IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN PETER MUISE — APPELLANT

V. — NO. 2007-KA-00553-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN PETER MUISE **APPELLANT**

V. **NO. 2007-KA-00553-SCT**

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. John Peter Muise, Appellant
3. Honorable Cono Caranna, District Attorney
4. Honorable Stephen B. Simpson, Circuit Court Judge

This the 5 day of Feb, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF ISSUES

ISSUE ONE:

WHETHER APPELLANT'S SPEEDY TRIAL RIGHTS WERE VIOLATED BY A FOUR HUNDRED AND NINETY-SIX (496) DAY DELAY WHICH PREJUDICED HIS DEFENSE AT TRIAL.

ISSUE TWO:

WHETHER APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE COUNSEL WHEN THE TRIAL COURT ERRED IN GRANTING TRIAL COUNSEL'S MOTION FOR A CONTINUANCE IN ORDER TO SECURE MEDICAL RECORDS, EXPERT TESTIMONY, AND CRUCIAL WITNESSES ESSENTIAL TO APPELLANT'S THEORY OF DEFENSE.

STATEMENT OF INCARCERATION

John Peter Muise, the Appellant in this case, is currently in the custody of the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction of this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann. 99-35-101 (Supp. 2001)***.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of the Second Judicial District of Harrison County, Mississippi, and a judgment of conviction for murder against John Peter Muise following a jury trial on June 11-13, 2007, Honorable Stephen B. Simpson, Circuit Judge, presiding. Mr. Jackson was subsequently sentenced to a term of life imprisonment in the custody of the Mississippi Department of Corrections.

FACTS

John Peter Muise (hereinafter referred to as "Mr. Muise") was arrested on February 1, 2006, the day that the crime he was charged with occurred. On April 27, 2006, Mr. Muise filed, through his first attorney, a Demand for a Speedy Trial. (C.P. 11, RE 17). On July 24, 2006, Mr. Muise filed a pro se Demand for a Speedy Trial. (C.P. 12-13, RE 18-19). On November 07, 2006, Mr. Muise filed a Motion to Dismiss Charges for Failure to Provide a Fast and Speedy Trial. (C.P. 14-21, RE 20-27). All of these motions were filed before Mr. Muise was even indicted for the crime that he was later convicted of.

On November 14, 2006, Mr. Muise was finally indicted, after spending over nine (9) months in the custody of the Harrison County Sheriff's Department. (C.P. 60, RE 15-16). On April 20, 2007, over five (5) months after he had been indicted, Mr. Muise waived arraignment and entered a plea of not guilty to the charges against him. (C.P. 27).

On or about May 3, 2007, Mr. Muise's trial counsel, the newly formed Harrison County Public Defender's office, took possession of Mr. Muise's case from his former counsel. (T. 2). Upon reviewing the files, the Harrison County Public Defender's Office, concluded that there was a conflict of interest that prevented the office from representing Mr. Muise. (T. 3). According to the Court's computer records, an Assistant Public Defender at the newly created office had previously represented co-indictee Michael Fladland (hereinafter referred to as "Mr. Fladland") in the case. (T. 3). Accordingly, the Public Defender's office prepared the file to be sent to another attorney to remedy the conflict of interest. (T. 3). However, it was discovered that the conflict was a result of an inadvertently and improperly entered court document that named a member of the Public Defender's office as counsel. (T. 15). It was therefore concluded that the Public Defender's office, would, in fact, take the case. (T. 3).

Upon that decision, Mr. Muise's trial counsel went to the jail to meet with his client for the first time, eleven days, four of them falling on a weekend, before the first trial date was set. (T. 4). No other attorney had ever been to meet with Mr. Muise. (T. 4).

During the short time trial counsel had to prepare for Mr. Muise's case, it was unable to locate or serve key witnesses as well as the co-indictee, Mr. Fladland. (T. 4).

Furthermore, trial counsel maintained that it would be unable to adequately obtain a means to impeach the testimony of a critical eyewitness to the case who was on Flexeril, Tylenol Three, Ultram and Xanax and suffered anxiety attacks. (T. 8). Defense counsel wished to secure a subpoena *duces tecum* for the witness's medical records to be reviewed

in camera by the trial court to determine whether the witness' perception might have been impaired. (T. 9).

