IN THE MISSISSIPPI COURT OF APPEALS

No. 2006-KA-02100-COA

MICHAEL GOLDMAN APPELLANT

Vs.

STATE OF MISSISSIPPI APPELLEE

BRIEF OF APPELLANT

Appeal from the Circuit Court of Madison County, Mississippi

Julie Ann Epps ([redacted]
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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.

Michael Goldman
Appellant/Defendant

Lisa Ross
Darla Mannery Palmer
Trial AttorneyS for Michael Goldman

Julie Ann Epps
Appellate Attorney for Michael Goldman

David Clark
Jamie McBride
Thomas L. Kesler
District Attorney and Assistant District Attorneys

Jim Hood
Attorney General

The State of Mississippi
Appellee

Honorable William E. Chapman, III
Circuit Court Judge, Madison County, Mississippi.

SO CERTIFIED, this the 10th day of August, 2007.

Julie Ann Epps

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STATEMENT OF THE CASE

The indictment:

Michael Goldman was indicted in November, 2004 for a May 30, 2003, attack on Ebony Beal. CP. 5; RE. 12. He was charged with three counts: burglary with intent to commit sexual battery in violation of M.C.A. §97-17-23; sexual battery of Ebony Beal in violation of §97-3-95; and causing bodily harm to Ebony Beal by striking and choking her in violation of § 97-3-7.

The trial:

Ebony Beal was spending the night at her mother's house on the night of May 29, 2003. Her mother, Tina Beal, was still at work when Ebony went to sleep that night around 10:00 or 11:00 p.m. T. 108. Around 1 a.m., the phone rang. The caller, a male, wanted to know if Ebony's mother was home. Ebony said "no." A few minutes later, there was another call by the same male asking if her brother was at home. Ebony again said "no." T. 109. Later, Ebony heard noises and then she saw a shadow. She dialed 911 and the dispatcher told her to stay on the phone. T. 110. Ebony told the dispatcher that she saw a knife. The person holding the knife retreated but quickly returned holding a blanket in front of his face. T. 111-112. Ebony started screaming and the intruder told her that she shouldn't be there alone. T. 112. The intruder took Ebony's clothes off and tried to make her perform oral intercourse. T. 113. Ebony refused and shook her head back and forth. The intruder then started having intercourse with Ebony. T.

114. Ebony managed to grab the knife and they wrestled over the weapon. Ebony was cut in the process. T. 114. The intruder managed to get the knife back and at that point the police arrived. T. 115. It was only then that Ebony realized that the intruder was Michael Goldman. T. 115. Goldman "said that he was drunk, that he was sorry, he didn't know what he was doing." T. 116.

Ebony's grandfather L.C. Beal testified that he was at his home on May 30, 2003 (he does not live in the same house as his daughter Tina). T. 140. His phone rang between 1 and 3 a.m. and a male caller asked if Tina was at home. T. 141. Beal replied that Tina was at work. T. 142.

Madison County Deputy Sheriff Joey Butler testified that he was in the office on Highway 51 in Canton when he got a call about a home invasion on Laura Drive. T. 144. At the house on Laura Drive he was joined by Deputy Johnson. Butler kicked in the front door. T. 147. To the left of the living room was a bedroom. Butler testified that he saw Goldman on top of Ms. Beal. T. 147. The deputies charged into the room and ordered Goldman onto the ground. Goldman stated that "he had gotten drunk. He said, 'I fucked up and made a mistake.'" T. 149.

The prosecution admitted the approximately twelve-minute 911 call through the dispatcher who took the call, Stephen Vincent. T. 207.

The defense put three witnesses on the stand. The first was Dontavious Cleaver. T. 221. He had been living with Reverend James Dauhtery, the Reverend's wife Lolita and the couple's three girls. T. 221. Michael Goldman

was also living in the home. T. 222. Cleaver testified that the knife that had been introduced into evidence was the same knife that the people in Reverend Dauhtery's household kept in the Lincoln Town Car to use to pry open the house's door when it would jam. T. 222-23.

