spence simply alleged that the informant had provided reliable

information and was trustworthy. (T38-39; Exhibit S-1 for identification) Spence gave no testimony to Judge Addy as to the informant's veracity or prior history of convictions and/or arrests. (T38-39; 42) In both cases, the informants allegedly saw drugs in the defendant's possession.

The Court of Appeals reversed and rendered in favor of Roebuck, stating that "simply repeating an informant's allegation, without more, does not overcome the threshold requirements for probable cause." Id. at 1137 14. Further, the Court opined that

> an affidavit must present a substantial basis for crediting that hearsay. [cit. om.] That substantial basis has been overcome where the ***affidavit contains a statement that an officer has successfully used a confidential informant to prosecute criminal allegations in the past***. [cit. om.] Similarly, it is sufficient ***where an affidavit contains corroborating evidence to show a confidential informer is truthful and reliable***. [cit. om.] Where a request for a search warrant relies on information relayed by a confidential informant, probable cause for the issuance of a search warrant exists where law enforcement ***independently corroborates a confidential informer's statements***. The common factor is that, by affidavit or oral testimony, law enforcement must present in issuing judge with some "indicia of veracity or reliability" supporting the confidential informant's allegation. [cit. om.]

Roebuck at 1137 ¶15. (emphasis added) The Court went further, saying that

> we do not find fault due to the lack of the word "reliable" in the affidavit or underlying facts and circumstances. We find fault in the search warrant because nothing before Judge Graham suggested that the informant's information was reliable or true. Further none of the methods of demonstrating veracity or reliability were before Judge Graham.

Id. at 1140 ¶25. The conviction was reversed and rendered.

Similarly, in **State v. Woods**, 866 So. 2d 422 (Miss. 2003), the Supreme Court upheld the suppression of the results of a search warrant based upon information provided by a previously untested informant, without indicia of veracity or reliability being shown to the issuing court. **Id.** at 426-427 ¶14. Despite the accuracy of the information, the Court held that corroboration of the information would be required in advance of the issuance of the warrant. **Id.** at 427 ¶18. **See Florida v. J.L.**, 529 U.S. 266, 271 (2000)(anonymous uncorroborated tip, despite being accurate, did not suggest officers had a reasonable basis of suspecting criminal activity; "reasonableness of official suspicion must be measured by what the officers knew before they conducted their search."); **Rainer v. State**, 944 So. 2d 115, 118 (Miss. App. 2006)("reasonableness of official suspicion must be measured by what the officers knew before they initiated the search").

The search warrant herein should not have been issued. As fruits thereof, the alleged contraband and statement should not have been presented to the jury. This error should have been addressed on appeal.

3. Comments of trial counsel

In addition to the argument that counsel below failed to address the appellate rights of the Appellant, there are issues as to comments made by counsel. During voir dire, counsel told the jury that "I don't have a client right now" and that it "would be unnatural for you not to question why my client might not be here." (T18) In closing arguments, he told the jury that

"I'm in a predicament here . . . having to represent somebody that's not here." (T97)

Notwithstanding instructions from the court not to consider the absence of Jay, (T3; CP30) counsel called it to the jurors' attention twice, at crucial times. While concession of certain unfavorable facts may be necessitated as trial strategy, no attorney should concede guilt. **Faraga v. State**, 514 So. 2d 295, 308 (Miss. 1987). Likewise, counsel should not call the jury to infer that something is wrong if the defendant is absent. A fundamental right, that of due process and of a fair trial, is impaired by causing such inferences. This matter should have been subject of appeal by the attorneys subsequent to trial counsel.

4. Improper enhancement in indictment

The indictment of the Appellant contains a separate paragraph asserting that Jay was a second offender under the drug statutes. This practice was considered in **Hentz v. State**, 852 So. 2d 70, 76 ¶17 (Miss. App. 2003). In **Hentz**, the defendant claimed that the enhancement language should have been included in the actual charging language of the principal offenses, rather than as a separate count. The Court of Appeals held that the matter had been waived. **Id**.

In the instant proceeding, trial counsel failed to address the issue. Further, Jay was not present and waived no such issue. Appellate counsel should have been permitted to address defects in the indictment upon appeal, but were wrongfully denied the opportunity by the summary orders of the trial judge.

