CASE NO.: 2007-KA-01268-COA

IN THE SUPREME COURT OF MISSISSIPPI

EDGAR LEE COMMODORE, JR.,	)	
	)	
Defendant - Appellant,	)	
v.	)	**ORAL ARGUMENT REQUESTED**
	)	
STATE OF MISSISSIPPI,	)	
	)	
Plaintiff - 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.

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STATEMENT FOR ORAL ARGUMENT

Defendant requests oral argument in this matter on the grounds that there are numerous issues on appeal. Defendant further asserts that the instant appeal is not frivolous, that the dispositive issues herein have not been recently authoritatively decided, that the facts and legal arguments cannot be adequately presented in the briefs and record and that the decisional process would be significantly aided by oral argument.

STATEMENT OF ISSUES

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VI. THE CIRCUIT COURT ERRED WHEN, DESPITE OBJECTION BY DEFENDANT, IT ALLOWED TESTIMONY AS TO DEFENDANT'S INTENT

STATEMENT OF THE CASE

Defendant was indicted on charges of conspiracy to commit a burglary, burglary, attempted grand larceny and attempted aggravated assault. (R[1]. 10-11) After a jury trial which commenced on 29 November 2005 and concluded on 30 November 2005, Defendant was found guilty on all charges. (R. 151-152) On 14 December 2005, Defendant was sentenced to serve twenty (20) years, day for day, as a habitual offender, to wit: five (5) years on Count 1, conspiracy; seven (7) years on Count 2, burglary; ten (10) years on Count 3, attempted grand larceny; and twenty (20) years on Count 5, attempted aggravated assault, to run concurrently. (ST[2]. 34, 35; *Denial Of Post-Trial Motions And Sentence Of The Court As A Habitual Offender,* R. 156-157) On 19 December 2005, Defendant, through new counsel, A. E. Rusty Harlow, Jr., filed a Motion for Reconsideration or in the Alternative for New Trial. (R. 234) On 21 February 2006, Defendant filed a Motion For Leave To File Out-Of-Time Appeal And An Extension To File Appeal. (R. 163) Defendant retained undersigned counsel, who was admitted, pro hac vice, on 7 November 2006. (R. 182, 184) On 21 May 2007, Defendant filed his Motion For New Trial and Brief In Support Thereof. (R. 200 - 226) The Court heard hearings on Defendant's post-trial motions on 29 January 2007, 21 May 2007 and 25 June 2007 and, on 6 July

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[1] R denotes references to the Record on appeal.
[2] ST denotes references to the Sentencing Transcript.

2007, the trial court issued an order granting the motion for out of time appeal, denying Defendant's Motion For New Trial and reopening the period for appeal. (R. 242) Defendant timely filed a Notice of Appeal. (R. 19 July 2007) This appeal follows.

STATEMENT OF FACTS

On 18 October 2004, Edgar Commodore was picking up his nephew, George Stevenson, from a friend's house in DeSoto County. (T[3]. 188) Mr. Roosevelt Hill called Commodore and asked him to come and see Hill's aunt's new house. (T. 188, 189) Roosevelt Hill was already at the house when Commodore arrived and a light was on inside. (T. 189, 196, 198)

Deborah Hill, who lived across the street, heard a loud vehicle, saw a headlight shine up into her window, looked out the window and saw some vehicles backing up to the house. (T. 123, 124) Her husband, Brian Hill, observed two vehicles parked backwards into the driveway. Brian Hill retrieved his gun, drove across the street and parked his car so that neither vehicle could get out of the driveway. (T. 107, 108) There was no activity at the house when Brian Hill pulled up. (T. 109, 110) Brian Hill testified that he never saw the men in the house. (T. 113, 118, 125) However, Deborah Hill testified that she saw the men come out of the house. (T. 124, 126)

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[3] T denotes references to the Trial Transcript.