Cleaver testified that he first knew Michael Goldman from church and school and he had known Ebony Beal for about two years. T. 223. On May 30, 2003, sometime after midnight, Goldman woke Cleaver up and asked to use his cell phone. T. 224. Goldman told Cleaver that Cleaver had missed a call from Ebony. T. 224. Cleaver testified that he had seen Michael and Ebony together on various occasions leaving school, leaving church together and riding to school together. T. 225.

Reverend James Dauhtery testified that in May, 2003, he was living in Canton with his wife, his three daughters, Dontavious and Michael. T. 240. He testified that the front door of their house often got stuck and the family used a butcher knife to open it when it got stuck. T. 241. He identified the knife (State's ex. 1) as the knife they used on the door. T. 241. Dauhtery's wife is Michael Goldman's first cousin. T. 242. Michael had been staying with them. He was a big help around the house. T. 242. Reverend Dauhtery testified that he had seen Michael and Ebony together at school and at church. T. 244.

Michael Goldman testified on his own behalf. He had known Ebony Beal since he was around fifteen years old. T. 258. They had spent time together at school and church. T. 258. On May 30, 2003, he had gotten home around 12:30

and asked Dontavious if he could use his cell phone to call his friend Trenasia. T. 259. When he picked up the phone, he saw that there was a missed call from Ebony. T. 259. He called Trenasia. He then called Ebony and told her he had seen her earlier in the park and asked what she was doing. He asked Ebony if he could come over. T. 259. She said "sure." He gave Dontavious his cell phone back and went down the street to Ebony's house. There he knocked on the door multiple times but no one ever came to the door. T. 260.

Goldman testified that he went back to Reverend Dauhtery's house and called Ebony and asked her why she didn't come to the door. She told him that she had not heard him. T. 261. He went back to her house and knocked again and, again, got no response. T. 262. At this point, he was worried that something was wrong. T. 263-64. He went to the window on the side and knocked; he knocked on the back door and then noticed an open window. He went to his car and tried to call Ebony on the phone and still got no answer. T. 263.

Michael testified that he found this all very strange because just as he had driven up to the house, he had seen a light go out and so he knew that someone was in the house. He decided to check it out himself. T. 264. He grabbed the knife that was kept in the car and gained entrance through a window. T. 264. He went through the house and ran into Ebony, startling her so that she was jumping up and screaming. T. 265. Michael tried to calm her down by telling her "this is Mike, why didn't you come to the door." She was screaming "don't stab me." T. 265. She asked why he had come through the window and he told her that when

she didn't come to the door, he thought someone was in the house with her. T. 266. They talked. She wanted to know what he had come to the house for. He told her he needed to leave and as he did so, she pulled him to her. T. 268. Michael thought that she wanted to have intercourse with him. T. 268. She wasn't telling him to get off of her or pushing him away. T. 268. She asked him whether she wanted him to get on top of her and that is where the police busted in. T. 269. The police threw him outside and kicked him. T. 270. Michael testified that it was never his intention to force Ebony to do anything and that his only intention when he went into the house was to see what was going on in there. T. 271.

The jury found Goldman guilty on all three counts. T. 310-11; CP. 41-43; RE. 15-17. The trial court sentenced Goldman to 25 years on the burglary and 30 on the sexual battery to be served concurrently. T. 317-18. The trial court sentenced Goldman to 20 years on the aggravated assault to run consecutive to the other sentences. T. 318; CP. 44; RE. 18.