5. Denied requests for continuances

The lower court was requested to continue the trial until the next term of court, in order to permit the Defendant to heal from the uncontroverted assault that he suffered prior to trial. Also, at least once, the trial court was asked to continue the case until Jay was present for court. In each instance, the lower court denied the request.

The consideration below of the trial in absentia issue shall encompass the continuance requested regarding Jay's absence from court. However, the pretrial request for continuance for mental reasons was supported by medical grounds, which, in turn, called into question constitutional issues regarding Jay's ability to assist in his own defense. That there was no dispute as to Jay's injuries and brain damage would support the request. Caselaw developed from the Sixth Amendment's rights of the accused mitigate in favor of the resetting. Further, the April, 2005, term of the Newton County Circuit Court had at least one (1) additional week after the trial date, six (6) days in June, 2005, six (6) days in October, 2005, and eighteen (18) days each in August and November, 2005. *Judiciary Directory and Court Calendar, State of Mississippi*, p. 32 (2005 edition). **See Gray v. State**, 819 So. 2d 542, 546 ¶22 (Miss. App. 2001)(appellate court took notice of directory).

In this cause, it appears that no record was made of the hearings, if any, of the post-trial motions in this cause. The two orders provide only a summary denial. However, based upon the

fundamental rights of the Appellant which were at risk, and based upon the utter lack of a properly-perfected appeal, the lower court should have acted to protect the rights of the Appellant. As noted in **Triplett**, **Myers**, and **Allison**, the fundamental rights of the client have to be protected by the court, particularly where counsel is no longer acting to do so.

The lower court should have granted the out-of-time appeal requested on behalf of Jay. This Court now should act to protect the fundamental rights of the Appellant and allow the appeal to go forward, notwithstanding the deficiencies of counsel.

ISSUE THREE: THE TRIAL COURT ERRED IN DENYING TO THE APPELLANT HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL BY CONDUCTING THE TRIAL IN THE ABSENCE OF THE APPELLANT.

As noted hereinabove, the primary matter presented before this Court is the fundamental unfairness of the lower court's putting the Appellant to trial in absentia. From the record, the trial judge acted precipitously and arbitrarily on the morning of April 11, 2005, allowing a fifteen (15) **minute** delay before the commencement of the trial.

Cases involving an absent defendant have several features in common. One of these is that the trial court is to make a determination as to whether the absence of the defendant is free, voluntary, and knowing. In the instant case, no such hearing appears of record. Less than five (5) days previous to trial, the Appellant was being examined, under court order, to determine the state of his mental condition. Although there was a dispute as to Jay's capacity, there was no dispute as to Jay's having been

brain-damaged, with severe trauma, in September, 2004, and that Jay was undergoing continuing treatment for this condition.

There was no hearing. Although later there arose a significant question as to whether Jay knowingly was absent, nothing appeared in the record except a summary determination prior to trial that the trial would start in 15 minutes. Not until the sentencing hearing on Friday, April 15, 2005, four days after the trial, was there any hearing of record as to Jay's absence. (RE16-18; T105-107) Even then, the sentencing order reflects that the trial judge found that Jay had notice of the sentencing hearing, (RE7; CP43) notwithstanding trial counsel's comment that he had no knowledge of the sentencing himself until April 14, 2005. (RE18; T107)

If a defendant is in custody and consents to trial in the absence of the defendant, the trial may progress. *Mississippi Code Annotated* §99-17-9 (1972), as amended and revised. Where the defendant is free on recognizance or bail bond, is charged with a misdemeanor, and is not present for trial, the court may proceed with the trial in the absence of the defendant. **Id**.

However, in a line of cases commencing with **Sandoval v. State**, 631 So. 2d 159 (Miss. 1994), the Mississippi Supreme Court has held generally that ***felony*** causes should not be tried in absentia. **See Simmons v. State,** 746 So. 2d 302, 308 ¶26 (Miss. 1999)(defendant appeared after trial started, but suffered prejudice from proceedings during absence); **Jackson v. State,** 689 So. 2d 760, 763 (Miss. 1997)(appearance after trial commenced

evidenced lack of waiver to be present, necessitating reversal); **Villaverde v. State,** 673 So. 2d 745, 746-747 (Miss. 1996) (defendant had been in contact with counsel but failed to appear for trial; court's denial of continuance and trial in absentia required reversal); **Banos v. State**, 632 So. 2d 1305, 1308-1309 (Miss. 1994)(neither defendant appeared at any stage of the proceedings, requiring reversal).