Defense counsel also urged the trial court to grant a continuance for the purposes of petitioning funds for a medical expert to testify concerning the effects of the prescription drugs that the witness was on. (T. 10).

On June 11th, Mr. Muise's trial counsel filed a motion for a continuance (C.P. 31-34, RE 28-31). Upon a hearing regarding the motion, the trial court denied trial counsel's motion for continuance and called for a short recess before bringing Mr. Muise to trial. (T. 18, C.P. 69, RE 32).

At trial, the victim's wife, Jamie Little (hereinafter referred to as "Ms. Little") testified to hearing a loud noise outside, seeing the appellant run up the stairs, hearing gunshots, and seeing her husband fall backwards. (T. 36). She testified to seeing the appellant wearing a red ball cap, jacket, and blue jeans. (T. 39). Ms. Little then testified that she went outside and the Mr. Muise's truck came back and an individual she identified left the truck and went back to her trailer. (T. 41). She then testified that she heard more gunshots. (T. 41). The truck then drove away. (T. 41).

According to her own testimony, Ms. Little was taking four (4) doctor-prescribed pharmaceuticals that day. (T. 43-44). According to testimony and the evidence admitted at trial, it was extremely dark that night with very little artificial lighting both inside and outside the trailer. (T. 54-55).

There was further testimony by a neighbor who said she saw a man in a cap walk up to the trailer where the victim was shot, but admitted she "didn't see too much." (T. 84).

Shortly after police were called to the scene, officers pulled over a white truck driven by Mr. Muise. (T. 122). Michael Fladland was also in the truck. (T. 122). A gun was discovered near the center console of the vehicle. (T. 123). The gun, which did not have Mr. Muise's fingerprints on it, was later identified to be Mr. Fladland's. (T. 118-19).

The State's medical examiner testified that the victim had been shot four times. (T. 150-51). Despite this, an evidence technician for the Harrison County Sheriff's Department was unable to find any indications of blood on the shoes Mr. Muise was wearing the night of the incident. (T. 161).

The jury deliberated, and after a little over an hour and a half, delivered a guilty verdict against Mr. Muise. (T. 227) (C.P. 103, RE 33). On June 14, 2007, the defendant filed a Motion for New Trial and J.N.O.V., claiming that the verdict was contrary to law, contrary to the overwhelming weight of the evidence, and the Motion to Continue was improperly denied . (C.P. 106-07, RE 35-36). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant timely filed a notice of appeal. (C.P. 109, RE 38)

SUMMARY OF THE ARGUMENT

Appellant was denied his constitutionally-mandated right to a speedy trial because of a four hundred and ninety-six (496) day delay in trial. Because of this delay, Appellant's defense at trial was significantly compromised, resulting in prejudice.

Secondly, Appellant was denied his right to effective counsel when the trial court erred in allowing Appellant time to cure the prejudice created by the speedy trial violation. Moreover, Appellant was denied the opportunity to adequately cross-examine the State's key witness in the case, therefore limiting his ability to adequately present his defense at trial.

ARGUMENT

ISSUE ONE: WHETHER APPELLANT'S SPEEDY TRIAL RIGHTS WERE VIOLATED BY A FOUR HUNDRED AND NINETY-SIX (496) DAY DELAY WHICH PREJUDICED HIS DEFENSE AT TRIAL.

For the ease of this Honorable Court's analysis of the argument, the following table provides a time-line regarding the argument *sub judice.*

SPEEDY TRIAL TIME LINE

Event	Date	Time Elapsed
Arrest (C.P. XX)	February 1, 2006	0 days
Demand for Speedy Trial (C.P. 11)	April 27, 2006	84 days
Demand for Speedy Trial (C.P. 12-13)	July 24, 2006	175 days
Motion to Dismiss Charges for Failure to Provide a Fast and Speedy Trial (C.P. 14-21).	November 7, 2006	280 days
Indictment (C.P. 9-10)	November 14, 2006	287 days
Waiver of Arraignment (C.P. 27)	April 20, 2007	444 days
First Day of Trial	June 11, 2007	496 days

i. Standard of Review

Review of a speedy trial claim involves a question of fact: whether the trial delay arose from good cause. ***Flora v. State***, 925 So. 2d 797, 814 (Miss. 2006) (citing ***Deloach v. State***, 722 So. 2d 512, 516 (Miss. 1998)). An appellate court will uphold the trial court's finding of good cause if the decision is supported by substantial credible evidence. ***Id.*** (citing ***Folk v. State***, 576 So. 2d 1243, 1247 (Miss. 1991)). On the other hand, if no probative evidence supports the trial court's findings, the appellate court must reverse the decision and dismiss the charge. ***Ross v. State***, 605 So. 2d 17, 21 (Miss. 1992) (citing ***Strunk v. United***