SUMMARY OF THE ARGUMENT

Michael Goldman was indicted on three counts. One of these was for aggravated assault. The indictment charged Michael with assault causing serious bodily injury by striking and choking Ebony Beal. The testimony, though, contained no evidence that Michael struck or choked Ebony. Instead, Ebony testified that Michael used a knife. The court thereafter instructed the jury that Michael was guilty of aggravated assault if he attempted to cause bodily injury with a knife. The instruction worked a constructive amendment to the indictment changing not only the manner of the assault but the requirement that the prosecution prove serious bodily injury (or any bodily injury for that matter). The instruction denied Michael Goldman a defense that he had to the aggravated assault charge contained in the indictment and, thus, was a substantive amendment that could only be accomplished – at least, legally - by the grand jury. This substantive amendment to the indictment requires that Goldman's conviction and sentence for aggravated assault be reversed.

Trial counsel for Michael Goldman failed to object to the instruction's amending the indictment. Her failure to properly preserve this issue for review fell below the standard expected of effective counsel and denied Goldman his right to counsel guaranteed by the United States and Mississippi Constitutions.

The trial court also erred when it disallowed Goldman from presenting evidence that he had previously had sexual relations with Ebony Beal. This

evidence was relevant to Goldman's defense that the sexual activity that night was consensual. To the extent that the trial court's ruling was based on defense counsel's failure to provide proper notice pursuant to M.R.E. 412, defense counsel's performance amounted to ineffective assistance of counsel.

It was further error for the trial court to allow the prosecution to introduce Ebony's medical records into evidence. This permitted the jury to take with them into their deliberations a previous out-of-court statement of Ebony Beal concerning the incident. A prior out-of-court statement, even when admissible to prove that the declarant didn't recently contrive her testimony, is never admissible as substantive evidence.

Finally, the trial court in this case met with the jurors privately prior to pronouncing sentence. To the extent that the court discussed the case with the jury outside the presence of the defendant, the defendant was denied the opportunity to know and, if necessary, to rebut, any information used by the court in pronouncing sentence.

If any single error is not cause for reversal, the several errors considered together require that Michael Goldman's convictions and sentences be reversed.

LAW AND ARGUMENT

1. The trial court erred in allowing the jury instruction on count three to constructively amend the indictment to change not only the method of the assault but also the necessity of proving any injury.

In count three of the indictment, Michael Goldman was charged with purposely causing **serious injury** to Ebony Beal "**by striking and choking her . .** ." CP. 6; RE. 13. The instruction as to this count, however, instructed the jury to find Michael Goldman guilty of aggravated assault if they found that he caused or attempted to cause **bodily injury** with **"a knife, a deadly weapon."** CP. 38; RE. 14. The instruction had the effect of amending the indictment in violation of Michael's right to have the charges first presented to a grand jury. U.S.Const. Amend. 5; Unif.R.Cir. and Crim. Ct. 7.09. Mississippi law is clear that substantive amendments to an indictment can only be made by a grand jury. *Forkner v. State*, 902 So.2d 615, 623 (Miss.App. 2004).

An indictment must include "a statement of facts and circumstances that will inform the accused of the specific offense with which he is charged." *Hamling v. United States,* 418 U.S. 87, 117, 94 S.Ct. 2887(1974); *Russell v. United States,* 369 U.S. 749, 763-64, 82 S.Ct. 1038 (1962); *Hodgin v. State*, 2007 WL 2128353, *4 (Miss., July 26, 2007). This serves several purposes:

> (1) to furnish the accused such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, (2) to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction if one should be

> obtained and (3) to guard against malicious, groundless prosecution.

Garner v. State, 944 So.2d 934, 939 (Miss.App. 2006). If the defendant is not apprised of the charges he would have to defend against at trial, prejudice may occur. *United States v. Berger*, 295 U.S. 78, 83-84, 55 S.Ct. 628 (1935).

The Constitution prohibits constructive amendment of an indictment. The prohibition is derived from the Fifth Amendment, which provides that "[n]o person shall be held to answer for ... [an] infamous crime, unless on a presentment or indictment of a Grand Jury," United States Constitution Amend. V, and from the Sixth Amendment and Fourteenth Amendment due process clauses, which guarantee that a defendant have notice of the charges against him. *United States v. Bishop*, 469 F.3d 896, 902 (10 Cir. 2006).