Commodore had left his truck running and was walking towards the house when Brian Hill approached and asked him what he was doing there. (T. 189, 200) Roosevelt Hill ran past Commodore, got into his vehicle and fled. (T. 110, 189, 200) Brian Hill did not attempt to pursue Roosevelt Hill, instead, he pulled out his gun and turned on Commodore. (T. 154, 189) Commodore jumped into his vehicle, ducked down to avoid being shot, and drove away. (T. 189) Deborah Hill was watching form her window and called the police. (T. 125)

Brian Hill followed Defendant's vehicle until Defendant was stopped by police. (T. 113, 190) Commodore thought that the officers were responding to the shots fired and stopped his vehicle. (T. 190) Officer Danielle Beith, an officer with the Southaven Police Department, responded to the call, activated her emergency equipment and initiated a stop on Defendant's vehicle. (T. 128, 129) Officer Beith testified that, after she read Commodore his rights, he first advised that he was picking up his nephew from his girlfriend's house and then admitted that he was a lookout for another guy who was going to steal a dishwasher out of one of the houses under construction in the area. (T. 131, 132, 263) Officer Beith testified that Commodore never complained about being shot at. (T. 264, 267)

Officer Todd Pierce, also a police officer with the Southaven Police Department, responded to the call as well. (T.

173, 174) Officer Pierce testified that Commodore admitted to being a lookout while Roosevelt Hill stole a dishwasher. (T. 174, 177, 267).

However, Commodore testified that he spoke with both officer Beith and Officer Pierce and informed them that Roosevelt Hill asked him to come and look at a house in the area. (T. 191) Commodore advised the officers that Roosevelt Hill was in the house when he arrived, but that he did not know how Roosevelt Hill had entered the house and he didn't see Roosevelt Hill steal anything from the house. (T. 191) Commodore never told officers that he was a lookout for Roosevelt Hill. (T. 191, 195, 209) Commodore did advise the officers that he was shot at during the incident. (207, 208) This was confirmed by Officer Pierce's testimony. (T. 174)

Officers also stopped and arrested Roosevelt Hill, a convicted felon who had previously served time for armed robbery. (T. 155-158) When Roosevelt Hill was initially asked why Commodore was at the house, he told police that he didn't know and that he didn't know where he and Commodore met that night. (T. 156, 165, 166)

However, after being arrested and indicted, Roosevelt Hill changed his story and testified that Commodore asked him to serve as look out while Commodore stole items from the house. (T. 151). Roosevelt Hill testified that Commodore lead the way

to the house and that Commodore and another man went into the house while he sat in the van. (T. 153, 153) When Brian hill pulled up, Roosevelt Hill claims that he was still sitting in his van but then exited the vehicle. (T. 154) Roosevelt Hill claims that Commodore and the other man then came running out of the house at which time he got back into his van and drove away. (T. 154).

Commodore did not try to run over or strike Brian Hill with his vehicle. (T. 189) Commodore did not take anything out of the house and testified that he did not know anyone who took anything out of the house. (T. 190)

Steven Cannon, the owner of the home THAT was allegedly burglarized, testified that he went to his house after being advised that it was burglarized. (T. 139) Cannon noticed that the microwave/vent-a-hood and the cooktop were missing and that the double oven and dishwasher were pulled away from the wall and cabinet. (T. 140) However, Officer Pierce testified that nothing was found in either Commodore's or Roosevelt Hill's vehicles. (T. 178) Officer Pierce also testified that there was no evidence that anything was taken and the appliances that Cannon claims were missing were never located. (T. 178).

SUMMARY OF THE ARGUMENT

The Circuit Court erred when it denied Defendant's motion for new trial and failed to provide any reasoning, in its order

denying Defendant's motion, explaining the court's denial of Defendant's motion.

The evidence was insufficient to support Defendant's conviction and sentence in that the question of Defendant's guilt hinged solely on the credibility of witnesses, evidence against Defendant was weak, there were conflicts in the evidence, alleged eyewitness testimony was inconsistent, there was a lack of evidence and testimony as to a material issue in the case, to wit: Defendant's intent, was erroneous admitted at trial.

Trial counsel's actions and omissions, individually and cumulatively, amounted to ineffective assistance. Trial counsel failed to adequately investigate Defendant's case, failed to adequately investigate Defendant's criminal history, failed to adequately investigate State's witnesses and co-defendant such that he could sufficiently cross-examine and impeach, failed to request curative instructions such that the jury would not be unduly influenced by inadmissible testimony and failed to discuss the case and evidence with Defendant and failed to adequately prepare Defendant to testify on his own behalf.

The Circuit Court erred when it sentenced Defendant as a habitual offender when, despite granting leave for the State to amend the indictment to add habitual offender language, the State failed to file the amendment. Thus, the Circuit Court

sentenced Defendant as a habitual offender under an un-amended indictment which failed to allege habitual offender status as to Defendant.

The Circuit Court erred when it allowed the speculative and opinion testimony of State's witnesses as to a material issue in the case, to wit: the intent of Defendant.

