

**IN THE COURT OF APPEALS OF MISSISSIPPI  
2006-TS-00719**

**JOSH KIRK DAVIS**

**APPELLANT**

**V.**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF OF APPELLANT  
ON APPEAL FROM THE CIRCUIT COURT OF YAZOO COUNTY**

**COUNSEL FOR APPELLANT**

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2006-TS-00719**

**JOSH KIRK DAVIS**

**APPELLANT**

**V.**


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

1. State of Mississippi .....Appellee
2. James H. Powell, III, Esq. ....Attorney for Appellee
3. Josh Kirk Davis.....Appellant
4. Cynthia A. Stewart, Esq. ....Attorney for Appellant

  
\_\_\_\_\_  
Cynthia A. Stewart  
Attorney of record for Appellee

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**STATEMENT REGARDING ORAL ARGUMENT**

Appellant requests oral argument.

### **STATEMENT OF ISSUES**

- I. TRIAL COUNSEL WAS INEFFECTIVE UNDER MISSISSIPPI AND UNITED STATES CONSTITUTIONS IN FAILING TO INVESTIGATE AND DISCOVER A DEFENSE TO THE OFFENSE.
- II. DAVIS WAS DENIED DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ART.3, SECTIONS 14, 16 AND 24 OF THE MISSISSIPPI CONSTITUTION.
- III. DAVIS WAS DENIED DUE PROCESS AND A FAIR TRIAL AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ART. 3, SECTIONS 14, 16, 24 AND 26 OF THE MISSISSIPPI CONSTITUTION.

## **STATEMENT OF THE CASE**

### **(i) Course of Proceedings**

The Plaintiff/Appellant in this action is Josh Kirk Davis (hereinafter “Davis”). The Defendant/Appellee is the State of Mississippi (hereinafter “State”). Davis was indicted in the Circuit Court of Yazoo County, Mississippi of the capital murder of William “Bubba” Arnold. **At the time of the crime, Davis was 15 years old.** He was tried by a jury and convicted of murders less than capital and sentenced to life in prison. He appealed his conviction to the Mississippi Supreme Court which affirmed his conviction on July 17, 2003. *Davis v. State*, 849 So.2d 1252 (Miss. 2003). On October 5, 2004, Josh Davis filed Motion (Cause No. 2004-3177) Application for Leave to File Motion for Post-Conviction Relief with the Mississippi Supreme Court, which granted an evidentiary hearing on November 3, 2004.

### **(ii) Statement of Facts From Trial**

During the night of July 29, 2000, and the early morning hours of July 30, 2002, William “Bubba” Arnold, Davis, Blake McNeer, Megan Smith, Michelle Campbell and Nicki Campbell were swimming and fishing in a lake at a deer camp in rural Yazoo County. At some point, while the others were swimming, the forty-six (46) year old Arnold made unwelcome sexual advances toward the seventeen (17) year old Nicki Campbell. *Id.* at 1253.

After learning of the advances, McNeer confronted Arnold who brandished a shotgun and told the others to leave the property. They went to Michelle Campbell’s house where, a short time later, Mike Campbell, Michelle’s father, and Clifton Campbell, Mike’s brother and Nicki’s father, returned. Michelle and Davis informed Clifton of what Arnold had done and Clifton left the house with Davis. *Id.*

In his third statement to police, David claimed that he and Clifton had gone to Arnold’s cabin where Clifton pointed a shotgun at him and ordered him to fire in the cabin where Arnold



supposedly was. Davis took the gun and fired three shots through the blind in the door which had glass missing. Arnold was killed by a shotgun blast to his face. *Id.*

At trial, Megan Smith and Michelle Campbell testified that after David and Clifton left the house, they drove out to the camp where they saw Clifton and Davis running from the cabin with Clifton holding the shotgun. Clifton pointed the gun at the girls and told them not to tell or he would kill them. Tr. 207, 408. Later when the girls returned to the house, Davis told them he had fired the shotgun into the cabin. (Trial Tr. 375, 429).