"[A] constructive amendment of the indictment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged." *United States v. Chambers*, 408 F.3d 237, 241 (5th Cir. 2005). *See also, Dunn v. United States*, 442 U.S. 100, 105, 99 S.Ct. 2190 (1979) (stating variance occurs when facts proven by evidence at trial differ from those alleged in indictment).

In this case, count three of the indictment charged Michael with causing or attempting to cause **serious** bodily injury by **striking and choking** Ebony. CP. 6; RE. 13. There was never any evidence that Michael choked or struck Ebony and

this absence of evidence provided Michael a defense to the charges contained in count three.

The instruction as to count three also told the jury it could convict Michael if they found that Michael caused or **attempted** to cause bodily injury with a knife. The jury under this instruction need not find that Goldman caused any injury.

The indictment, on the other hand, required that the jury find that Goldman caused **serious** bodily injury. Serious bodily injury is that "which creates a substantial risk of death or which causes serious, permanent disfigurement, **or protracted loss or impairment of the function of any bodily member or organ.**" *Fleming v. State* 604 So.2d 280, 292 (Miss. 1992) (emphasis supplied) citing section 210.0 of the Model Penal Code (1980). Since Ebony's injuries were limited to scratches,[1] the amendment via instruction also took from Michael the defense that any injuries suffered by Ebony were not serious. Where the defendant is charged with assault using a deadly weapon, e.g. a knife or gun, it matters not that any injury results. Thus, the constructive amendment to the indictment here meant that the prosecution no longer had to prove that Ebony suffered serious bodily injury or **any** injury for that matter. The constructive amendment, then, was substantive and could only be done by the grand jury.

[1] Ebony described her injuries as cuts (T. 117) but the medical records describe them as scratches. State's Ex. 7.

In *United States v. Nunez*, 180 F.3d 227 (5th Cir. 1999), the defendant was indicted on a charge of resisting arrest by assaulting a police officer with a firearm. At trial, the court gave the jury two instructions: one that allowed the jury to convict if it found that the defendant resisted arrest with the use of a firearm and another instruction allowing a guilty verdict of the jury found that the defendant resisted arrest by "forcibly assaulting, impeding, intimidating or interfering with a federal officer." *Nunez*, 180 F.3d at 230. The jury acquitted the defendant on the charge of assault under the first instruction but convicted him under the second instruction.

The Fifth Circuit reversed the conviction finding that the instruction's amending the charge was such that it allowed the defendant "to be convicted of a crime for which he had not been indicted." *Nunez*, 180 F.3d at 232.

> There is a substantial factual difference between resisting arrest using a firearm and doing so without using a firearm. While both charges stem from the same incident, the difference between using and not using a firearm is great enough that it allowed Nunez to be convicted of a crime for which he had not been indicted.

Id.

Just as in *Nunez*, the instruction changing the theory of the prosecution's case for the charge was a substantive amendment to the indictment. Because such amendments made be made only the grand jury, and that was not done here, the conviction and sentence for aggravated assault must be reversed.

2. Trial counsel was ineffective for failing to object to the constructive amendment of the indictment.

To establish a claim for ineffective assistance of counsel a petitioner must prove that under the totality of circumstances (1) the counsel's performance was deficient and (2) the deficient performance deprived the defendant of a fair trial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064(1984); *Benson v. State,* 821 So.2d 823, 825 (Miss.2002); *Burns v. State,* 813 So.2d 668, 673 (Miss.2001). "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Burns,* 813 So.2d at 673.

