

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI  
2007-CA-01292-COA**

**DAVID MARTIN ROBERT**

**APPELLANT**

**vs.**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLANT**

**APPEAL FROM THE CIRCUIT COURT OF  
KEMPER COUNTY, MISSISSIPPI**

**(Oral Argument Requested)**

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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 disqualifications or refusal.

Honorable Judge Lester Williamson  
Lauderdale County Circuit Judge  
P.O. Box 86  
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Mr. David Martin Robert, Appellant  
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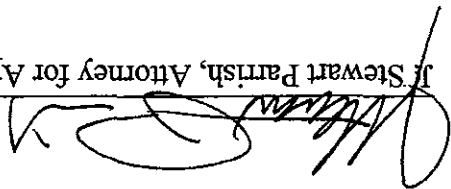
Bilbo Mitchell, Esquire  
Kemper County District Attorney  
P.O. Box 5172  
Meridian, MS 39302-5172

James A. Williams, Esquire  
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Meridian, MS 39302-5002

Honorable Judge Larry Roberts  
Supreme Court Justice  
Jackson, MS

This the 29<sup>th</sup> day of February, 2008.

J. Stewart Parrish, Attorney for Appellant

A handwritten signature in black ink, appearing to read "J. Stewart Parrish", is written over a horizontal line.

## **TABLE OF CONTENTS**

Certificate of Interested Persons.....	Page 2
Table of Contents.....	Page 4
Table of Authorities.....	Page 5
Statement of Issues.....	Page 6
Statement of the Case.....	Page 7
Summary of Argument.....	Page 10
Argument.....	Page 15
Conclusion.....	Page 29
Certificate of Service.....	Page 30

## TABLE OF AUTHORITIES

### **Cases:**

<i>Bryan v. Holzer</i> , 589 So.2d 648, 659 (Miss. 1991)	Page 15
<i>Davis v. State</i> , 743 So.2d 326, 334 (Miss. 1999)	Page 25
<i>Ferguson v. State</i> , 507 So.2d 94, 96 (Miss. 1987)	Page 24
<i>Hiter v. State</i> , 660 So.2d 961 (Miss. 1995)	Page 15
<i>Johns v. State of Mississippi</i> , 926 So.2d 188 (Miss. 2006)	Page 16,17,18,24,25
<i>Moore v. State</i> , 584 So.2d 426, 430 (Miss. 1991)	Page 25
<i>Payton v. State</i> , 708 So.2d 559 (Miss. 1998)	Page 24
<i>Reynolds v. State</i> , 521 So.2d 914, 918 (Miss. 1988)	Page 15
<i>Schmitt v. State</i> , 560 So.2d 148, 154 (Miss. 1990) quoting <i>Strickland</i> , 466 U.S. @ 694	Page 16
<i>State v. Takman</i> , 564 So.2d 1339, 1332	Page 24
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 Supreme Court 2052, 80 Lawyer's Ed. 2 <sup>nd</sup> 674 1984	Pages 6,14,15,16, 25
<i>Triplett v. State</i> , 666 So.2d 1356 (Miss. 1985)	Page 25, 26, 29
<i>Williams v. Mississippi State Bar Association</i> , 492 So.2d 578 (Miss. 1986)	Page 17

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**STATEMENT OF ISSUES**

The sole issue of this appeal is whether or not the circuit court's denial of Appellant's Petition for Post-Conviction Collateral Relief was clearly erroneous after applying the standards as set out in *Strickland v. Washington*, 466 U.S. 668, 104 Supreme Court 2052, 80 Lawyer's Ed. 2<sup>nd</sup> 674 1984. Appellant contends that the circuit court was incorrect and clearly erroneous in denying his motion for post-conviction collateral relief in that his counsel had confessed ineffectiveness and at the trial of the post-conviction collateral relief action, it was clearly shown that it is probable that the verdict would have been different but for his trial counsel's deficient performance.

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**STATEMENT OF THE CASE**

On March 25, 1999, somewhere close to midnight, a fight and gunfire broke out at the Other Side of Midnight juke joint located in Kemper County, Mississippi. When the police arrived, they found Lakel Cross shot to death. A criminal investigation was initiated and eventually led to the arrest of David Martin Robert (hereinafter "Appellant") for the premeditated murder of Lakel Cross. A Meridian attorney named Jim Williams was appointed to represent David Martin Robert and defend him against the charges in the indictment. Mr. Williams arraigned the Appellant, requested discovery, and, ostensibly, prepared for trial set in October, 1999.

By his own admission, Attorney Williams approached the District Attorney's office in October, 1999, and advised them that, in his opinion, the indictment against the Appellant was fatally flawed. (RE p. 70, l. 23 – p. 71, l. 7) Once that error had been pointed out to them, the District Attorney's office agreed with Mr. Williams and a joint continuance was granted until the January, 2000 term of court.