ARGUMENT AND CITATION OF AUTHORITY

I. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR NEW TRIAL

A motion for new trial challenges the weight of the evidence. Ross v. State, 954 So.2d 968 (2007). When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, This Court will disturb a verdict only when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. Id. *citing* Bush v. State, 895 So.2d 836, 844 (Miss.2005); Herring v. State, 691 So.2d 948, 957 (Miss.1997). This Court has stated that, on a motion for new trial, the court sits as a thirteenth juror, and the evidence is weighed in the light most favorable to the verdict. Id. A finding that the verdict was against the overwhelming weight of the evidence indicates that the Court disagrees with the jury's resolution of conflicting evidence and requires a new trial. Id. "This Court has not hesitated to invoke its authority to order a new trial and allow a second jury to pass on the evidence where

it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence[,] even where that evidence is sufficient to withstand a motion for a directed verdict." Lambert v. State, 462 So.2d 308, 322 (Miss.1984) (Lee, J., dissenting) *citing* Shore v. State, 287 So.2d 766 (Miss.1974). A greater quantum of evidence favoring the State is necessary for the State to withstand a motion for a new trial, as distinguished from a motion for J.N.O.V. Pharr v. State, 465 So.2d 294, 302 (Miss.1984).

In the instant case, Defendant asserts the State did not meet its burden to withstand Defendant's motion for new trial, that Defendant proved insufficiency of the evidence and that Defendant showed that the evidence did not weigh heavily in favor of the verdict. First, the Circuit Court erred in denying Defendant's ineffective assistance of counsel claim. The Circuit Court found that:

> some of the actions of Commodore's attorney was trial strategy. Also, the Court finds that Commodore has not set forth credible proof of his allegations and his motion should be denied on the ground of ineffective assistance of counsel and his other grounds. (R. 242)

Defendant raised at least five (5) areas where trial counsel was deficient. The Circuit Court stated that it only considered *some* of trial counsel's actions trial strategy. The Circuit Court failed to identify the number of actions it found to be trial strategy, failed explain which actions were trial strategy

and failed to even make reference to the remaining actions which Defendant asserts constitute ineffective assistance of counsel. Further, Defendant asserts that he provided credible proof that trial counsels actions were deficient as discussed fully in section III, *infra*.

In denying Defendant's Motion For New Trial, the Circuit Court summarily denied relief on all other issues raised in Defendant's motion without any explanation or citation to the record. However, as discussed fully in the sections below Defendant shows that there was insufficient evidence to support the conviction, there were conflicts in the evidence, a lack of evidence and erroneously admitted evidence that proved to be highly prejudicial to Defendant resulting a denial of Defendant's fair trial rights.

II. A RATIONAL TRIER OF FACT COULD NOT HAVE FOUND APPELLANT GUILTY OF ATTEMPTED AGGRAVATED ASSAULT BEYOND A REASONABLE DOUBT

Appellant's conviction should be reversed because of the insufficiency of the evidence. When a criminal defendant challenges the sufficiency of the evidence supporting his or her conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis original.) Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 61

L.Ed.2d 560 (1979). The jury resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from the evidence. Id.

Here, the evidence is not competent to support each fact necessary to make out the State's case for attempted aggravated assault. The testimony of Roosevelt Hill is questionable, and speculative, at best, as to any conduct by Defendant which would constitute attempted aggravated assault. Mr. Hill was impeached when he admitted that, at a minimum, he was untruthful when he spoke with police officers. (T. 172) Additionally, Roosevelt Hill gave two (2) separate statements to officers, which wholly contradicted one another.(T. 168 - 172) Roosevelt Hill's testimony is also questionable as to whether he actually witnesses Defendant's actions as they relate to the attempted aggravated assault charge since Roosevelt Hill was already in his truck and was fleeing the scene prior to the time when Defendant began to drive his vehicle away. (T. 116) The Court admits, in its ruling on Defendant's motion for directed verdict, that, if the only evidence of the attempted aggravated assault was the testimony of Roosevelt Hill, then that would not be enough.

The Court reasoned that the testimony of Brian Hill essentially supported the State's case for attempted aggravated assault. However, Brian Hill's testimony is contradictory and,

if anything, supports Defendant's theory of defense, to wit: Defendant was attempting to get away from a man who pulled a gun out on him. Brian Hill testifies that Defendant attempted to hit him with his vehicle and that he did not pull his gun until he saw Defendant coming towards him.