Mississippi law is clear that had counsel objected at trial to the amendment this Court would have had no choice but to reverse. *Moses v. State,* 795 So.2d 569 (Miss.App. 2001). Unquestionably, then, trial counsel's failure to object to the amending of the indictment constituted ineffective assistance of counsel. *Benbow v. State,* 614 So.2d 398 (Miss. 1993) (defendant denied effective assistance of counsel in plea to aggravated assault where he was represented by a law student under supervision of counsel and neither counsel nor student questioned potential defects on the face of the indictment).

A reasonably competent lawyer is expected to object to indictments that are clearly defective. *See, e.g., United States v. Jones,* 403 F.3d 604 (8th Cir. 2005)

(counsel ineffective in possession of firearm case for failing to challenge indictment as multiplicitous where the indictment included two counts of possessing the same firearm as two different dates); *Young v. Dretke,* 356 F.3d 616 (5th Cir. 2004) (counsel was ineffective in murder case for failing to move to dismiss untimely indictment); *Wilcox v. McGee,* 241 F.3d 1242 (9th Cir. 2001) (counsel ineffective in failing to move, on double jeopardy grounds, for dismissal of second indictment charging the same offense).

The failure of trial counsel to object here requires reversal of the conviction and sentence on count three.

3. The trial court erred in refusing to allow the defendant to cross-examine Ebony Beal about her past sexual relations with the defendant.

Michael Goldman's defense at trial was that the sex was consensual. In support of this defense, Michael intended to testify and produce evidence from several other witnesses, that he had previously had sex with Ebony. The prosecution moved to exclude this evidence (CP. 27) and the trial court granted the prosecution's motion on the grounds that 1) notice had not been proper under M.R.E. 412 and 2) the court believed that the 911 tape was conclusive on the issue of whether the sex was consensual or not. T. 216-17. Ebony, though, was allowed to testify that she had not had previous sexual relations with Michael. T. 115.

In excluding the evidence, the trial court never first determined whether some lesser sanction would have been justified under the circumstances. Implicit

in the concept of fairness provided in the Fourteenth Amendment is a criminal defendant's constitutional right to present a defense. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142 (1986). The Mississippi Court of Appeals has held that when a trial court is faced with excluding alibi witnesses because of a procedural violation, it should not automatically exclude the testimony. *Houston v. State*, 752 So.2d 1044, 1047 (Miss.App. 1999). "When the issue before the court involves the potential loss to the defendant of the vital right to call witnesses on his behalf, we think it proper for the trial court to consider whether one of the lesser sanctions in the rule might not adequately deal with the defendant's lack of diligence." *Id.* "If 'the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence,' it would be entirely appropriate to exclude the witness' testimony." *De La Beckwith v. State*, 707 So.2d 547, 575 (Miss. 1997) quoting *Taylor v. Illinois,* , 484 U.S. 400, 413, 108 S.Ct. 646 (1988).

In this case, defense counsel, prior to trial, provided the prosecution a list of witnesses and summaries of their testimony and, on the Friday before trial, had the witnesses available for the prosecution to interview. T. 215. One of the witnesses had only come to the attention of defense counsel at about the same time she apprised the prosecution of these witnesses. T. 215. Nevertheless, the trial court prohibited the defense from putting on any testimony regarding a previous sexual relationship between Michael and Ebony. T. 216. The court's ruling was

based not only on the violation of M.R.E. 412 but also because the court believed that

> even if there had been a prior sexual relationship between the defendant and the victim, Ebony Beal, it's very clear on that tape that she was not consenting; and I believe that it would be confusing to the jury to say that because – to allow a defendant to make an argument that, because she had had sex with him before or consented, that that is a defense to him coming in and committing the sexual battery at knifepoint.

T. 216.

It was not for the court, however, to determine the believability of the defense. To the extent that the trial court's exclusion was based on the court's determination that Michael's defense (that the sex was consensual) was not worthy of belief, the ruling was error. A defendant is entitled to present his theory of the case to the jury even where the defense strikes the court as "highly unlikely." *Hester v. State,* 602 So.2d 869, 872-73 (Miss.1992).