Prior to trial, both Smith and Campbell had told police that Clifton had said he had shot Arnold and that Davis was with them at the time of the crime. (Trial Tr. 206-07).

**(iii) Statement of Facts from Post-Conviction Evidentiary Hearing<sup>1</sup>**

Dr. William Owen testified as a medical expert regarding the autopsy and cause of death. After reviewing the autopsy report of the victim, he concluded that the first shot was fired into the left side of the victim's head from very close range based on the pellets in the back of the wound. The second wound was a distant wound.

The first wound to the left side of the head was fatal; any subsequent wounds were fired into a dead body. Tr. 39-41. Dr Owen further pointed out that at the time the fatal shot was incurred, the victim was raising his left hand in a defensive manner. Tr. 41-42; Ex. P-2; Ex. P-3. This wound, according to the doctor, started with the victim alive as evidenced by the defensive action taken by the victim upon seeing the weapon and was **undoubtedly instantly fatal**. (Tr. 42).

Dr. Owen testified that a semi-automatic 12-gauge shotgun ejects from the right and near. (Tr. 43-44). Calton Shaffer, an investigator for the Yazoo County Sheriff's Department testified that in no statement did Mr. Davis place himself inside the room when he fired the shot. (Tr. 68).

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<sup>1</sup> Cites are to transcript of evidentiary hearing.

Ricky Shivers, the Yazoo County medical examiner, testified regarding the room in which the deceased was found. (P-8).

Stark Hathcock, the State's firearm's expert, likewise testified that the gun in question, a semi-automatic 12-gauge shotgun, ejects to the right and rear. (Tr. 81). He further testified that the shells would not tend to go far. (Tr. 82).

### **SUMMARY OF THE ARGUMENT**

Trial counsel was ineffective under Mississippi and United States Constitutions in failing to investigate and discover a defense to the offense. The testimony of all of the witnesses presented at the evidentiary hearing, regarding the mechanism of the firearm (Owen Tr. 43-44; Hathcock Tr. 82-82), the layout of the room and location of the body (Ricky Shivers, Tr. 70, P-8) and the fatal shot being fired inside the room (Owen Tr. 42) support a defense likely to lead to acquittal: that Josh Davis fired either into the cabin from outside or into a dead body, but did not and could not have fired the shot that killed the victim. This defense was not presented to the jury due to the ineffectiveness of trial counsel. Secondly, Josh Davis was denied due process and a fair trial in violation of his sixth and fourteenth amendment rights under the United States Constitution and Art. 3, Section 14, 16 and 24 of the Mississippi Constitution due to the failure of the jury instructions to adequately define aiding and abetting. Finally, Josh Davis was denied due process and a fair trial and his right to effective assistance of counsel in violation of his sixth and fourteenth amendment rights under the United States Constitution and Art. 3, Sections 14, 16, 24 and 26 of the Mississippi Constitution due to the failure of trial counsel to see that the jury was properly instructed on the essential elements of the offense.

### **ARGUMENT**

#### **I. TRIAL COUNSEL WAS INEFFECTIVE UNDER MISSISSIPPI AND UNITED STATES CONSTITUTIONS IN FAILING TO INVESTIGATE AND DISCOVER A DEFENSE TO THE OFFENSE.**

At trial, defense counsel presented no coherent defense. On the one hand, counsel relied on the defense of duress. On the other hand, the defense made a half-hearted attempt to suggest that someone else had fired the fatal shots and tried to set up Josh for the crime.

Duress, however, is not a defense to murder so that counsel were unable to secure an instruction on that defense. In fact, the district attorney instructed the jury that duress was not a defense to the crime. (Trial Tr. 492).