> A. ...the person getting in the white vehicle had to run around to their truck, and I proceeded around the front of my truck towards the front of his truck to try to stop him from leaving.
>
> Q. And so what happened at this point?
>
> A. At that point, I got in front of the vehicle. I pointed my gun at the driver of the vehicle when he began to put the vehicle in gear like he was going to come towards me. (T. 110)

However, Brian Hill's own testimony contradicts this contention when he testified, on cross-examination, to the following:

> Q. Now you also jumped in front of Commodore's vehicle trying to prevent him to leave—I mean, prevent his leaving: is that correct?
>
> A. That's correct. (T. 118)
>
> Q. Okay, when did you draw your gun?
>
> A. ...After Mr. Roosevelt Hill jumped in his vehicle and I was headed toward this guys vehicle. (T. 120)

The record is clear, and there is not contradiction, that Roosevelt Hill jumped into his vehicle first. Brian Hill's testimony clearly shows that he drew his gun *after* Roosevelt Hill jumped into his car, but before Defendant began to drive away. Brian Hill's testimony clearly shows that he jumped in

front of Defendant's vehicle holding the gun just as Defendant began to drive away. Brian Hill admits during his testimony that he was blocking the Defendant and that, in order for the Defendant to get out of the driveway, he would have to go around him. Also, Hill indicates that there was not much space between his car and the Defendant's vehicle.

Further, Brian Hill testified that the Defendant never slowed down and didn't give him any indication that the Defendant was going to back up over him. (T. 120). At most, the testimony that Defendant was trying to hit Brian Hill with his vehicle was speculative, spoke to a material issue, and was erroneously admitted.

The conflicts in the evidence create a reasonable doubt and the evidence fails to support Defendant's conviction for attempted aggravated assault.

III. Defendant's Sixth Amendment Rights Were Violated When He Received Ineffective Assistance Of Counsel

This Court has stated the standard for review on ineffective assistance of counsel, following the standard provided in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and Stringer v. State, 454 So.2d 468 (Miss.1984). Puckett v. State, 879 So.2d 920, 935-936 (Miss.2004). The Court held:

> "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case. Id. at 687, 466 U.S. 668, 104 S.Ct. 2052. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Stringer v. State, 454 So.2d 468, 477 (Miss.1984) (citing Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674). The focus of the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Id.

Then, to determine the second prong of prejudice to the defense, the standard is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Mohr v. State, 584 So.2d 426, 430 (Miss.1991). Strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all

the circumstances, applying a heavy measure of deference to counsel's judgments. Strickland, at 691, 104 S.Ct. at 2066.

Here, Defendant's trial counsel was ineffective in that he a) failed to adequately prepare Petitioner for his testimony; b) failed to adequately investigate Defendant's case; c) failed to prepare a adequate and reasonable defense strategy; d) failed to adequately question and cross examine witnesses; and e) failed to request proper corrective instructions following improper testimony which was timely objected to and properly sustained by the Court.

A. *Defendant Received Ineffective Assistance of Counsel When His Trial Attorney Failed To Adequately Prepare Petitioner For His Testimony*

In this case, there were numerous conflicts in testimony. Therefore, the entire question was witness credibility. Petitioner asserts that he should have been better prepared by this counsel to testify. Specifically, Defendant should have been prepared for cross examination such that he did not volunteer information which would make otherwise inadmissible evidence admissible. The effectiveness of 'defendant's testimony turns simply upon whether or not the jury chose to believe them. Defendant testified that he did not steal, when in fact, he had been previously convicted of theft of property. Defendant volunteered the following testimony which was unsolicited by the State:

A. "...my intentions was not to steal. I don't steal.

Q. What did you just say? What did you just say?

A. I said my intentions was not to steal, I don't steal. (T. 211)

Defendant opened the door for the State to impeach him using prior convictions. The next day, Defendant testified again, this time volunteering, without solicitation by the State, other convictions which were wholly unrelated to theft or burglary, to wit: Defendant's aggravated assault and statutory rape convictions.

Defense counsel had a duty to adequately prepare Defendant to testify on his behalf, prepare Defendant for cross-examination, and counsel Defendant regarding the volunteering of information which would be high prejudicial to Defendant's defense. However, here, trial counsel did not prepare Defendant to testify or prepare Defendant for cross-examination.