Once the January, 2000 term of court arrived, the District Attorney's office dismissed the prior indictment and re-indicted the Appellant for depraved heart murder in case number 2000-CR-017. (RE p. 70, ll. 9-22) Attorney Williams met with Appellant on that date for approximately one (1) hour and discussed both the prior indictment and the current indictment, as well as arraigned the Appellant on the new indictment. (RE p. 94, l. 14 – p. 95, l. 18) Attorney Williams never requested discovery on the new

indictment, as he apparently believed it would be duplicative of the prior discovery. (RE p. 70, ll. 2-15) Trial was set for May 1, 2000 in the Circuit Court of Kemper County. The Honorable Judge Larry Eugene Roberts was the judge assigned to the case.

On the morning of the trial, Attorney Williams had several witness subpoenas issued, (RE p. 79, l. 9 – p. 81, l. 13) as well as filed a motion to suppress a statement made by the Appellant to the police after being advised of his Miranda rights. (RE p. 136, ll. 26-29) All of the witnesses subpoenaed as well the statement were contained in the discovery from the prior indictment. The subpoenas were issued and a hearing was held on the motion to suppress. After a hearing, Judge Roberts denied the motion to suppress Appellant's statement. The trial then commenced after which the Appellant was found guilty of murder and sentenced to life in the custody of the Mississippi Department of Corrections without the possibility of parole.

Appellant then appealed his conviction to the Court of Appeals and then to the Supreme Court of the State of Mississippi, both attempts being unsuccessful. The Appellant then filed an application for post-conviction collateral relief, which was summarily denied by Judge Roberts. Appellant's Attorney Williams then filed a petition with the Supreme Court of Mississippi to allow Post-Conviction Collateral Relief, attaching with it an affidavit from Attorney Williams confessing his ineffectiveness. The Supreme Court issued a mandate requiring the Circuit Court of Kemper County to conduct a hearing on the merits of Appellant's Petition for Post-Conviction Collateral Relief. (RE p. 4) A hearing was held in that petition on the 22nd day of September, 2006, the sole witness being Attorney Williams and the Honorable Judge Lester Williamson then denied Appellant's Petition for Post-Conviction Collateral Relief. Aggrieved by this decision, Appellant perfects this appeal of that denial, arguing that his trial counsel was



ineffective in that the ineffectiveness clearly prejudiced his case and that in all probability, had he had competent assistance of counsel, he would not have been convicted at the trial level.

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**SUMMARY OF THE ARGUMENT**

Appellant contends that his trial counsel's performance was deficient for the following reasons:

1. Attorney Williams has confessed his ineffectiveness in an affidavit to the Supreme Court, which affidavit was accepted by the Supreme Court and resulted in a mandate being issued to the Circuit Court of Kemper County to have a hearing on the merits of the post-conviction collateral relief petition;

2. Attorney Williams was deficient in failing to request a continuance so that an absent eye witness, Cedric Boyd, could be subpoenaed to appear to testify live at trial. Additionally, if Cedric Boyd was unavailable, Attorney Williams should have filed notice pursuant to Mississippi Rules of Evidence 804 (b)(5) to have Cedric Boyd's prior identification of another person as the shooter admitted at trial;

3. Attorney Williams' performance was deficient in failing to have Debra Boyd, an eye witness to the shooting, to identify another individual, who was present in the courtroom and whom Debra Boyd had previously identified as the shooter, in front of the jury.

4. Attorney Williams' performance was deficient in failing to meet with Appellant. Attorney Williams' contact with the Appellant was apparently limited to one to one and a half (1 - 1 /2) hours at which point Attorney Williams never completely discussed or went over the discovery with the Appellant;

5. Attorney Williams' performance was deficient in allowing Dr. Steven Hayne, forensic pathologist, to testify outside his tendered area of expertise as to the type of bullet that was recovered from the body;

6. Attorney Williams' performance was deficient in failing to have the shell casings and the bullet sent to the lab for ballistic comparisons. Additionally, Attorney Williams' performance was deficient in failing to even look at the recovered shell casings to determine whether or not they were from a similar caliber weapon as the handgun Appellant admitted to having and firing on the night in question;

7. Attorney Williams' performance was deficient in failing to redact certain prejudicial references, including references to gang affiliation, in the statement which was admitted into evidence over objection;

8. Attorney Williams' performance was deficient in failing to subpoena essential and available witnesses until the day of trial, evidencing lack of preparation;

9. Further evidencing a lack of preparation, Attorney Williams' performance was deficient in failing to rigorously cross examine an eye witness who not only put Appellant at the scene of the shooting, but also testified that Appellant admitted to having done the shooting when the investigation of the highway patrol investigator revealed that she wasn't even in the car in which the Appellant left the scene of the shooting.