States, 412 U.S. 434, 440 (1973)). The State bears the burden of proving good cause for the speedy trial delay, and thus bears the risk of non-persuasion. ***Flores v. State***, 574 So. 2d 1314, 1318 (Miss. 1990); ***Nations v. State***, 481 So. 2d 760, 761 (Miss. 1985).

The Sixth Amendment of the United States Constitution guarantees the right to a speedy trial, which is a fundamental right. ***State v. Woodall***, 801 So. 2d 679, 681 (Miss. 2001). Unlike the statutory right provided to a criminal defendant via the Statutes of the State of Mississippi, a defendant's constitutional right to a speedy trail arises when an indictment or information is returned against him, or when "actual restraint [are] imposed by arrest and holding to a criminal charge." ***Bailey v. State***, 463 So. 2d 1059, 1062 (Miss. 1985); *See also* ***U.S. v. Marion***, 404 U.S. 307 (1971). The Mississippi Supreme Court has held that the placing of a detainer against an individual "suffices to make him an accused." ***Perry v. State***, 419 So. 2d 194, 198 (Miss. 1982).

In ***Barker v. Wingo***, the United States Supreme Court established the test for judging the merits of speedy trial claims. ***Barker v. Wingo***, 407 U.S. 514 (1972). There, the United States Supreme Court declined to make a bright line rule, but instead adopted a four-factor balancing test "in which the conduct of both the prosecution and the defendant are weighed." ***Id.*** at 529. The four factors are: (i) length of the delay, (ii) the reason for the delay, (iii) the defendant's assertion of his right, and (iv) prejudice to the defendant. ***Id.*** at 530.

ii. **Length of the Delay**

Any delay of over eight months is presumptively prejudicial and triggers the balancing of the other three ***Barker*** factors. ***Woodall***, 801 So. 2d at 682. The lodging of a detainer again a person otherwise in custody suffices to make the prisoner an accused. ***Bailey***, 463 So.

2d at 1062. Because Mr. Muise was in custody since the date of his alleged crime, four hundred and ninety-six (496) days passed between the accusation against Mr. Muise and his trial. Therefore, a balance of the other three factors of the ***Barker*** test should be conducted.

iii. Reason for the Delay

Under the ***Barker*** test, " 'different weights' are to be 'assigned to different reasons' for delay" ***Doggett v. United States,*** 505 U.S. 647, 657 (1992)(quoting ***Barker,*** 407 U.S. at 531). There is nothing in the record of the case at bar to indicate any reason for the delay. No continuances were granted. The first day the case was set for trial, it went to trial, four hundred and ninety-six days after Mr. Muise was arrested.

Official negligence and court congestion, the likely causes of the delay in this instance, are "more neutral" reasons that weigh "less heavily," but are nevertheless counted against the government in terms of balancing. ***Barker***, 407 U.S. at 531.

This factor weighs in favor of Mr. Muise.

iv. The Defendant's Assertion of his Right

The duty to bring a defendant to trial always rests with the State. ***Stevens v. State***, 808 So. 2d 908, 917 (Miss. 2002); ***Sharp v. State***, 786 So. 2d 372, 381 (Miss. 2001). While the State bears the burden to bring the defendant to trial, the defendant has some responsibility to assert the speedy trial right. ***Wiley v. State***, 582 So. 2d 1008, 1012 (Miss. 1991). Mr. Muise asserted his speedy trial right on three separate occasions: once through his first attorney, and twice in pro se motions before the court.