Although trial counsel testified that he did prepare Defendant for his testimony, trial counsel's responses were speculative, at best. Specifically, in response to questions regarding whether he prepared Defendant to testify, trial counsel stated, "Yes, I *think* I did." *Emphasis added.* (MFNT 390) Yet, trial counsel was unable to provide any documentation of the meetings, testimony regarding the length of time he spent preparing Defendant to testify or the dates on which these meetings allegedly occurred.(MFNT 390-391)

Defendant testified that trial counsel did not prepare him at all prior to calling Defendant to the stand to testify, except to advise him to state to the Court that he didn't steal. Specifically, Defendant testified as follows:

Q. …Did [trial counsel] call you as a witness

A. Yes, sir

Q. Did he prepare you before he called you as a witness?

A. No, sir.

Q. Meaning, did he ask you questions and say, "These are the questions I'm going to ask you, and these are the cross-examination questions that Mr. Murphey might ask you"? Did he do that?

A. No, sir.

Q. Did you spend any time going over what you would say and what Mr. Murphey might ask you based on you saying something?

A. No, sir. (MFNT.II. 429)

A. I said, "I don't steal."

Q. You said you don't steal?

A. Yes, sir.

Q. Why did you say that?

A. Well, honestly, I don't, but Mr. Beck told me to say that.

Q. He told you to say you don't steal?

A. He said the best thing for you to do is get up there and announce so the Judge can hear it and let him make the decision. He said, "Let the Court know that you do not steal." And he asked me about my - a robbery

charge, but to my knowledge, that robbery charge was supposed to have been dropped. (MFNT.II.430)

Q. Other than encouraging you to say you do not steal, was there any other counsel that he gave you concerning your direct examination?

A. No, sir. (MFNT.II. 431)

Additionally, Defendant definitively testified that Mr. Beck never reviewed the indictment or discovery with him, never explained the evidence against Defendant, never reviewed the so-called eyewitness statements or the statements of the co-defendant with him. (MFNT.II. 434-435) Trial counsel admitted that he did not meet with Defendant very much in preparation for trial or during his representation. (MFNT[4] 392)

Here, it is clear that trial counsel did not adequately prepare Defendant for his testimony at trial. The admission by counsel that he did not meet with Defendant, the speculative and unsure nature of trial counsel's responses, the definitive testimony of Defendant that he was not prepared for his testimony and the additional testimony that trial counsel did not review any discovery or documents with Defendant relevant to his case make it evident that Defendant received ineffective assistance of counsel.

Further, Trial counsel was ineffective in that, once Defendant made the statement that he did not steal, trial

[4] Denotes a reference to the Motion For New Trial Proceedings on 21 May 2007.

adequately investigate and prepare for trial. Trial counsel testified at the Motion For New Trial Hearing that he was aware of the Defendant's convictions prior to trial. However, it is clear, from the record, that Trial Counsel did not adequately investigate Defendant's criminal history. At trial, trial counsel stated, "He has a record, yes, but I don't think it's robbery. (T.212) Trial counsel also stated, "...Mr. Commodore informs me that the robbery charged was dropped and the conviction he has is an aggravated assault charge and a statutory rape charge. (T. 213) After a recess to afford the parties an opportunity to further research Defendant's convictions, defense counsel noted that his paralegal went into the court to investigate the convictions that morning, one day after the trial began. (T. 230)

The record indicates that trial counsel was not aware of Defendant's criminal history and that trial counsel relied on Defendant's understanding of his prior convictions as opposed to investigating Defendant's criminal history. It is reasonable for any trial attorney to familiarize himself with a Defendant's criminal history when calling that Defendant to testify on his behalf.

Trial counsel's failure to adequately investigate the case was highly prejudicial and harmful to Defendant because it prevented trial counsel to adequately prepare Defendant to

testify and for cross-examination. Further, because this case was decided based on witness credibility, the evidence that was made admissible by Defendant's voluntary testimony as to his character and his prior convictions was crucial.

Additionally, Counsel failed to investigate and obtain telephone or cell phone records to support Defendant's theory of Defense that Roosevelt Hill called Commodore just before the incident and asked him to come over. This would also refute Roosevelt Hill's testimony that Commodore planned the burglary, that they met at Roosevelt Hill's mother's house and that Roosevelt Hill followed Commodore to the location of the incident.