The foregoing deficiencies materially prejudiced the Appellant's case and probably would have resulted in a different verdict, had Attorney Williams acted as competent trial counsel should act in the following respects:

1. Cedric Boyd and his mother, Debra Boyd, were eye witnesses to the shooting of Lakel Cross and both had previously identified another individual as the shooter. Had Attorney Williams secured the appearance of Cedric Boyd at trial to testify

as to his prior eye witness identification of another person as the shooter, and had Attorney Williams brought up the fact that Ms. Boyd had previously identified a co-defendant as the shooter (the co-defendant was present in the courtroom at the time of her testimony), it would seem most probable that the jury would not have convicted the Appellant of a crime for which an eye witness had identified another individual as the perpetrator.

2. Attorney Williams never discussed the entirety of the facts and circumstances surrounding this event with the Appellant, nor did he attempt to ascertain the Appellant's version of events. It is most probable that had Attorney Williams spent more time with the Appellant, he would have discovered certain key pieces of evidence which were either missing or had not properly been processed and thus, would have been able to provide a more effective representation at trial and the verdict of the jury would have been "not guilty."

3. Dr. Steven Hayne testified as a pathologist as to the cause of death of Lakel Cross. Dr. Hayne was not qualified as an expert in forensics and Attorney Williams allowing him to testify that the fatal shot was fired with a black talon bullet which corresponded to the statement Appellant had made to law enforcement regarding the type of bullets in his firearm was deficient performance. That, in and of itself, would not probably have swayed the jury's verdict but in combination with the following few instances of ineffectiveness, it most probably affected the verdict of the jury.

4. Attorney Williams' failed to have the recovered shell casing sent to the state crime lab for ballistic comparison would have shown whether or not all the shell casings recovered had been fired from the same weapon and also would have shown the caliber of the weapon in which the shells were fired as well as the brand of ammunition

which was used. While this omission, in and of itself, would not probably have swayed the jury's verdict, in the totality of the deficient performance, it most probably affected the verdict of the jury.

5. Attorney Williams' performance was deficient in failing to have the recovered bullet from the body of Lakel Cross sent to the lab for ballistic comparison. He was further deficient in failing to look at the recovered shell casings, which was material in that had the recovered shell casing been a caliber other than 9mm, it would have indicted another person was shooting, as Appellant had only identified a 9mm as his firearm. Had the crime lab determined that the bullet was not 9mm or that it was not a black talon, either would have been inconsistent with Appellant's statement to the police and in combination with the above preponderance of error, would have resulted in a verdict of not guilty.

6. Attorney Williams' ineffectiveness in failing to redact certain prejudicial references from the statement to the police was material in that those statements included gang affiliation and reference to other crimes. Such ineffectiveness was material in that it tended to bias or prejudice the jury against the Appellant and therefore, the verdict would have been different had Attorney Williams not done so.

7. The ineffectiveness of Attorney Williams in failing to subpoena witnesses until the day of trial was material in that it showed his total lack of preparation for this trial for which Appellant was sentenced to life without the possibility of parole. Failure to properly prepare materially affected the jury's outcome as they basically only got one side of the story and that was the best side which was presented by the State, who for obvious reasons did not point out the inadequacies in the investigation. More likely than

not, had Attorney Williams effectively prepared for trial, Appellant would have been found not guilty.

8. The State elicited testimony from Charlotte Curtis that she rode with the Appellant from the scene of the crime and that he stated he had shot someone. Sergeant Danny Knight, Investigator with the Mississippi Highway Patrol's investigation revealed that she was not in the car when it left The Other Side of Midnight after the shooting.

For these reasons, the performance of Appellant's trial counsel was ineffective and that ineffectiveness did materially impact the jury's verdict and most probably the jury would have found the Appellant not guilty had Appellant received effective assistance of counsel. Both prongs of the *Strickland* test have been satisfied and Appellant is entitled to a new trial.

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**ARGUMENT OF APPELLANT WITH SUPPORTING AUTHORITIES**

**STANDARD OF REVIEW**

On Appeal, the appropriate standard review for the denial of post-conviction collateral relief is whether or not the ruling of the trial court was clearly erroneous. *Reynolds v. State*, 521 So.2d 914, 918 (Miss. 1988). This standard requires the appellate court to reverse the findings of the trial court when, after reviewing the evidence, the appellate court has a strong conviction that a mistake has been made. *Bryan v. Holzer*, 589 So.2d 648, 659 (Miss. 1991). A review of the evidence leaves no doubt that a mistake has been made.

The standard for ineffective assistance of counsel is well-settled law and is set out in *Strickland v. Washington*, 466 U.S. 668 (1984), other citations omitted. The *Strickland* test is a two-pronged test which requires first that the Appellant show that the counsel's performance was deficient. That is that the errors made by the trial counsel were so grave that it would be tantamount to not having a lawyer as guaranteed by the Sixth Amendment to the United States Constitution. The deficiencies must not be weighed on their own, but must be viewed in a totality of the circumstances so as to eliminate reasonable trial strategy and mere inadvertence as sources of the deficiency.