In recent cases, the courts have relied on ***Perry vs. State***, for the proposition that the defendant's demand for dismissal or for an instant trial is insufficient to assert the speedy

trial right. ***Perry v. State***, 637 So. 2d 871, 875 (Miss. 1994). The facts in ***Perry***, however, are easily distinguishable from the case at bar. In ***Perry***, the defendant did not assert his right until he filed a motion to quash and dismiss the indictment. ***Id.*** In the current case, the Appellant on two occasions made a motion for a speedy trial. It was not until over six months after his motions for a speedy trial that the defendant made his motion to dismiss charges for failure to provide a fast and speedy trial. Mr. Muise was in jail for the entire duration of the delay in coming to trial, whereas the defendant in ***Perry*** was only in jail for one month during the delay. ***Id.***

It should further be noted that Mississippi courts have been open to demands for speedy trials offered by defendants. *See,* ***State v. Fergusson***, 576 So. 2d 1252, 1254 (Miss. 1991) (noting "Nothing in the law requires that the demand [for a speedy trial] be in writing").

Therefore, this factor weighs in favor of Mr. Muise.

Should this Honorable Court find this case to be similar to ***Perry*** and conclude that Appellant did not sufficiently assert his demand for a speedy trial, it should be noted that Mr. Muise made a demand for a speedy trial on two (2) separate occasions. Appellant later filed a motion to dismiss charges for failure to provide a fast and speedy trial on a later occasion. This Court should consider that more persuasive and more in the favor of Mr. Muise than if he had merely filed one demand for a speedy trial or one motion to dismiss for failure to provide.

v. Prejudice

There are three interests that an individual's speedy trial rights are intended to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *See* ***Jenkins v. State,*** 607 So. 2d 117 (Miss. 1992).

In ***Doggett***, the United States Supreme Court concluded that "the speedy trial enquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice." ***Doggett***, 505 U.S. at 655. The ***Doggett*** Court further concluded that "affirmative proof of particularized prejudice is not essential to every speedy trial claim." ***Id.*** at 655. Excessive delay may compromise the trial in ways that neither side can prove, so that the longer the delay becomes, the prejudice it may cause, even without proof, should take an increasing role in the mix of relevant factors. ***Id.*** at 656.

In the case *sub judice*, Mr. Muise's defense was exceedingly disadvantaged by the delay in bringing him to trial. Because of the delay, Mr. Muise was unable to pursue his defense that he was not the shooter due to the fact that, during the delay, the Harrison County Sheriff's office lost contact with the co-indictee in the case. At the time of trial, Mr. Fladland, the co-indictee, was on wanted on an active warrant from Colorado for forgery.

Because of the loss of a witness essential to his defense, the delay was prejudicial to Mr. Muise; therefore, this factor weighs in favor of the Appellant.

vi. Conclusion

Upon a balancing of the Barker factors, this Honorable Court should conclude that the Appellant was denied his constitutionally-mandated right to a speedy trial. All four factors

weigh in favor of the Appellant; therefore, this Honorable Court should grant appellant the proper remedy for the violation of his constitutional rights.

It is widely established that the sole remedy for a Sixth Amendment speedy trial violation is the dismissal of the charges with prejudice. ***Bailey,*** 463 So. 2d at 1064. *See also* ***Ross v. State***, 605 So. 2d 17 (Miss. 1992); ***Strunk v. United States***, 412 U.S. 434 (1973). Because of this, appellant asks this Honorable Court to reverse appellant's conviction and release him from the custody of the Mississippi Department of Corrections.

ISSUE TWO: WHETHER APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE COUNSEL WHEN THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A CONTINUANCE IN ORDER TO SECURE MEDICAL RECORDS, EXPERT TESTIMONY, AND CRUCIAL WITNESSES ESSENTIAL TO APPELLANT'S THEORY OF DEFENSE.

i. Standard of Review

The decision to grant or deny a continuance is made a trial court's discretion. ***Stack v. State***, 860 So. 2d 687, 691 (Miss. 2003); ***Johnson v. State***, 631 So. 2d 185, 187 (Miss. 1994). In order to demand a reversal, a trial court's denial of a continuance must result in "manifest injustice." ***Id.*** (quoting ***Gray v. State***, 860 So. 2d 53, 58 (Miss. 2001)). "The burden of showing manifest injustice is not satisfied by conclusory arguments alone, rather the defendant is required to show concrete facts that demonstrate the particular prejudice to the defense." ***Id.*** at 691-92 (citations omitted).

ii. Criminal defendants are entitled to effective counsel.[1]

[1] Appellant is not contending that trial counsel was ineffective, but, rather, that the trial court's error resulted in a situation which deprived Appellant of effective counsel. There is nothing in the record to indicate that any of trial counsel's decisions and methods at trial had any effect that would reach to point of prejudice as outlined by ***Strickland v. Washington***, 466 U.S. 668 (1984).