C. *Defendant Received Ineffective Assistance of Counsel When His Trial Attorney Failed To Adequately Question And Cross Examine Witnesses*

Defendant was denied effective assistance of counsel when his trial attorney failed to adequately question and cross examine witnesses. Defendant's theory of defense was that he was called by a friend and asked to come and look at a house. Within moments after his arrival, and before he even had a chance to enter the house, a man, Brian Hill, arrived with a gun and Defendant fled the scene in fear of his safety. Both Defendant, Roosevelt Hill and Brian Hill testify that the sequence of events occurred very quickly. Therefore, it is

critical to Defendant's theory of defense to identify a timeline or timeframe of events.

Trial counsel did not question either Brian Hill or Deborah Hill about the length of time that elapsed between the time Debora Hill first looked out of her window and saw the men and the time that Brian Hill arrived in the driveway. The length of time that Defendant was present at the house is important because Defendant's defense was that he was only there for a very brief period of time and that he never entered the house. This is supported by the fact that Deborah Hill heard a loud noise consistent with the exhaust pipes on Defendant's SUV and indicating that Defendant was just arriving when Deborah hill heard the noise. Deborah Hill first testified that, when she looked out of her window, she saw two vehicles backing up to the house. She later testified that when she looked out of her window, someone was exiting the house. However, if Defendant had just arrived, then he could not have been the man exiting the home. This supports Defendant's argument that he never went inside the home, thus, the evidence does not support a conviction of burglary.

Similarly, trial counsel did not question either Defendant or Roosevelt Hill about the timeframe of the events and how long they were at the house before Brian Hill arrived. Based on the testimony of Brian and Deborah Hill, Defendant was not there

long enough to either enter the house, carry away the two missing appliances, or attempt to carry away the two appliances which were moved away from the wall and cabinet.

Additionally, trial counsel failed to impeach Deborah Hill, Brian Hill and Roosevelt Hill. Deborah Hill first testified that she looked out of the window and saw two (2) vehicles backing into the driveway. Later, on rebuttal, she testified that, when she looked out of her window, she saw two men coming out of the house. Deborah Hill gave two conflicting statements which were not addressed at all by trial counsel.

Brian Hill first testified that he pulled his gun when he did not get a response to his question as to what the men were doing at the residence. He later testified that he did not pull his gun until he saw Defendant coming at him. Trial counsel made no attempt to impeach Brian Hill's Testimony.

As the only evidence in this case is the uncorroborated, contradictory testimony of Brian Hill and Deborah Hill, witness credibility was a crucial issue at trial and trial counsel's failure to impeach the witnesses cannot be said to have been harmless or trial strategy.

D. *Defendant Received Ineffective Assistance of Counsel When His Trial Attorney Failed To Request Proper Curative Instructions Following Improper Testimony Which Was Timely Objected To And Properly Sustained By The Court*

Where an objection to impermissible testimony is sustained, the jury should be admonished by the trial court to disregard the statement. The Court may, on its own, offer such curative instruction to the jury. However, if the Court fails to offer such instruction, defense counsel should request the curative instruction to remove any prejudicial effect from the minds of the jurors.

It is the well established rule in Mississippi that where a trial judge sustains an objection to testimony interposed by the defense in a criminal case and instructs the jury to disregard it, the remedial acts of the court are usually deemed sufficient to remove any prejudicial effect from the minds of jurors. Forrest v. State, 352 So.2d 1328 (Miss.1977); Herron v. State, 287 So.2d 759 (Miss.1974); Myrick v. State, 290 So.2d 259 (Miss.1974). The jury is presumed to have followed the directions of the trial judge. Evans v. State, 422 So.2d 737, 744 (1982); Hughes v. State, 376 So.2d 1349 (1979); Gray v. State, 375 So.2d 994 (1979); Duke v. State, 340 So.2d 727 (1976). However, here, the Court failed to give, and defense counsel failed to request such curative instructions. This

omission by the Court amounts to error. The omission by defense counsel amounts to ineffective assistance of counsel.

Specifically, trial counsel failed to request a curative instruction following Officer Beith's testimony on rebuttal examination that Mr. Commodore confessed to being a lookout and to being involved in and knowing about the alleged burglary. (T. 135) Defense counsel appropriately objected to the testimony and the Court properly sustained the objection because the nature of the testimony was not challenged during the Defendant's case and proofs. However, no curative instruction was given and defense counsel did not request one. The testimony was highly prejudicial because it is contrary to Defendant's theory of defense. Although it was briefly discussed on direct examination, it was improper and unfairly prejudicial for the testimony to be presented to the jury.