While there is a presumption that counsel is competent, *Hiter v. State*, 660 So.2d 961 (Miss. 1995), that presumption may be overcome by showing that but for the deficiencies in his lawyer's performance, there is a reasonable probability that the verdict

would have been different. *Schmitt v. State*, 560 So.2d 148, 154 (Miss. 1990) quoting *Strickland*, 466 U.S. @ 694. *Strickland* also holds that the deficient performance must prejudice the defense to such an extent as to deprive the defendant of a fair trial and that the result of the lack of a fair trial shows the verdict to be unreliable. *Strickland* @ 687.

It is Appellant's contention that the Mississippi Supreme Court has already made, in its mandate, a decision that the performance of Trial Counsel Attorney Williams was deficient, nevertheless, in an abundance of caution, Appellant will set out the numerous instances and examples of deficient performance at the trial level by Attorney Williams. It should also be noted that in addition to the mandate issued by the Supreme Court finding deficient performance, Attorney Williams has fallen on his own sword and by sworn affidavit, has admitted not only that his trial performance was deficient, that it materially prejudiced the case and but for his deficient performance, a different verdict would have been reached. (RE pp. 43-44; p. 70, ll. 23-27; p. 73, ll. 1-13; p. 89, l. 27 – p. 90, l. 6; p. 96, ll. 14-19; p. 101, ll. 14-27; p. 104, ll. 20-24; p. 109, ll. 13-27; p. 114, l. 18 – p. 115, l. 4; p. 130, ll. 7-22; p. 136, ll. 10-25; p. 137, ll. 4-17; p. 150, ll. 16-23; p. 174, l. 23 – p. 176, l. 24)

The *Strickland* analysis has been applied by the appellate courts of Mississippi innumerable times in cases involving allegations of ineffective assistance of counsel. For the purposes of this appeal, Appellant relies upon the case of *Johns v. State of Mississippi*, 926 So.2d 188 (Miss. 2006) recently decided by the Supreme Court on April 6, 2006. The similarities between that case and the case at bar are strikingly similar. The attorney who represented Oliver Johns is named John Jackson. In the opinion, the Supreme Court noted that four (4) months after the conclusion of the trial, Jackson was indicted for the sale of marijuana within a correctional facility and was later convicted of



that charge. *Id @ ¶ 10*. The trial attorney who represented David Martin Robert, James Williams, had previously been disbarred for a drug conviction, though he was later readmitted to the practice of law. (RE p. 11, ll. 3-9, RE p. 11, ll. 20-22) *See also, Williams v. Mississippi State Bar Association*, 492 So.2d 578 (Miss. 1986). Additionally, in the Johns case, "Jackson repeatedly stated he did not remember specific details regarding his representation of Johns. He did, however, remember 1) going to the scene of the shooting, and 2) talking to two (2) people who may have been witnesses, but he did not remember who they were." *Id @ ¶ 9*. Likewise, in the case which is the subject of this appeal, Attorney Williams repeatedly said he did not remember specific details of his representation (RE p. 68, ll. 18-22; p. 76, ll. 8-10; p. 85, ll. 9-19, ll. 22-24; p. 86, ll. 26-28; p. 91, ll. 23-27; p. 93, ll. 12-25; p. 94, ll. 11-13; p. 95, ll. 11-18; p. 103, ll. 4-8; p. 109, ll. 10-12; p. 112, ll. 4-11; p. 151, ll. 3-7; p. 161, ll. 18-21) and while he did visit the scene of the shooting, he did not personally talk to any witnesses but relied upon his investigator, whose name he could not remember, to interview witnesses for him. (RE p. 159, ll. 22-29) Transcripts of those interviews, if they exist, were never utilized at trial.

### **DEFICIENT PERFORMANCE**

Like Johns, Appellant asserts a multitude of deficiencies in the representation of him by Attorney Williams. Since the performance of the attorney must be measured within a totality of the circumstances, Appellant will not single out any specific instance as being dispositive of the appeal, but rather the cumulative prejudicial effect of all of the deficiencies in his attorney's representation of him during trial. *Johns @ ¶ 32*. In judging the performance of Attorney Williams in his trial representation of the Appellant, it is important to note that Attorney Williams had had discovery in the preexisting indictment as early as August of 1999, some eight or nine months prior to the date of trial

in this case. (RE p. 74, l. 7 – p. 77, l. 4) Furthermore, Appellant was incarcerated during this entire time, a fact which Attorney Williams knew, as well as the fact that Attorney Williams knew of his location. (RE p. 74, ll. 14-24) Nevertheless, despite the fact that he had a captive audience, Attorney Williams met with the Appellant on one (1) occasion and only went over his statement and the statement of his wife. (RE p. 74, l. 14 – p. 75, l. 18) In the *Johns* case, in which counsel was found to be constitutionally ineffective, Attorney Jackson met with the client four (4) times and at least two (2) of those meetings lasted more than forty-five (45) minutes. *Id @ ¶ 33*. The total pretrial contact Attorney Williams had with the Appellant was two to two and one-half hours (2 – 2 ½) which included discussions, arraignments, and perhaps a preliminary hearing. (RE 91, ll. 4-12, RE 94 l. 14 – RE p. 95, l. 18) Attorney Williams never took the time to prepare Appellant for trial, nor did he seek to elicit any input from Appellant as to the facts surrounding the shooting event or any alternative theories of defense that the Appellant may have had.