It is a longstanding legal principle in the courts of Mississippi that defendants are entitled to an attorney who is prepared for trial. ***Cruthirds v. State***, 2 So. 2d 145, 156 (Miss. 1941) (holding "A fair and impartial trial includes a reasonable opportunity to prepare for trial").

The right to counsel contained in the United States Constitution guarantees that criminal defendants will have the right to an attorney who has had adequate time to prepare for trial. ***Lester v. State***, 692 So. 2d 755, 777 (Miss. 1997) (concluding "The Sixth Amendment right to assistance of counsel is not satisfied unless the accused attorney is given adequate time to prepare his defense")(citations omitted); *See also* ***Powell v. Alabama***, 287 U.S. 45, 59 (1932); ***White v. Ragen***, 324 U.S. 760, 764. (holding "it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel").

iii. The trial court deprived appellant his right to effective counsel by not allowing Counsel a continuance in order to discover the location of witnesses essential to Appellant's defense at trial.

In asking for the continuance, Mr. Muise's trial counsel was merely attempting to cure the prejudice that was created by the unreasonable delay in taking his client to trial.[2] Appellant contends that failure to locate Mr. Fladland was severely detrimental to the theory of Appellant's defense at trial.

[2] It should be noted that though Issue One concerns Appellant's denial of his constitutional right to a fair trial, it is not incongruous with Issue Two's concern regarding Appellant's right to effective counsel. The request for the motion or a continuance was made in hopes of curing the problems created by the failure of the State in bringing Appellant to trial in an adequate time frame. Witnesses were lost, and, in asking for a continuance, Appellant's trial counsel hoped to locate the witness in order to effectively argue Appellant's theory of defense at trial.

By refusing to grant the continuance, the trial court deprived appellant of a means by which to argue his theory of the case at trial. Had there been a continuance, it is likely that Mr. Fladland would have been located and could have been subpoenaed by Mr. Muise's trial counsel. This could have easily fortified the reliability of Mr. Muise's defense at trial that he was not the shooter, but that it was Mr. Fladland.

Furthermore, trial counsel wished to serve a subpoena on Cherrie Mark Roach (hereinafter referred to as "Mr. Roach"), the man who sold the alleged murder weapon to Mr. Fladland. Though the fact that the alleged murder weapon was Mr. Fladland's was stipulated to by both sides at trial, had defense counsel gotten a more adequate chance to examine Mr. Roach regarding the specifics of the gun purchase, Appellant's defense would have been greatly strengthened.

iv. The trial court erred when it deprived appellant of his right to effective counsel by not allowing trial counsel an opportunity to secure an expert witness to testify to the pharmaceutical interaction of four medications taken by the state's key witness in the case.

A separate reason for asking for a continuance was to provide newly-appointed trial counsel was to subpoena medical records of Jamie Little, the State's key eye-witness in the case.[3] Furthermore, trial counsel wanted an opportunity to secure an expert witness to testify at trial.

According to her own testimony at trial, Jamie Little was taking four different medications at the time of the incident; (i) Tylenol Three, a narcotic pain medication

[3] The fact that the Harrison County Public Defender's Office was newly appointed to represent the Appellant at trial was in no way the fault of trial counsel or the Appellant. As noted above, the error concerning an inaccurate filing with the trial court which led the office to mistakenly believe a conflict of interest existed.

containing codeine, (ii) Ultram, a narcotic-like pain reliever, (iii) Flexeril, a skeletal muscle relaxer, and (iv) Xanax, a medication associated with the treatment of anxiety and panic disorders.

As noted by trial counsel's motion for continuance, all four of these drugs have side-effects and complications that could be potentially damaging to a witness's ability to properly recall that which was seen. Xanax's possible side effects include attention disturbance, blurred vision dizziness, drowsiness, and lightheadedness. (C.P. 37). Possible side effects of Flexeril are dizziness and drowsiness. (C.P. 40). Ultram's potential side effects are dizziness, drowsiness, and blurred vision. (C.P. 44). Lastly, Tylenol 3's side effects relevant side effects are light-headedness and dizziness. (C.P. 47). If all of these drugs, when used in solitude, have such side effects, there can be little doubt that in concert there must be some interaction between them.