Similarly, defense counsel appropriately objected, and the Court properly sustained Defendant's objection to Brian Hill's testimony that Defendant's intent was to strike him with his vehicle. (T. 111) However, no curative instruction was given by the court, no curative instruction was requested by defense counsel and there was no request for the testimony to be stricken from the record.

E. Defendant Received Ineffective Assistance of Counsel When His Trial Attorney Failed To Adequately Confer With Defendant And Protect Defendant's Rights

Defense counsel failed to adequately protect Defendant's rights and counsel Defendant. The Court determined, and the State agreed that the only conviction which would have been used for impeachment was the robbery conviction. (T. 224) The court noted that all other convictions should be redacted. (T. 245) Even after court recessed for the day, defense counsel failed to confer with Defendant regarding his rights and testimony regarding prior convictions. When Defendant took the stand and again began to testify as to prior convictions, Defense counsel failed to request time to confer with his client. Specifically, Commodore testified that he also had an assault charge and that he had served time for aggravated assault and statutory rape. (T. 252, 254, 255). Trial counsel's failure to confer with his client and protect Defendant's rights during trial constitutes ineffective assistance of counsel.

Additionally, it is clear from Defendant's testimony at the 25 June 2007 Motion For New Trial Hearing that Defendant's trial counsel did not properly advise him about the possibility of being sentenced as a habitual offender, the possible resulting penalties or what role the habitual status would play in Defendant's decision whether to take a plea or proceed to trial. Despite trial counsels contrary testimony during the 21 May 2007

hearing, Defendant clearly testified that trial counsel did not, at any time prior to trial, discuss the habitual offender matter with him. (MFNT.II[5]. 422) Specifically, Defendant testified as follows:

> Q. Okay. Before you went to trial, were you talked to about the habitual offender or being a habitual violator, what that meant as it relates to sentencing if you went to trial?
>
> A. No, sir.
>
> Q. Did you know that there was no parole if you were convicted as a habitual violator?
>
> A. No, sir.
>
> Q. Was there any discussion that you had with Mr. Beck concerning that?
>
> A. Not concerning that. (MFNT.II. 422)
>
> Q. Okay. Is there any point that you knew that if you were convicted you would be given the maximum allowable time under the law unless you could prove that it was disproportionate to what the crime was?
>
> A. No, sir.
>
> Q. Had you ever had a discussion with Mr. Beck about that?
>
> A. No, sir. (MFNT.II. 426)

Additionally, although trial counsel testified that he did prepare Defendant to give his testimony, trial counsel based that belief on his normal procedures when dealing with criminal clients. Trial counsel was unsure as to whether or not he prepared Defendant stating, "Yes, I *think* I did." Further, it

[5] MFNT.II. denotes a reference to the transcript of proceedings from the second motion for new trial hearing on 25 June 2007.

is clear from trial counsel's testimony that he did not meet with Defendant often, did not know about Defendant's criminal convictions and did not adequately investigate Defendant's criminal history such that he was aware of what convictions existed. This evidence, coupled with Defendant's testimony that trial counsel never discussed Defendant's testimony and convictions with Defendant show that trial counsel failed to adequately prepare Defendant to testify. Thus, trial counsel was ineffective.

F. Trial Counsel's Errors, Both Individually and Cumulatively Amounted To Ineffective Assistance Of Counsel

Defendant asserts that each of the errors discussed above individually constitute ineffective assistance of counsel. Notwithstanding, and without waiving that argument, Defendant asserts that, even if the individual errors do not, in and of themselves, constitute ineffectiveness, that they cumulatively amount to ineffective counsel.

The cumulative error doctrine stems from the doctrine of harmless error, codified under Mississippi Rule of Civil Procedure 61. Ross v. State, *supra* at 1018. It holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial. Id. *citing* Byrom v. State, 863 So.2d

836, 847 (Miss.2003). As an extension of the harmless error doctrine, prejudicial rulings or events that do not even rise to the level of harmless error will not be aggregated to find reversible error. Ross v. State, *supra* at 1018. As when considering whether individual errors are harmless or prejudicial, relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged. Id. *citing* Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (Nev.1998) *citing* Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1289 (1996). That is, where there is not overwhelming evidence against a defendant, This Court is more inclined to view cumulative errors as prejudicial.