Attorney Williams did prepare some subpoenas which were filed prior to trial, one of which was for a local newscaster, the other which was for Cedric Boyd (RE p. 81, ll. 3-9). Attorney Williams filed no pretrial motions, although he did file a motion on the day of trial to suppress the statement and had previously contemplated filing a motion for change of venue which necessitated the subpoenaing of the local newscaster. (RE p. 81, ll. 20-29) The witness subpoenas which were material to the case were issued on the morning of trial, May 1, 2000. (RE p. 81, ll. 10-13) Clearly, Attorney Williams failed to give any meaningful preparation for the trial of this case, a murder trial which carried the penalty of life without parole.

Of special importance was the testimony of Cedric and Debra Boyd. Both Cedric and Debra Boyd were eye witnesses to the shooting and were in the club, The Other Side of Midnight, on the night that the killing occurred. (RE p. 96, l. 14 – p. 97, l. 21, RE p. 97, l. 29 – p. 99, l. 18) Both had been previously interviewed by law enforcement and had been shown a photographic lineup, that lineup included a picture of the Appellant, as well as his two (2) un-indicted co-conspirators. (RE p. 117, l. 23- p. 118, l. 3) Their names were William Glass and Sanders Ruffin. Attorney Williams testified at the hearing on the post-conviction collateral relief motion that he was aware prior to trial that Cedric Boyd was unavailable as a witness. (RE p. 95, l. 27 – p. 96, l. 5) He did not take the time to ascertain that Cedric Boyd was in the army, nor did he make any efforts to serve him with a witness subpoena to the Department of the Army or to our local congressman's office. (RE p. 98, l. 27 – p. 99, l. 16) Even knowing that Cedric Boyd had previously identified another person, not the Appellant, as the killer, Attorney Williams did not request a continuance to obtain the presence of Cedric Boyd at the trial. (RE p. 98, ll. 20-24, RE p. 96, ll. 14-19)

Had Attorney Williams done a diligent search to obtain the presence of Cedric Boyd at trial, and had that search been unfruitful, and had Attorney Williams had the foresight to file a notice of intention to use a prior statement as contemplated by Mississippi Rule of Evidence 804 (b)(5), Attorney Williams would have been able to get into evidence Cedric Boyd's prior identification of another individual as the killer. Clearly this issue was material and exculpatory, it had every indicia of reliability because Cedric Boyd was an uninterested bystander and he made the statements to law enforcement, which statements were duly recorded by law enforcement and Cedric Boyd was unavailable and the information sought to be elicited was unable to be provided by

any other means. Failure to obtain Cedric Boyd's testimony either live or through an 804 (b)(5) process was severely deficient. (RE p. 99, l. 19 - p. 102, l. 1) No witness stood up in trial, pointed to the Appellant and said, "That is the person that shot Mr. Cross." Mr. Boyd's testimony would have been that someone other than the Appellant shot Mr. Cross. (RE p. 97, ll. 18-21)

Likewise, Debra Boyd was an uninterested bystander who was an eye witness to the killing. Her presence was obtained by issuance of a subpoena on the day of trial and she did appear and testified on the second day of trial. By chance, the very individual that she had identified in the photographic lineup as the shooter was present in the courtroom during her testimony. (RE p. 127, l. 29 - p. 131, l. 14) She was called by Attorney Williams in his case in chief in defense of the Appellant. She did not identify Defendant as the shooter, nor did she identify Anthony Rhone, whom she had previously identified as the shooter. Attorney Williams did not cross examine her regarding her prior identification, nor did he point out the previously identified suspect in the courtroom. (RE p. 128, l. 23 - p. 130, l. 22) Clearly this was deficient performance and showed a lack of preparation including an absence of any trial strategy.

Attorney Williams' performance was so deficient and lacking of any trial preparation. This point is born out that during voir dire of the jury, he asked three (3) questions: 1) which directed the venire's attention to pretrial publicity, which was extremely poor judgment; 2) concerning prior jury service; 3) which was a rambling stream of consciousness diatribe which was eventually objected to by the District Attorney and sustained by the trial judge. At that point, having asked only two (2) questions, Attorney Williams sat down. (RE p. 86, l. 22 - p. 90, l. 6) Clearly, he was not

ready to try a jury trial in a murder case and his pretrial preparation was virtually non-existent.

