# IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**JERRY DEMETRIUS DELOACH** — **APPELLANT**



**V.** — **NO. 2006-KA-2103-COA**

**STATE OF MISSISSIPPI** — **APPELLEE**

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## BRIEF OF THE APPELLANT

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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

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| **V.** | **NO. 2006-KA-2103-COA** |
| **STATE OF MISSISSIPPI** | **APPELLEE** |

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Jerry Demetrius Deloach, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable James T. Kitchens, Jr., Circuit Court Judge

This the 6th day of June, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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# BRIEF OF THE APPELLANT

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## STATEMENT OF THE ISSUES

**ISSUE NO. 1: WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GRANT THE SUBMITTED JURY INSTRUCTION ON THE DEFENSE ALTERNATE AND OR LESSER INCLUDED OFFENCE THEORY OF THE CASE.**

**ISSUE NO. 2 : WHETHER THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE DECLARE A MISTRIAL FOR INEFFECTIVE ASSISTANCE OF COUNSEL**

## STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lowndes County, Mississippi, and a judgement of conviction for the crime of burglary of a church against Jerry Deloach ["Deloach"] resulting in a sentence of fourteen (14) years following a trial commenced on November 27, 2007, Honorable James T. Kitchens, Circuit Judge, presiding. Deloach is presently incarcerated under the supervision of the Mississippi Department of Corrections.

## FACTS

Maxine Hall was the pastor at Full Gospel Ministry. On Sunday February 13, 2005, Deloach arrived at the 11:00 service. Deloach asked for help from the church, saying he needed $200 to buy a car. Pastor Hall took him into an inner office, the finance office, where she gave him the money. (T. 86-88)

When she left the church that day, the church was "intact." The next day when she returned, a deacon and policeman were at the church. The door had been kicked in. In the finance office, she observed torn boxes and scattered papers. On the desk were two checks, on the church's account, with the name "Jerry Deloach" on them. She had not authorized any checks be issued to Deloach. However, even though valuable property was in the building, nothing was stolen from the church. (T. 89-91)

After a suppression hearing, Louis Alexander, a detective with the Columbus Police Department testified that he responded to a burglary at the Full Gospel Church. (T. 133-134)
He observed that a side door had been kicked in and splintered. Inside the church he observed drawers open and papers strewn. He found two single checks, torn from the check book, with the name "Jerry Deloach" on the signature line. (T. 135-141) The checks had been lost.

Alexander went to talk to Deloach and took a statement from him. The statement was reduced to writing by Alexander, and signed by Deloach. A DVD of the interview was played for the jury. (T. 141-148) Although no musical instruments were taken from the church, the district attorney inquired of Detective Alexander, if, musical instruments were stolen, how would they be converted to cash. Alexander answered they were typically pawned. (T. 148)

On cross examination, Alexander agreed that Deloach had been induced into his admission with offers that Alexander wanted to help him. (T. 156) Alexander also deceived Deloach, telling him that his fingerprints were found on the checks. (T. 158) After thirty minutes, Deloach told the investigators that he broke in and intended to steal. Again, the evidence showed that nothing was taken, although there were

expensive sound equipment items there for the taking.

Redirect involved a question concerning the techniques used in the questioning of Deloach: "These are the same techniques they're using for that matter in Iraq right now, are they not?" The prosecutor indicated the use of this message could make an investigator a "hero" by saving "1,000 American lives." This was followed by a question of "what normally happens in these interrogations." Alexander then explained that "normally" no one just admits breaking "into the house" taking the TV and taking "it to the pawnshop." This is "get[ting] the truth out of them." (T. 168-169, R.E. 9-10) These questions and answers were without objection.

At this juncture, the State rested and the defense moved for a directed verdict. Deloach was advised by the court concerning his right to testify and reminded that the court had ruled that Deloach's prior convictions could be used to impeach him. (T.171-173)

In the opening statement, Counsel for Deloach stated that the defense was that Deloach did not have an intent to steal, "once [he] got in there."

Deloach then testified on his own behalf. He preemptively admitted both Youth Court problems and a conviction for larceny. He stated he pled guilty and was sentenced to a term in Parchman. (T. 176-177) He had been out since July 2004 and joined the Full Gospel Ministry Church in October of that year. He went every Sunday and sang in the choir.