At the very least, it should be noted that those taking Ultram should avoid using drugs that make individuals taking them sleepy. (C.P. 44). This includes other pain medications (such as Tylenol 3), muscle relaxants (such as Flexeril), and medications for depression and anxiety (such as Xanax). (C.P. 44).

In denying the motion, the trial court concluded that trial counsel would have the opportunity to cross-exam the witness regarding the effects of the four different types of medication she was taking at the time. However, appellant contends that given the short amount of time between trial counsel's initial review of the case and the first date for trial, there was not a sufficient enough time for counsel to familiarize itself with the specifics of the drugs taken by the witness. Furthermore, trial counsel would not be able to question Ms.

Little on the potential interactions between the various drugs in her system at the time of the incident, because he was not completely aware of them. This is evidenced by trial counsel's request with the trial court to have time in order secure funds for a medical expert to conclude what the potential interactions of the four drugs in the witness's system would be. If not fully aware of what the interactions could potentially be, how could trial counsel effectively cross-examine the witness regarding them?

In addition, the trial court's conclusion that defense counsel would be able to cross-examine Ms. Little regarding any interactions or side-effects from her pharmaceutical use directly contradicts trial counsel's position – that Ms. Little is not intentionally lying, but that she misapprehended the situation. If Ms. Little believed that she was telling the truth, she would not be able to properly testify upon cross-examination whether the drugs effected her perception the night in question.

This argument is further strengthened by the fact that eyewitness testimony is inherently unreliable.[4] Confidence in eyewitness accounts does not indicate accuracy.[5] *See, e.g.* Gary L. Wells & R. C. L. Lindsay, *Accuracy, Confidence and Juror Perception in Eyewitness Identification*, 64. J. APPLIED PSYCHOLOGY 440 (1979); Saul Kassin, *The General Acceptance of Psychological Research on Eyewitness Testimony: A Survey of Experts*, 44 AM. PSYCHOLOGIST 1089 (1989)(concluding that eighty seven (87) percent of

[4] Appellant contends that the State's contention to the jury that "there's nothing in this word any more credible than an eyewitness in the history of jurisprudence, period." is completely inaccurate. (T. 222).

[5] Though not controlling, several courts in other states have recognized the doubt regarding the confidence/accuracy connection. ***Commonwealth v. Jones***, 423 Mass. 99, 110 (1996); ***State v. Long***, 721 P.2d 483 (Utah 1986).

experimental psychologists surveyed agreed that eyewitness confidence is not an indicator of accuracy). No matter how confident Ms. Little might be in what she witnessed the night in question, it should in no way be indicative of any corollary between her account and what actual took place that evening.

v. Conclusion

In ***Lambert v. State***, the Mississippi Supreme Court addressed the issue of denial of a continuance when trial counsel was not prepared for trial. ***Lambert v. State***, 654 So. 2d 17, 22 (1995). Just as in the case at bar, the unpreparedness at trial counsel had nothing to do with procrastination on the part of the defendant, but rather because of a short time between the obtaining of counsel and trial.[6] ***Id.*** As this honorable Court has noted, "While Mississippi need not provide any of its citizens with a perfect trial, she must provide all of her citizens with a fair one." ***Stubbs v. State***, 845 So. 2d 656, 666 (Miss. 2003).

Because the trial court erred in denying the motion for continuance, the appellant's defense was prejudiced. Mr. Muise was unable to locate a witness that was essential to his theory of the case; furthermore, Mr. Muise was unable to obtain medical records and expert opinion to impeach the testimony of the State's key witness against him. For these reasons, this Honorable Court should reverse and remand for a new trial.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been

[6] In ***Lambert***, there was a short time between the indictment and the trial date. Still, this is analogous to the facts in the current case because trial counsel's unpreparedness was based solely on the apparent conflict of interest due to an error in court documents. In both situations, the unpreparedness was not in trial counsel's control.

specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on a charge of murder, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for John Peter Muise, 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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This the 5 day of FEB, 2008.

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