Although counsel seemed to be arguing the guilt of someone other than Davis, counsel did almost nothing to investigate and present this as a credible defense. Counsel failed to timely obtain discovery, investigate the crime scene or hire an expert to substantiate their theory that someone other than Davis fired the fatal shots and that Davis, if he had fired shots at all, fired shots into a corpse.<sup>2</sup>

**The prosecution's theory at trial was that Davis fired three shots from a shotgun through an opening in the doorway of the cabin which struck the victim causing him to die. (Trial Tr. 116-28).**

**As Dr. Owen testified, the first shot was fired into the left side of the victim's head from very close range inside the cabin based on the pellets in the back of the wound. The second wound was a distant wound. The testimony of all of the witnesses regarding the mechanism of the firearm (Owen Tr. 43-44; Hathcock Tr. 82-82), the layout of the room and location of the body (testimony of Ricky Shivers, Tr. 70, P-8) and the fatal shot (Owen, Tr. 42), support a defense likely to lead to acquittal: that Josh Davis fired either into the cabin from outside or into a dead body, but did not and could not have fired the shot that**

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<sup>2</sup> Wesley Evans testified at the evidentiary hearing that he was appointed to assist retained counsel in representing Josh Davis. Mr. Evans further testified that had time and circumstances permitted, he would have hired an expert. (Tr. 73-74). Mr. Evans raised the ineffectiveness of co-counsel in direct appeal. *Davis v. State*, 849 So.2d 1252 (Miss. 2003).

**killed the victim. This defense was not presented to the jury due to the ineffectiveness of trial counsel.**

The first wound to the left side of the head was fatal; any subsequent wounds were fired into a dead body. (Tr. 39-41). Dr Owen further pointed out that at the time the fatal shot was incurred, the victim was raising his left hand in a defensive manner. (Tr. 41-42; Ex. P-2; Ex. P-3). This wound, according to the doctor, started with the victim alive as evidenced by the defensive action taken by the victim upon seeing the weapon and was **undoubtedly instantly fatal**. (Tr. 42).

From the autopsy report and the testimony and exhibits it appears that three shotgun blasts did indeed strike the decedent. However, two of these blasts appear to have come from his left side rather than from the doorway. Since there is a defensive wound to the left hand, this means that the fatal shots must have been fired from the left since the deceased could not have survived any one of the shotgun blasts. In other words, the defensive wound could only have been made by the first shotgun blast because the victim would have been dead when struck by the second or third shots. Therefore, the fatal shot was fired from the left, not from the doorway, according to the testimony of Dr. Owen. This testimony is supported by that of Crime Lab ballistics expert, Stark Hathcock. (Tr. 81-82).

Moreover, two spent cartridges were found at the base and to the right rear of the bean bag pillow in front of the couch on which the decedent was found. This is where they would be expected to be had they been fired from the left of the victim rather than from the doorway. *Id.* In other words, the position of these two shells is consistent with shots from the left, but not from the doorway. *Id.* See Exhibits P-2 and P-3.

Moreover, Dr. Owen testified and as the autopsy shows, the shotgun blast to the right side of the decedent's head was fired at a downward angle different from that of the other two shots.

The trajectory of the shots to the left was up at approximately a thirty to forty degree angle; whereas the one to the right side was essentially downward. (Trial Tr. 148). Moreover, there is a spent cartridge to the right rear of the doorway which is where this round would have been expected to have been ejected by the firearm in question which ejects to the right of the gun. *Id.* In other words, the only shot which is consistent with having been fired from the doorway was not the fatal shot—an alternative theory which is consistent with someone other than Davis having fired the fatal shots. *Id.*

Had counsel obtained the laboratory reports sufficiently in advance of the trial, they could have discovered a potential defense in time to employ an expert who could have disputed the state's theory of the case.<sup>3</sup> For example, Dr. Owen, a physician with extensive experience in gunshot wounds, testified to a degree of reasonable medical certainty that the victim was dead at the time that any shot was fired through the doorway. (Tr. 39-41). The only shots anyone says were fired by Josh Davis were fired from the doorway.

This Court is familiar with the two-part test for claims of ineffective assistance of counsel. First, a convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. Second, the defendant must show that the acts or omissions charged prejudiced his defense; *i.e.*, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 690-694 (1984); *Davis v. State*, 743 So.2d 326 (1999). The *Strickland* Court elucidated this test further: "When a defendant challenges a

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<sup>3</sup> Wesley Evans testified at the evidentiary hearing that he was appointed to assist retained counsel in representing Josh Davis. Mr. Evans further testified that had time and circumstances permitted, he would have hired an expert. (Tr. 73-74). Mr. Evans raised the ineffectiveness of co-counsel in direct appeal. *Davis v. State*, 849 So.2d 1252 (Miss. 2003).

conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.” *Id.*, 466 U.S. at 695.