Deloach specifically denied breaking the door to the church. He denied going into the church whatsoever. (T. 180-181) He explained that his statement to Alexander was induced by his understanding that he would clear the file and accordingly not be revoked if he simply admitted to the burglary. (T. 181-182) He was scared about returning to Parchman and believed his false confession would prevent his return. Cross examination by the State revealed that Pastor Hall actually "had [Deloach] sign a check " (T.189) to provide

a "paper trail" of the $200.00 benevolence gift to Deloach, thus showing that Deloach actually lawfully signed at least one check while in the church. He did not agree to the State's suggested theory of the case, that because he was aware of collection monies, he signed the two checks found to cover for his intention to steal the collection receipts.

Upon the conclusion of Deloach's testimony, the defense rested.

Rebuttal by the State included a denial by Alexander that he told Deloach he could avoid the penitentiary by agreeing that he had burglarized the church. Pastor Hall indicated Deloach could have seen money being counted in the next room when she gave him $200.00.

Thereupon the State finally rested.

## SUMMARY OF THE ARGUMENT

The defense submitted an instruction on its theory of the case, that Deloach did not intend to commit larceny in the church, but instead had only committed vandalism. This alternative theory should have been submitted to the jury as a Defendant is entitled to have the jury instructed on his theory of the case, even where it is an alternate theory, contradicted by the defendant himself. Furthermore, as nothing was stolen and there was certainly testimony of vandalism, the alternate theory was supported by the evidence.

Deloach's trial counsel, in his closing argument, virtually admitted Deloach's guilt, and effectively impeached and discredited his client's testimony. Such a lack of loyalty to his client should be, per se, ineffective assistance of counsel. It was compounded by the highly prejudicial and irrelevant testimony concerning what normally happens with larceny and pawning of the stolen goods, and how the investigator "gets" to the "truth." Not only did the defense impeach the defendant and his testimony of the events; but it allowed irrelevant testimony by Detective Alexander that the method he used in Deloach's confession is

one to "get the truth out of them."

## ARGUMENT

### ISSUE NO. 1: WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GRANT THE SUBMITTED JURY INSTRUCTION ON THE DEFENSE ALTERNATE AND OR LESSER INCLUDED OFFENCE THEORY OF THE CASE.

There is perhaps no more cardinal right, and one that is more established in the State of Mississippi, than the defendant's right to present his theory of the case, and for the jury to be instructed thereon. Upon the conclusion of the instant trial, in which, as set forth in the recitation of facts, there was no evidence adduced showing that anything was taken during the break-in at the Full Gospel Ministry Church. The evidence showed a door was splintered, that papers were scattered on the floor and drawers opened. (T. 136-139) This evidence , when viewed in the light favorable to the defendant, is entirely consistent with an intent not to steal but to vandalize. "[I]tis well settled law of this State that a defendant has a fundamental right to present his theories of the defense to the trial jury no matter how meager the evidence may be in support thereof or no matter how unlikely the evidence may be." *Womack v. State*, 774 So.2d 476, 484 -485 (Miss. App. 2000), (citing *Macmillan v. City of Jackson*, 701 So.2d 1105 (¶ 13) (Miss.1997))

Deloach, through his trial counsel, submitted an instruction[1] on the crime of vandalism, (T. 205, C.P. 56, R.E.5) The State argued against the instruction claiming "there was no basis in the evidence. This defendant testified that he did not go into the church at all." (T. 205) As set forth above, there indeed was evidence, more than meager, that the crime of vandalism or destroying or defacing church property under Miss. Code Ann. § 97-17-39, which would be a lesser non included offense. "[A]lesser non-included offense applies where there is evidentiary support that a defendant is guilty of a lesser charge arising from the same

[1]The trial court viewed this instruction as a lesser included offense instruction. (T. 205)

nucleus of operative facts. *Green v. State*, 884 So.2d 733, 737 (Miss. 2004) (citing *Meade v. State*, 539 So.2d 1324, 1329 (Miss.1989))

The trial court refused any instruction on the lesser non included offense of vandalism or destroying or defacing a church ruling that there was no factual basis for it, relying on *Heidel v. State*, 587 So. 2d 835 (Miss. 1991) This ruling was contrary to the evidence presented at trial. It is of no consequence that Deloach testified that he had not broken into the church. In the recent case of *Brown v. State*, ___So. 2d___ , 2007 WL 152222, 8 (Miss. App. Jan. 23, 2007) The Court of Appeals clearly affirmed that a criminal defendant is entitled to have an alternate and even inconsistent theory of defense submitted to the jury. This is so where, as in *Brown, Id,* the defendant in his own testimony does not support the defense. Brown claimed to not have sold cocaine while asserting the alternate defense of entrapment. Deloach asserts the alternate defense of malicious destruction or vandalism, even while denying entering the church. As stated in *Brown, Id.* at p. 8, (citing *Love v. State*, 441 So. 2d 1353, 1356 (Miss. 1983)) "it is fundamentally unfair to deny the jury the opportunity to consider the defendant's defense where there is testimony to support the theory."