In **Sandoval**, the Court considered whether the absence of a defendant from the commencement of his trial constituted the deprivation of fundamental rights. A factual scenario close to that of the instant case included Sandoval's presence for pretrial matters and contact prior to trial with counsel, his absence for trial, and claims of prejudice arising from his absence. **Id**. at 160-161. Sandoval contended that he was not able to explain custodial statements or to refute the constructive possession theory of the state, and that the request to continue the case should have been granted. **Id**.

The Supreme Court interpreted the clear language of Section 99-17-9 to require a defendant's presence at the commencement of trial before the trial may proceed in absentia. **Id**. at 164. The Court reversed the conviction and remanded for another trial. **Id**.

In essence, **Sandoval** and its progeny suggest that a trial court errs in conducting trials in absentia, wherein a suspect's rights are prejudiced. In these cases, common features included a denied request to continue the trial for a short term, allowing defense counsel, or others, time to contact the absent party.

In 2002, a retrenchment of sorts began, with the Court making fact-certain exceptions to **Sandoval**, starting with **Jefferson v. State**, 807 So. 2d 1222 (Miss. 2002). In **Jefferson**, the Court announced:

> We find that ***under the facts presented*** by the case at bar that the trial court did not err in trying Jefferson in absentia. Jefferson was present for his arraignment, though it was waived, at which time his trial was set. He was again present at his omnibus hearing. Following this, Jefferson spoke directly with his attorney numerous times, and specifically just a week prior to his trial date. These facts demonstrate that Jefferson was well aware of the date his trial was set. Beyond that, ***the most glaring evidence*** of Jefferson's deliberate intent to evade justice ***was the unrefuted testimony*** of Andrea Dillon, his long-time acquaintance, ***that Jefferson had informed him of his plan to run and avoid trial***.
>
> . . . .
>
> The trial court also found that ***Jefferson suffered no prejudice due to his willful absence***. The State asserts that this finding is supported by the fact that while Jefferson was indicted for possession of 119 grams of marihuana with the intent to distribute, ***he was only found guilty by the jury of the lesser-included offense*** of simple possession. We agree that Jefferson suffered no prejudice due to his absence.
>
> . . . .
>
> By our ruling today, we do not overrule **Sandoval** and its progeny; rather, we carve out an exception based upon willful, voluntary and deliberate actions by a defendant in avoiding trial, such as those presented here. Jefferson was clearly aware of the date of his trial, ***he was granted two continuances***, and evidence was presented that ***he had expressed a clear intention to evade trial***.

Jefferson, 807 So. 2d at 1226-1227 ¶¶14-15, 17-18. (emphasis added) As stated by the Court, the decision was based upon the facts of the case and not meant as a general rule.

Jay's case is distinguishable on several points from the **Jefferson** decision. That testimony was received indicated a

hearing on the absence of Jefferson. He had been granted prior continuances. Jefferson was not allegedly brain-damaged. Jefferson had bragged about a plan to skip trial, while Jay had been attempting to comply with procedures to accommodate his brain-damage and mental capacity. Jefferson's counsel filed his appeal properly, unlike that of Jay. Finally, Jay was convicted on all three counts as charged, had no opportunity to assist in his defense, and received a 31-year sentence, with no proper appeal filed.

The Court of Appeals recently indicated that an evidentiary hearing should be conducted to determine whether an absent defendant had voluntarily caused his/her absence. In **Baker v. State**, 930 So. 2d 399 (Miss. App. 2005), the defendant did not appear for the second day of his trial. After a brief recess for defense counsel to attempt to locate his client, the trial judge allowed another recess for law enforcement officers to attempt to find the defendant. Subsequent motions for mistrial and for a continuance were denied. Eventually, unsworn statements were received by the trial court from the defendant's father and the bail bondsman regarding the defendant's having left the county.

Although the defendant admitted later that he had fled the jurisdiction and the Court of Appeals found no prejudice arising from the unsworn statements, the Court did address the taking of the statements. According to the Court of Appeals, the failure to object to the taking of the unsworn testimony waived any defect.

> While Baker's counsel argued after the first brief recess that there was no proof at that point that Baker had

> voluntarily absented himself from trial, counsel did not object to the court's subsequently receiving the unsworn representations of Baker's father and his bail bondsman. Had he done so, ***the trial court could easily have placed the witnesses under oath and avoided the error Baker now claims***.