The trial court's prohibiting Goldman from putting this vital evidence before the jury was error. There was no proof that the failure to give notice exactly as required under Rule 412 was done to gain a tactical advantage. Therefore, the trial court's ruling preventing the defense from presenting its theory of the case was error.

4. Trial counsel was ineffective in failing to give proper notice so as to allow the Defendant to put on evidence of a previous sexual encounter with Ebony Beal.

In ruling that the defense could not put on any evidence of prior sexual relations between Michael and Ebony, the trial court ruled that the defense had not complied with Rule 412(c) (T. 216) which requires that the defense "make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin . . . ." M.R.E. 412(c). *See also Aguilar v. State*, 955 So.2d 386, 393 (Miss.App. 2006).

In failing to comply with Rule 412, trial counsel was ineffective and her ineffectiveness clearly prejudiced the defendant's case when it resulted in the exclusion of evidence which would have supported his defense that the sex was consensual.

That defense counsel's performance amounted to ineffective assistance of counsel should be obvious. As the Sixth Circuit has stated, "We note at the outset that a number of courts have found ineffective assistance of counsel in violation of the Sixth Amendment where, as in this case, a defendant's trial counsel fails to file a timely alibi notice and/or fails adequately to investigate potential alibi witnesses." *Clinkscale v. Carter,* 375 F.3d 430, 443 (6th Cir.2004). In another case, the same court found that "[a]n objectively reasonable attorney would have complied with Michigan law in providing the correct alibi notice. This is especially true because Petitioner's entire defense rested upon alibi." *Stewart v. Wolfenbarger*, 468 F.3d 338, 355 (6th Cir. 2006).

Because trial counsel's failure to follow Rule 412 resulted in the defendant's inability to put on important evidence substantiating his defense that the sex was consensual, trial counsel's performance was ineffective and defendant's resulting convictions and sentences should be reversed.

5. **The trial court erred in allowing the prosecution to admit Ebony's medical records.**

University Medical Center nurse Cheryl Flynt testified on behalf of the prosecution. On redirect, the prosecution had Flynt read the account of the incident taken from Ebony that was contained in the medical records and then introduced the medical records into evidence. T. 201-202; State's Ex. 7. The page-and-a-half narrative consisted of Ebony's out-of-court statement of what happened to her starting from the phone calls asking Ebony whether her mother and brother were home to the police kicking in the door. T. 201-202.

The records appear to have been introduced for no other purpose than to give the jury a prior consistent statement of the victim and, as such, their admission was reversible error. Even if the narrative was properly used to buttress Ebony's testimony, it was not admissible as substantive evidence and the narrative should never have been given to the jury to consider during their deliberations.

In *Quimby v. State*, 604 So.2d 741 (Miss. 1992), the defendant was charged with sexual abuse of his six-year-old daughter. The victim testified as to one incident but was unable to recall a previous instance of abuse. The prosecution

called a police detective to the stand to testify concerning the victim's out-of-court statement that she had previously been assaulted. On appeal, the Mississippi Supreme Court held that this testimony was error. "Our hearsay rule, M.R.E. 802, states in no uncertain terms that '[h]earsay is not admissible except as provided by law.' The prohibition is loud and clear. 'Hearsay is incompetent evidence.'" *Quimby*, 604 So.2d at 746 quoting *Murphy v. State*, 453 So.2d 1290, 1294 (Miss. 1984).

In *Caston v. State*, 823 So.2d 473, 488-489 (Miss. 2002), the trial court allowed the prosecution to question their witnesses about statements that they had made some 30 years previously – statements that corroborated their testimony at trial. The trial court did not, however, allow the prosecution to show the statements to the jury. On appeal, the Mississippi Supreme Court held that the trial court's ruling was error. "[E]liciting prior consistent statements in the absence of a challenge to the witness's veracity should be given only for the purpose of rebuttal." *Caston*, 823 So.2d at 489.