Attorney Williams did object to the statement made by the Appellant to law enforcement, post-Miranda, being admitted into evidence. He also filed a motion to suppress. Both the objection and the motion to suppress were denied. However, Attorney Williams did not seek to redact certain damaging, prejudicial and irrelevant statements which were contained within the statement including Appellant's alleged gang affiliation, and a prior criminal act committed by the deceased (RE p. 135, l. 7 – p. 136, l. 25). However, the statement could have been used to bolster the Appellant's case. In it the Appellant gave a motive for another person who had also been identified as the potential shooter by Cedric Boyd to kill Lakel Cross for snitching on them regarding a burglary that Appellant had not been involved in. That would have showed motive for another person to kill Cross, not the Appellant. Further, Attorney Williams could have cross examined Sergeant Knight, the investigator with the Mississippi Highway Patrol regarding how the term "black talon bullet" came to be in the statement. In fact, Appellant never identified the bullets as black talons. That identification was made by Sergeant Knight after Appellant said the bullets in his 9mm handgun had black tips. (RE p. 138, l. 15 – p. 140, l. 22) Neither of these avenues was explored by Attorney Williams and failure to do so was a deficient performance which shows a lack of trial strategy, as well as a lack of preparation.

Dr. Steven Hayne testified about the autopsy of Lakel cross, as well as the recovery of the bullet which caused the fatal injury. Although Dr. Hayne was not tendered as an expert in ballistics, the District Attorney asked Dr. Hayne if he could identify the style of the bullet which was recovered from the body. Attorney Williams

did not object to Dr. Hayne testifying outside of his scope of expertise. (RE p. 143, l. 26 – p. 145, l. 4) Dr. Hayne then promptly identified the bullet as a black talon. To compound that mistake, Attorney Williams on his cross examination of Dr. Hayne, reinforced the identification of the bullet as a black talon, thereby not only waiving grounds for appeal by not making a contemporaneous objection, but also adopting the improper testimony as his own. (RE p. 146, l. 28, p. 149, l. 6) This is clearly deficient performance to allow an expert to testify to a material fact which linked the fatal bullet to the bullets allegedly in Appellant's gun on the night of the killing.

Attorney Williams never had the fatal bullet sent to the state crime lab for ballistics comparison. (RE p. 151, ll. 8-14) Attorney Williams never even determined whether or not the fatal bullet was of 9mm caliber. (RE p. 151, ll. 3-22) Appellant had made a statement to the police that his firearm was a 9mm and a competent attorney would have found out whether or not the fatal bullet was 9mm before going to trial. Additionally, Attorney Williams did not request the shell casings which were recovered from the scene to be sent to the state crime lab for ballistics comparison to determine whether or not they had been fired from the same gun or from different guns. (RE p. 110, ll. 3-29) It would have been important to know before trial whether all the bullets came from one gun, that is, that they all exhibited similar extractions, ejector, and firing pins marks or there had been numerous firearms fired that night. Attorney Williams also failed to do the most simple examination of the spent cases that can be done. He failed to actually look at the casings to determine whether or not they were 9mm in caliber and what brand they were. (RE p. 151, l. 26 - p. 152, l. 17) Clearly if the casings had not been 9mm they didn't come from the Appellant's gun.

Though the Appellant had in his statement to police said that he bought the pistol and the ammunition from the Rock House Gun Store in Meridian, Attorney Williams did not contact the Rock House to determine whether or not they carried black talon bullets. (RE p. 141, l. 5 – p. 143, l. 25) Black talon bullets have been outlawed since approximately 1994 and are not sold to the civilian market. By picking up the phone, Attorney Williams could have determined whether or not the bullets identified as black talons which were in the Appellant's 9mm pistol on the night of the shooting, could have even been purchased at the Rock House in Meridian. He could have found that they were not offered for sale at the time that firearm was purchased. It would have been a simple matter to subpoena the owners of that store to testify that they didn't sell black talon bullets on the date that firearm was purchased, nor any date subsequent thereto. This is a total lack of pretrial preparation and it is a deficient performance. It shows not only lack of preparation, but also complete lack of any trial strategy.

The most damning testimony against the Appellant came from Charlotte Curtis who testified that she had ridden from The Other Side of Midnight home to Meridian with the Appellant after the shooting. Her testimony was that he had admitted doing the shooting to her. Sergeant Knight with the Mississippi Highway Patrol's notes indicated that he had determined to his satisfaction that Charlotte Curtis was not in the car which left The Other Side of Midnight. (RE p. 155, l. 20 – p. 158, l. 24) That detail was apparently overlooked by Attorney Williams in his pretrial preparation, or the lack thereof, and Charlotte Curtis' testimony was un-impeached. (RE p. 159, l. 10 – p. 160, l. 29) This shows a lack of trial preparation, a lack of trial strategy, and a total and impermissible ignorance of the facts of this very important case. This is deficient performance for a trial attorney. In fact, Attorney Williams testified that while he had