The record in this case demonstrates that counsel’s failure to investigate and present a coherent defense resulted in extreme prejudice to the defense. Accordingly, Davis was denied his constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and under Article III, Section 26 of the Mississippi Constitution of 1890, thus requiring post-conviction relief.

The entire case must be examined, bearing in mind that Davis has been convicted and has been sentenced to a term of life imprisonment. The lapses by Davis’s counsel must be viewed “. . . in the context of the nature and seriousness of the charges and the potential penalty. . . . The determination of whether defendant received reasonably effective assistance is predicated on the entire record and the totality of the circumstances surrounding the trial performance.” *State v. Tokman*, 564 So.2d 1339, 1343 (Miss. 1990). Upon review of the record, it is apparent that Davis did not receive effective assistance of counsel, and as a result he suffered such severe prejudice that he was denied his constitutional right to a fair trial. In any event, the claims of ineffective assistance of counsel presented here are sufficiently concrete to require an evidentiary hearing. *Tokman, supra*; *Faraga v. State*, 557 So.2d 771 (Miss. 1990).

The Sixth Amendment “envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 675 (1984). Courts have long recognized that in order to render constitutionally adequate effective assistance of counsel, an attorney must present “an intelligent and knowledgeable defense” on behalf of his client. *Caraway v. Beto*, 421 F.2d 636, 637 (5<sup>th</sup> Cir. 1979).

In order to discover an intelligent available defense, an attorney must conduct an investigation of the facts as well as the applicable law. *Davis v. State*, 743 So.2d 326, 338 (Miss. 1999). An attorney provides ineffective assistance if he fails to perform an independent investigation of the facts, circumstances, pleadings and laws. *Rummell v. Estelle*, 590 F.2d 103, 104-05 (5<sup>th</sup> Cir. 1979).

In *Payton v. State*, 708 So.2d 559 (Miss. 1998), the defendant was charged with rape. The Mississippi Supreme Court found that defense counsel's failure to investigate the case against the defendant amounted to ineffective assistance of counsel. The failure to investigate included failing to investigate prior convictions of the alleged victim, failing to interview and subpoena witnesses, failing to take any pictures during the attorney's only visit to crime scene, failing to take statements from possible witnesses, failing to interview the victim's roommate, and failing to inquire into the alleged victim's background. "[P]retrial investigation is of utmost importance," the Mississippi Supreme Court stated in *Payton*. *Payton*, 708 So.2d at 562. "There is no basic question that the defendant is entitled to a basic defense." *Id.*

Insofar as counsel had a strategy, part of it seemed to be to suggest that someone other than Davis fired the shots. However, counsel failed to put on expert testimony that the fatal shots could and probably were fired from someplace other than the doorway even though an expert could have provided reasonable doubt as to whether the shots which struck Arnold were fired by Davis.

There was evidence presented at the trial that Dr. Steven Hayne, who performed the autopsy, did not determine the time of death; nor did investigators test Clifton Campbell, Josh Davis or anyone else for gunshot residue; nor did they recover any fingerprints from the shotgun or the shotgun shells. (Tr. 238, 246). Thus, the evidence at trial did not exclude the possibility that someone else shot Arnold.

In the murder case of *Frias v. State*, 722 P.2d 135 (Wyo. 1986), there was some evidence that the victim's death may have been a suicide rather than a murder. Trial counsel, however, failed to investigate a suicide defense and failed to procure expert testimony that would have supported such a defense. "There is no question that under the particular facts and circumstances of this case, counsel's failure to investigate the suicide defense undermines confidence in the outcome," the court stated. "Testimony of experts to refute the State's theory that the victim was shot in the back was crucial to the defense." *Frias*, 722 P.2d at 146.