After the trial court's ruling, counsel for Deloach made this ambiguous statement: "I agree there's no basis for it now. I'm not going to withdraw it to preserve the record." (T. 205) Were this statement to be held to have waived this viable issue, it would dovetail neatly into the following issue.

**ISSUE NO. 2 : WHETHER THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE DECLARE A MISTRIAL FOR INEFFECTIVE ASSISTANCE OF COUNSEL**

There is one instance where a defense counsel's actions at trial can be said to be per se ineffective assistance of counsel, and that is where the attorney denounces his client's testimony as false. That counsel in effect impeaches his own client, rendering the defendant's version of events as untrue and effectively vouch-safing the State's theory of the case:

> Strickland itself recognizes that a lawyer has a duty to represent his client not only with diligence but with loyalty. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984). See also, Anders v. California, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493, 498 (1967); U.S. v. Alvarez, 580 F.2d 1251, 1256 (5th Cir.1978). No more devastating breach of this duty can be imagined than for a lawyer to denounce his client before the trier of fact as untruthful.

*Ferguson v. State,* 507 So.2d 94, 97 (Miss. 1987) Such a denunciation is painfully apparent in the case at bar. In his closing argument, Deloach's counsel directly rebutted Deloach's testimony that he had not broken into the church:

> Okay. I am convinced that you believe from the evidence that Jerry broke into the church. I am convinced from the evidence that you probably believe that Jerry strew all these papers all these papers out that's shown in the photographs...and created a mess. (T. 217, R.E. 11)

Deloach testified that he did not go into the church and that he was tricked into saying he did by being led to believe the file would then be closed. Such an argument simply contradicts Deloach. This says that Deloach's attorney has found the evidence that directly contradicts Deloach so compelling that he believes it himself, or at least does not see how a jury could disbelieve it. It portrays Deloach as a liar to the jury. How can the jury then believe that he never intended to steal? The Mississippi Supreme Court has held that to impeach your client as a liar is, per se, ineffective assistance, and is inherently prejudicial. "[A]n independent violation of the Sixth Amendment occurred in the present case when Ferguson's lawyer denounced him as a liar in open court before the trier of fact, and that this was an evil of such magnitude that no showing of prejudice is necessary for a reversal." *Ferguson , Id.,* at p.97

This virtual admission that Deloach lied is amplified and compounded where trial counsel fails to object to detective Alexander's testimony that his Iraq interrogation techniques get at the truth, thus affirming as true, by irrelevant opinion of a lay witness, that Deloach was truthfully admitting the crime:

> You have to press them. You have to get the truth out of them if you can get the truth. A lot of times you can't get it. Most of the time you can. (T. 169)

The result of these two events presented a message to the jury is that Deloach told the truth in his admission and lied on the stand. This case is almost entirely dependant on the confession to prove both that Deloach broke into the church and that he had the intent to steal. With the confession affirmed as the truth without objection and Deloach's testimony that he did not break in and was tricked into making a false admission, His conviction was assured and his right to a fair trial was violated. As the prosecuting attorney stated in his final statement to the jury; " At the end of the day, the only question you really need ask yourself is is it true? Because if it is, nothing else really matters." (T. 227, R.E. 13)

For the Appellant to prevail on a claim of ineffective assistance of counsel on direct appeal, the record must verify that the complained of actions constituting ineffective assistance were of constitutional proportion. *Clayton v. State,* 946 So. 2d 796 (Miss. App. 2006) It would appear to be inarguable that the impeaching and disavowing argument made against Deloach's testimony is clearly ineffectiveness of constitutional proportion.

## CONCLUSION

Jerry Deloach is entitled to have his conviction for burglary of a church reversed and remanded for a new trial.

Respectfully submitted,

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BY: _____

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## CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Jerry Demetrius Deloach, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Columbus, MS 39703

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This the 6th day of June, 2007.

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