"[A]dmission of a prior consistent statement of a witness where the veracity of the witness has been attacked is proper but should be received by the court with great caution and only for the purpose of rebuttal so as to enable the jury to make a correct appraisal of the credibility of the witness. " *White v. State,* 616 So.2d 304, 308 (Miss.1993).

Allowing the jury to take Ebony's statement with them to the jury room as substantive evidence was error. It improperly highlighted her version of the

incident. The trial court should never have allowed the prosecution to admit the medical records into evidence. This error requires that Goldman's convictions and sentences be reversed.

6. The trial court erred in meeting with the jury prior to sentencing.

After the verdict was returned and the jury polled (T. 312), but before sentencing, the trial court recessed in order to "visit" with the jury. T. 312. This visit with the jury, outside the presence of the defendant, carried with it the danger that the sentencing judge would be exposed to information or sentiments that the defendant had no opportunity to rebut. As such, it was error.

The "use of undisclosed evidence against a criminal defendant ... is the type of error that may undermine the fairness of a proceeding and that certainly tarnished the public reputation of judicial proceedings." *United States v. Hayes,* 171 F.3d 389, 395 (6th Cir. 1999).

It is certainly true that a sentencing hearing is not a criminal trial, and many of the constitutional requirements of a criminal trial do not apply at sentencing. *See Williams v. New York,* 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). But when the court in *Williams v. New York* determined that the Constitution does not give a criminal defendant the right to cross-examine witnesses against him at sentencing, it was careful to point out that this did not mean that "sentencing procedure[s][are] immune from scrutiny under the due-process clause." *Williams,* 337 U.S. at 252 n. 18, 69 S.Ct. 1079. Other cases prove the point. *See, e.g.,*

Mempa v. Rhay, 389 U.S. 128, 137, 88 S.Ct. 254 (1967) (due process right to counsel at sentencing); *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194 (1963) (due process right to obtain evidence favorable to the accused, held by the government and "material either to guilt *or to punishment")* (emphasis added); *Townsend v. Burke,* 334 U.S. 736, 741, 68 S.Ct. 1252 (1948) (due process right to ensure that sentence was not based upon "assumptions concerning [defendant's] criminal record which were materially untrue"); *cf. Gardner v. Florida,* 430 U.S. 349, 362, 97 S.Ct. 1197 (1977) (plurality) (qualifying *Williams v. New York* in the context of capital cases and holding that defendant had a due process right not to receive a death sentence based on information that he "had no opportunity to deny or explain").

Mississippi recognizes that a defendant has the right to review information used in determining his sentence. *Edwards v. State,* 615 So.2d 590, 598 (Miss.1993) (holding that defendant has no right to a presentencing report but does have a right to review it if one is used). Once the trial court talked to the jurors in this case off the record and prior to sentencing Michael Goldman, Goldman was entitled to know what was said and to respond accordingly. Because Goldman was denied this opportunity, the sentences imposed must be vacated and remanded.

7. The errors taken together are cause for a new trial.

The Mississippi Supreme Court has recognized that several errors not individually sufficient to warrant a new trial may, when taken together, require reversal. *Stringer v. State*, 500 So.2d 928, 946 (Miss. 1986); *Hickson v. State*, 472 So.2d 379, 385-86 (Miss. 1985). In this case, the court made several errors in its rulings that, cumulatively, had the effect of denying Michael Goldman a fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 298, 93 S.Ct. 1038, 1047 (1973) (reversing based on various evidentiary errors resulting in a denial of due process). If this Court finds that no single error in this case calls out for reversal of the convictions and /or sentences, it should nonetheless consider a new trial based on the plethora of errors that prevented Michael Goldman from obtaining due process.

Conclusion

For these reasons, Michael Goldman's convictions and sentences must be vacated or reversed and remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Julie Ann Epps, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the following:

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Hon. William E. Chapman
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This, the 10th day of August, 2007.

Julie Ann Epps