In *Rogers v. Israel*, 746 F.2d 1288 (7<sup>th</sup> Cir. 1984) the court held that counsel was ineffective for failing to call forensic experts who would have discredited the state's theory of how the crime occurred. See also, *Jones v. Thigpen*, 788 F.2d 1101 (5<sup>th</sup> Cir. 1986) cert. den. 479 U.S. 1087 (1987) (failure to obtain expert to support defense was professionally unreasonable and prejudicial).

Trial counsel's failure to obtain expert assistance cannot be chalked up to strategy. Trial counsel defended the case, in part, on the theory that someone other than Davis had killed Arnold. The failure of Davis's trial counsel to provide expert testimony on this defense was ineffective assistance of counsel.

**II. DAVIS WAS DENIED DUE PROCESS AND A FAIR TRIAL  
IN VIOLATION OF HIS SIXTH AND FOURTEENTH  
AMENDMENT RIGHTS UNDER THE UNITED STATES  
CONSTITUTION AND ART. 3, SECTIONS 14, 16 AND 24  
OF THE MISSISSIPPI CONSTITUTION.**

The jury instructions as a whole fail to tell the jury in any coherent fashion what they must find in order to find Josh Davis guilty as an aider and abettor,

Instruction No. 6, requested by the State as S-5, instructs the jury on aiding and abetting:

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by that person through the direction of another person as his or her



agent, by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

If another person is acting under the direction of the defendant or if the defendant joins another person and perform acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such persons just as though the defendant had committed the acts or engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others, it is necessary that the accused associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond [sic] reasonable doubt that the defendant was a participant and not a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and **that the defendant voluntarily participated in its commissions [sic] with the intent to violate the law** [emphasis added].

C.P. 79.

The vice of this instruction is readily apparent. In the last paragraph it tells the jury to find Davis guilty if Clifford Campbell committed the crime of murder and Davis “participated in its commissions [sic] with the intent to violate the law.” C.P. 79. It does not confine the jury to a finding that Davis intended to commit the crime of murder but rather if he intended to violate any law. As it stands, the jury could have found Davis guilty if he was present, Campbell committed the murder, and Davis assisted him in covering it up. In other words, Davis could have been convicted under this instruction if he was merely an accessory after the fact.

Being an accessory after the fact, without some act to assist or encourage the actual crime, is insufficient to support a guilty verdict. The defendant must share the community of intent to commit each and every element of the offense. *Hornburger v. State*, 650 So.2d 510 (Miss. 1995). As the Mississippi Supreme Court has said, a conviction for aiding and abetting requires proof of

a community of unlawful purpose at the time the act was committed. It involves some participation in the criminal act, **in furtherance of the common design** either before or at the time the criminal act is committed. *McNeer v. State*, Miss. 87 So.2d 568 [emphasis added].

*Shedd v. State*, 228 Miss. 381, 87 So.2d 899, 900 (1956). In other words, an aider and abettor must possess the same intent as the principal. *Welch v. State*, 566 So.2d 680, 684 (Miss. 1990).

It is clear, therefore, that in order to convict Davis of murder, the state had to prove both that he knowingly participated before or at the time of the crime and that he did so with the intent to further the crime of murder, not just any crime, and that merely facilitating the crime by helping to cover it up is an insufficient basis for conviction as a principal. *Shedd v. State*, 87 So.2d at 900. *See also, United States v. Falcone*, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed.2d 328 (1940) [conspirator must do more than just perform acts which further the aims of the conspiracy, he must commit acts with knowledge of the conspiracy and with intent to further its aims]; *United States v. Gaviria*, 740 F.2d 174, 184 (2<sup>nd</sup> Cir. 1984) [“[A]bsent evidence of . . . purposeful behavior [to further the aims of the principal], mere presence at the scene of a crime, even coupled with knowledge that at that moment a crime is being committed, is insufficient to prove . . . membership in a conspiracy’ [citation omitted]”]; *Gray v. State*, 487 So.2d 1304 (Miss. 1986) [holding instruction to be error, albeit harmless because of other instructions, where it failed to require that an act done knowingly in furtherance of a conspiracy be done with intent to further it].