Id. at 412 ¶30. (emphasis added) Thus, in order to avoid any error from not properly determining whether an absence is voluntary, the Court suggests the taking of sworn testimony.

Read together with the still-effective **Sandoval**, this language indicates that a trial court would be in error in not having some hearing of record and determining on the record that a defendant has voluntarily absented himself from the trial. In addition, the **Jefferson** decision reflects that Jefferson's trial date of March 20, 2000, was continued to March 21, 2000, and then to March 22, 2000, after which a hearing was conducted in the judge's chambers. Testimony was also received at one point from a long-time companion that Jefferson had planned to abscond.

In **Jones v. State**, 204 Miss. 284, 37 So. 2d 311 (1948), the medical condition of the missing defendant was considered a major factor in the reversal of his conviction. In **Jones**, medical testimony was offered to corroborate the defense motion for a continuance on the grounds that the defendant was not able to stand trial at that term. The motion was denied and the trial was set for the next week. Jones was tried in his absence and convicted. The judgment was reversed upon a finding that:

> ***[W]here the absence*** of the accused ***is due to his physical inability to attend*** his trial, ***it cannot be said that he voluntarily absents himself***; and, if tried in his absence, he is thereby deprived of his constitutional right to be present.

Id. at 285, 37 So. 2d at 311. (emphasis added) It could well be said that mental inability would be just as constraining.

In the court below, Jay was found by his treating doctor not to be able to assist in his trial. There was no dispute that he suffered from traumatic brain damage. Further, there was no hearing pretrial of record to determine whether Jay's absence was freely, voluntarily, and knowingly caused. Finally, the trial judge, after a short delay, informed the jury that:

> [A]t 9:00 I entered this courtroom, and I called up the case of State versus Douglas Jay for announcement. The State announced ready. Mr. Harris announced that his client was not here. I declared a recess to allow the officers some time to try to locate Mr. Jay, but at this time, it now being twenty-five minutes after nine, his whereabouts are unknown. This case is going to proceed and continue at this time.

(RE25; T3) Thus, not only was there no hearing of record on Jay's absence, but the jury was informed that officers had been sent for him, clearly implying wrongdoing. Notwithstanding the judge's directions not to consider the absence of Jay, the damage had been planted in the veniremen's minds.

This Court should consider the clear violation of Jay's fundamental right to be present at critical stages of his trial and of a fair trial. **See Simmons v. State**, 746 So. 2d 302, 308 ¶¶23-26 (Miss. 1999)(defendant's absence from voir dire and judge's extraneous comments before jury about absence of defendant, thereby possibly predisposing jury against defendant, constituted prejudice).

This Court should reverse the conviction and sentence in absentia of Douglas Jay. Further, this cause should be reversed for a new trial, with the opportunity to present all matters before a jury.

ISSUE FOUR: THE CUMULATIVE EFFECT OF THE ERRORS AT TRIAL AND POST-TRIAL DENIED TO THE APPELLANT HIS FUNDAMENTAL RIGHT OF DUE PROCESS OF LAW AND CONSTITUTED PLAIN ERROR.

The failure of trial counsel to perfect the appeal of the Appellant, the refusal of the trial court to allow an out-of-time appeal, and the trial in absentia of the Appellant individually prejudiced Douglas Jay, Jr. The lack of an appeal on the crucial issues below, including trial in absentia and suppression of evidence, deprived Jay of a fundamentally fair appellate process and effective assistance of counsel.

The appellate courts of this State "may reverse a conviction and/or sentence based upon the cumulative effect of errors that do not independently require a reversal." **Manning v. State**, 884 So. 2d 717, 730 ¶44 (Miss. 2004)(**citing Jenkins v. State**, 607 So. 2d 1171, 1183-1184 (Miss. 1992)). Further, in capital cases, even where "no error, standing alone, requires reversal, the aggregate effect of various errors may create an atmosphere of bias, passion, and prejudice that they effectively deny the defendant a fundamentally fair trial." **Id**. (**quoting Conner v. State**, 632 So. 2d 1239, 1278 (Miss. 1993)).