engaged in criminal practice for many years since his reinstatement to the practice of law, he had never before tried a murder case. (RE p. 113, ll. 6-7) That lack of experience was definitely shown in his representation of David Robert at the trial level. “At a minimum, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case.’ *Payton v. State*, 708 So.2d 559 (Miss. 1998) citing *Ferguson v. State*, 507 So.2d 94, 96 (Miss. 1987) (emphasis in the original). The decision not to interview witnesses, particularly your own, cannot be considered an effective strategic choice. When counsel makes choices of which witnesses to use or not to use, those choices must be based on counsel’s proper investigation. Counsel’s minimum duty is to interview potential witnesses and make an independent investigation of the facts and circumstances of the case. *State v. Takman*, 564 So.2d 1339, 1332; *Ferguson*, 507 So.2d 96.” *Johns* @ ¶ 38. As in the *Johns* case, Attorney Williams made no independent investigation of the facts and circumstances of the case. (RE p. 130, l. 23 – p. 133, l. 19; p. 120, l. 13 – p. 121, l. 19; p. 121, l. 20 - p. 122, l. 16) Although he hired a private investigator to investigate the case, he could provide no reports, nor could he remember whether or not that investigator actually even talked to any witnesses. (RE p. 159, l. 22 – p. 160, l. 13; p. 131, l. 21 – p. 133, l. 19) That is not meeting the minimum duty owed to the Appellant.

In *Payton v. State*, 708 So.2d 559 (Miss. 1998), the attorney likewise relied on a private investigator to do his investigation and never became personally involved. Attorney Williams did the same. Like the attorney in *Payton*, Attorney Williams went to the scene during the daytime, but did not take any photographs and did not interview any potential witnesses because the club was closed at the time. (RE p. 104, l. 25 – p. 107, l. 7) In fact, this case is exactly like *Payton* in that, “Payton’s attorney failed to conduct a



scintilla of discovery other than go to the crime scene one time and request the State to turn over its discovery” *Id.* That is exactly what Attorney Williams did in this case. “Jackson’s minimum duty was to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. He did neither.” *Johns* @ ¶ 42. That is exactly what Attorney Williams did in this case. (RE p. 152, ll. 7-17)

In determining the minimum reasonable competent performance of an attorney, the Mississippi Supreme Court set out a guideline in *Triplett v. State*, 666 So.2d 1356 (Miss. 1985).

Basic defense in this case required complete investigation to ascertain every material fact about this case favorable and unfavorable. It required familiarity with the scene and the setting. It required through his own resources and process of the court learning the names of, and interviewing every possible eye witness, and getting statements from each. It required prior to trial learning all information held by the State available to the defense through pretrial discovery motions. *Triplett* @ 1361.

This basic defense was denied to the Appellant. Clearly Attorney Williams’ performance was deficient and his conduct did not fall within the wide parameter of acceptable competence. Such deficient performance was tantamount to the denial of counsel as contemplated by the Sixth Amendment to the United States Constitution.

#### **PREJUDICE TO APPELLANT**

Once the first prong of the *Strickland* test has been met, the Appellant must then show that had the trial counsel performed as a minimally adequate attorney, the outcome of the trial would have been different. The reasonable probability test is, “the mover must merely show ‘a probability sufficient to undermine confidence in the outcome.’” *Davis v. State*, 743 So.2d 326, 334 (Miss. 1999) (quoting *Moore v. State*, 584 So.2d 426, 430 (Miss. 1991)) Like the attorney in the *Johns* case, Attorney Williams failed to

request a continuance to locate an eye witness to the shooting, Cedric Boyd, who had previously identified an individual other than the Appellant as the person who fired the fatal shots. (RE p. 95, l. 9 – p. 96, l. 24) Alternatively, Attorney Williams could have introduced Cedric Boyd's prior identification of another individual as the shooter as permitted by Mississippi Rule of Evidence 804 (b)(5). Attorney Williams neither asked for a continuance, nor filed a notice required by 804 (b)(5), nor did he attempt to introduce that evidence at trial. Since identity was the key issue and the only persons identified by the eye witnesses, Cedric and Debra Boyd, were individuals other than the Defendant/Appellant, had he introduced that testimony, the outcome probably would have been different.

Had Attorney Williams had Debra Boyd identify the co-conspirator seated in the courtroom who she had previously identified as the shooter, the outcome of the trial probably would have been different.

Even today we do not know the caliber of the bullet which killed Lakel Cross, nor do we know the caliber and brand of the shell casings which were recovered at the scene. Perhaps the bullet that was recovered from Lakel Cross was a 9mm and a black talon and all the shell casings were 9mm Winchester shell casings. We don't know that. Attorney Williams owed a duty to the Appellant to investigate all facts "both favorable and unfavorable." *Triplett* @ 1361. We cannot have confidence in the outcome of the trial because we don't know, even today, what the evidence was upon which the jury convicted the Appellant. Clearly had the bullet not been a 9mm, not a black talon, or had the shell casings been fired from another gun which were of a different caliber than 9mm, the outcome probably would have been different. We just don't know. A lack of evidence results in a lack of certainty that the right person was convicted for this crime.