In a case similar to the one here, the court in *Martinez v. Borg*, 937 F.2d 422 (9<sup>th</sup> Cir. 1991) found constitutional error in a California state court’s aiding and abetting instruction which failed to require an intent to aid the principal’s crime because the jury could have found the defendant guilty without finding facts necessary to find intent.

Under the instructions, the jury could have found Davis guilty based on a finding that Campbell killed Arnold and Davis had an intent to cover it up.

The Mississippi Supreme Court has repeatedly found fundamental error in aiding and abetting instructions despite an attorney's failure to object where the jury was misled about the essential elements of the crime. *E.g.*, *Berry v. State*, 728 So.2d 568 (Miss. 1999) [Plain error where instructions allowed conviction as accessory without a finding that the crime was ever completed]; *Lester v. State*, 744 So.2d 757, 759 (Miss. 1999) [Reversing for instruction which allowed defendant to be convicted for doing any act which was an element of the offense without finding that was also present at the time, consenting to and encouraging crime even though issue was not raised in briefs on petition for writ of certiorari].

Because the jury instructions may have led to the defendant being convicted without a finding of the requisite criminal intent, this Court should reverse his conviction. *Herring v. State*, 134 Miss. 505, 99 So. 270 (1924); *Earl v. State*, 168 Miss. 124, 151 So. 172, 173 (1933); *U.S. Const.*, Amends. VI and XIV and the Mississippi Constitution, Art. 3, §§14, 16, 24 and 26.

**III. DAVIS WAS DENIED DUE PROCESS AND A FAIR TRIAL AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ART. 3, SECTIONS 14, 16, 24 AND 26 OF THE MISSISSIPPI CONSTITUTION.**

Counsel's failure to see that the jury was properly instructed on the essential elements of the offense is yet another glaring example of constitutional ineffectiveness. *Gray v. Lynn*, 6 F.3d 265 (5th Cir. 1993). Counsel did not object to the instruction on the ground that it dispensed with a finding on the essential element of intent to commit murder. (Tr. 460).

Counsel was clearly ineffective in failing to object to an instruction which dispensed with a finding on an essential element. In *Martinez v. Borg*, 937 F.2d 422, 423 (9th Cir. 1991), the defendant was convicted of aiding and abetting. The instruction in question failed to require the defendant to have the specific intent to aid the principal's crime. The Ninth Circuit held this to be

constitutional error. *Accord, Flowers v. Blackburn*, 779 F.2d 1115 (5th Cir. 1986) [Instruction which relieved state of burden of proving accomplice's intent was constitutional error].

In fact, in a case not dissimilar to this one, the Fifth Circuit found that counsel rendered prejudicially ineffective assistance of counsel in failing to object to a jury instruction dispensing with intent. *Gray v. Lynn*, 6 F.3d 265 (5th Cir. 1993). Here, too, the error was prejudicial because the jury might have convicted Davis for committing an act in furtherance of the crime of aiding and abetting a cover-up of the crime.


Because counsel's failure to object to the instructions may have resulted in a conviction without the requisite intent finding, this Court should reverse Davis's conviction. *Herring v. State, supra*; *Earl v. State, supra*; *U.S.Const.*, Amends. VI and XIV and the Mississippi Constitution, Art. 3, §§14, 16, 24, and 26.

**CONCLUSION**

Josh Kirk Davis respectfully moves this Court to enter an order setting aside his conviction and sentence and ordering a new trial and for whatever relief may be appropriate and just.

This the 27<sup>th</sup> day of November, 2006

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I, hereby certify that a true and correct copy of the foregoing document was mailed, by first class mail, postage prepaid, a true and correct copy of the foregoing to the following:

Honorable James H. Powell, III  
District Attorney  
P.O. 311  
Durant, MS 39063

Honorable Jannie M. Lewis  
Circuit Judge  
PO Box 149  
Lexington, Mississippi 39095.

This the 27<sup>th</sup> day of November, 2006.

  
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CYNTHIA A. STEWART