Although the foregoing cases involved capital cases, the concept bears application herein. At every turn, Jay was deprived of a fundamental right. He was put to trial in absentia, despite

state and federal constitutional protections. Evidence obtained as a result of a deficient search warrant was admitted against him. The trial judge predisposed the jury by his pretrial comments. The trial counsel compounded the commentary to the jury concerning Jay's absence, telling the jury that he had no client and asking the jury to help him out of his predicament. After the trial, no appeal was perfected, notwithstanding plain errors.

Further, the Supreme Court "has held that a finding of plain error is necessary when a party's fundamental rights are affected." **Williams v. State**, 794 So. 2d 181, 185 ¶28 (Miss. 2001)(improper sentence enhancement was plain error). **See, generally, Berry v. State**, 728 So. 2d 568 (Miss. 1999)(improper instructions were plain error); **Signer v. State**, 536 So. 2d 10 (Miss. 1988)(evidentiary findings were plain error).

There are two (2) facets to the plain error rule. First, there must have been an error, and, second, the error must have resulted in a manifest miscarriage of justice, and the rule will be applied only if a fundamental or substantive right is affected. **Rumfelt v. State**, 947 So. 2d 997, 1002 ¶26 (Miss. App. 2006)(**citing Grubb v. State**, 584 So. 2d 786, 789 (Miss. 1991); **Gray v. State**, 487 So. 2d 1304, 1312 (Miss. 1986)).

"One of the most basic rights guaranteed by the confrontation clause of the Sixth Amendment to the United States Constitution 'is the accused's right to be present in the courtroom at every stage of his trial'". **Bostic v. State**, 531 So. 2d 1210, 1212-1213 (Miss. 1988)(**quoting Illinois v. Allen**, 397

U.S. 337, 338 (1970)). "[A]n accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." Id. (quoting Allen v. State, 384 So. 2d 605, 607 (Miss. 1980)).

There also attaches a fundamental right to counsel at all critical stages of the proceedings, even on first-round appeals. Harris v. State, 704 So. 2d 1286, 1289 (Miss. 1997). Prejudice arising from the lack of a proper appeal is obvious -- the loss of any review of errors before the trial court and the final imposition of sentence.

In the instant proceeding, Douglas Jay was prejudiced by the summary commencement of trial in absentia, thereby denying any chance of his being present to challenge evidence and testimony. His mental state compounded this issue. Evidentiary challenges were also precluded. Finally, the failure of counsel to perfect an appeal obviated any review of these matters.

Notwithstanding the procedural deficiencies in this case, this Court should apply the plain error rule to the deprivations of rights in this proceeding and, after review of these matters, reverse this cause and remand it for trial below. Further, the cumulative effect of these denials of fundamental rights should be found by this Court to justify and warrant reversal and remand.

CONCLUSION

The lower court erred in putting Jay to trial in absentia. By so doing, the lower court irreparably impaired Jay's right to a fundamentally fair trial, to confront witnesses, and to offer his own testimony. The lack of a pretrial finding of record that Jay's absence was "voluntary, free, and knowing", and of any order finding Jay to be mentally capable of standing trial, support reversing the trial judge's decision to proceed to trial.

Trial counsel's deficient performance also denied to Jay a fair trial. The glaring failure of trial counsel to perfect and prosecute a timely appeal clearly prejudiced Jay's right to the effective review of various issues herein, including evidentiary matters and the trial of Jay in absentia. Not pursuing post-trial matters clearly prejudiced the rights of the Appellant.

Finally, the cumulative effect of the errors below favor reversal. The plain error found in the lack of mental capacity, in proceeding to trial in absentia, in the admission of evidence, and the failure to perfect an appeal, and other errors, clearly denied to Jay a fundamentally fair trial.

This Court should reverse the judgment below. Further, this Court should remand this cause for a new trial on all issues.

SUBMITTED on this, the 16 day of July, 2007.

Respectfully,

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CERTIFICATE OF SERVICE

This is to certify that I have on this date served true and correct copies of the above and foregoing document upon the following:

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DOUGLAS E. JAY, JR. — APPELLANT

V. — CAUSE NO. 2006-KA-01805-COA

STATE OF MISSISSIPPI — APPELLEE

STATUTES AND RULES CITED IN BRIEF OF THE APPELLANT

APPEAL FROM THE CIRCUIT COURT OF NEWTON COUNTY, MISSISSIPPI

CAUSE NUMBER 04-CR-044-NWG

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