Clearly the outcome most probably would have been different had Appellant's trial counsel done a competent job and ascertained what the physical evidence was that would connect the Appellant to the death of Mr. Cross.

It is logical to assume that the verdict was based in large part upon the Appellant's statement to the police admitting that he had a firearm on that night and that he had fired some shots into the air, as well as the testimony of Charlotte Curtis, who testified that the Appellant admitted having shot Mr. Cross. A reasonable, competent attorney would have found Investigator Knight's interview notes which indicated that Charlotte Curtis wasn't even in the car in which the Appellant left The Other Side of Midnight club. (RE p. 155, l. 20 – p. 161, l. 3) Had she been cross examined on this very important point, or had that testimony been elicited from Investigator Knight, her veracity would have been severely undermined and the result of the trial most probably would have been different.

Attorney Williams was clearly unprepared for trial. That was evidenced in his two question voir dire, the fact that he filed no motion to suppress until the morning of the trial, the fact that he filed witness subpoenas for a newscaster and Cedric Boyd (whom he knew was unavailable) nine (9) days before the trial and witness subpoenas for Sanders Ruffin and William Glass on the morning of the trial, the fact that he deferred his opening statement until his case-in-chief and then gave a two (2) sentence opening which did not even set out what he intended to prove and was eventually objected to, and which point he sat down. Attorney Williams had no concept of the facts of the case and was unprepared to cross examine any of the witnesses. (RE p. 161, l. 4 – p. 169, l. 12) At the hearing, he maintained he had a vague recollection of most every fact and admitted not personally talking to a single witness and spending a bare minimum of two to two and

one-half (2 – 2 ½) hours with Mr. Robert, an hour and one-half (1 ½) of which was prior to indictment. All of this materially prejudiced the defense and resulted in the Appellant's conviction.

In his favor, Attorney Williams has admitted his deficiencies and the fact that those deficiencies materially prejudiced Appellant's case and resulted in his conviction. He has done so by affidavit to the Mississippi Supreme Court. That affidavit resulted not only in him being terminated from his position doing appeals for indigent clients, but in the termination of his appointment for indigent clients as well. Further, he was disciplined by the Bar and has suffered a loss of his professional reputation, as well as an economic loss. While this does not excuse his incompetent performance at trial, it does show his recognition of his deficient performance, as well as his good faith attempt to remedy that situation which he caused.

This Court can have no confidence in the verdict of guilty of murder against the Appellant and a sentence of life in prison without the possibility of parole because of this multitude of errors. As such, this Court must find that not only was counsel's performance deficient, but that the Appellant was prejudiced thereby and, had trial counsel been competent, the outcome of the trial most likely would have been different.

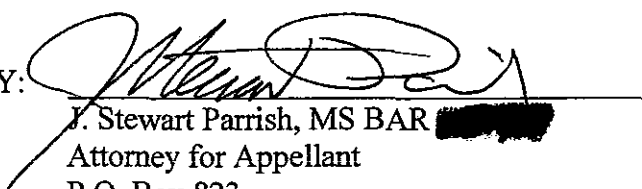

## CONCLUSION

Due to the totality of the circumstances, there is no question that Attorney Williams failed to do the most basic investigation and to provide the most basic defense as contemplated by *Triplett*. There is no question that had the jury heard eye witness testimony identifying two (2) other persons as the shooter and had Dr. Hayne not been able to testify as to the make of the bullet, and had Debra Boyd pointed out the co-conspirator in the courtroom as the shooter, and had the bullet been ballistically tested and shown not to be a 9mm, and had the statement given by the Appellant to law enforcement been properly redacted, and had Charlotte Curtis been impeached by the testimony of Investigator Knight, and had the evidence shown that the shell casings collected at the scene were fired from multiple firearms or were of another caliber other than 9mm, the verdict of the jury would not have been guilty. Because, even today, we do not know what the ballistic evidence (the physical evidence which linked Appellant to the murder) would have shown and we can have no confidence in the verdict. Therefore, the decision of the circuit court must be reversed and this case should be remanded for a new trial in the Circuit Court of Kemper County, Mississippi.

Respectfully submitted, this the 29<sup>th</sup> day of February, 2008.

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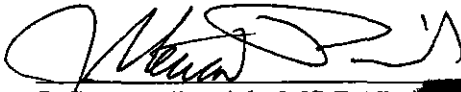
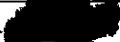
**CERTIFICATE OF SERVICE**

I, J. Stewart Parrish, Attorney for Appellant, do hereby certify that I have delivered by placing a copy of the Brief for the Appellant to the United States Mail, postage prepaid, addressed to the following individuals:

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So certified, this the 29<sup>th</sup> day of February, 2008.

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