Here, there is not overwhelming evidence against Defendant and in favor of the verdict. There is the contradicted testimony of co-defendant Roosevelt Hill, which, alone, is clearly insufficient as acknowledge by the Circuit Court and the contradictory testimony of Deborah and Brian Hill. Additionally, the record shows that the jury struggled with the evidence as it requested clarification as to placement of the vehicles and Brian Hill. As this case hinged on witness credibility, counsels' error in failing to adequately prepare Defendant to testify and adequately investigating Defendant's

criminal history resulted in the admission of bad character evidence against Defendant, significantly damaging Defendant's credibility. Further, counsels cumulative actions and omissions in failing to attach the credibility of Roosevelt Hill, Deborah Hill and Brian Hill were crucial and denied Defendant a fair trial.

Here, Defendant's trial counsel's performance was "outside the wide range of professionally competent assistance" Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574 (1986). His errors, viewed both separately and cumulatively, rendered the results of both the guilt-innocence and penalty phases unreliable. Thus, Defendant's judgment, conviction and sentence should be vacated.

IV. THE COURT ERRED WHEN IT ALLOWED THE STATE TO AMEND THE INDICTMENT IN ORDER TO SENTENCE DEFENDANT AS A HABITUAL OFFENDER AND SO THAT THE INDICTMENT WOULD CONFORM WITH THE STATE'S PROOFS

Courts may amend indictments only to correct defects of form; however, defects of substance must be corrected by the grand jury. Uniform Circuit and County Court Rule 7.09. Montgomery v. State, 891 So. 2d 179 (2004). "It is well settled in this [S]tate [···] that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case." Miller v. State, 740 So.2d 858, 862 (1999) (quoting Greenlee v.

State, 725 So.2d 816, 821 (1998)) The test for whether an amendment to the indictment will prejudice the defense is whether the defense as it originally stood would be equally available after the amendment is made. Griffin v. State, 584 So.2d 1274 (1991). Furthermore, it is well settled that an indictment may be amended after the State has rested. Burt v. State, 493 So.2d 1325 (1986); Burks v. State, 770 So.2d 960, 962-63 (Miss.2000).

The State made an oral motion on the morning of trial for leave to amend the Indictment to include language in order to charge the Defendant as a habitual offender. The Court granted the State's motion reasoning that the amendment affected only the sentencing and not the guilt-innocence phase of the case. However, in the interests of justice and equity, Defendant posits that it is fundamentally unfair to allow the State to amend the indictment with no notice to Defendant, such that Defendant would be subject to an enhanced sentence and that the indictment would conform with the State's proofs.

V. THE CIRCUIT COURT ERRED WHEN IT ALLOWED THE AMENDED INDICTMENT TO STAND WHEN THE STATE FAILED TO TIMELY FILE THE AMENDED INDICTMENT IN ORDER TO SENTENCE DEFENDANT AS A HABITUAL OFFENDER

The Court afforded the Defendant time between his conviction and the sentencing such that he could prepare to Defendant against an enhanced sentence under the habitual

offender statute. However, during this time, the State failed to file any amendment to the indictment such that it could sentence Defendant as a habitual offender. Defendant asserts that, although the State was granted leave to amend the indictment to add the habitual offender language, the amendment was never filed. Thus, Defendant's conviction as a habitual offender cannot stand, must be vacated and remanded for re-sentencing under the un-amended indictment.

Defendant posits that, a court's order allowing the State to amend does not, in and of itself, amend the indictment. It is similar to a Defendant who moves and is granted leave to file an out of time speedy trial demand, but who never actually files the demand itself. The Court's grant of leave does not excuse the party from the duty of actually filing the corrective pleading.

Defense counsel notified the Court upon sentencing that the amendment was never reduced to writing and never filed and moved to strike the amendment and to procedure with sentencing without consideration of the habitual offender statute. (ST. 3, 4) The Court specifically asked the State whether they had an order other than the order allowing the State to amend the indictment and the State admitted that it did not. (ST. 5) The court proceeded with the sentencing considering Defendant a habitual

offender reasoning that the Court's order entered on 29 November 2005 amended the indictment.

Upon information and belief, the Indictment was not actually and formally amended because it was not filed. "An indictment not so 'filed' is invalid; that is, a trial [or sentencing] cannot be had on it." Williamson v. State, 64 Miss. 229, 1 So. 171 (1886). Defendant asserts that the substantive requisites for amending an indictment were not conformed with and it was improper to sentence Defendant as a habitual offender. Thus, at a minimum, Defendant's judgment and sentence should be vacated. In the alternative, Defendant's judgment and sentence should be reversed and remanded for re-sentencing under the un-amended Indictment as written, excluding the habitual offender language.

VI. THE CIRCUIT COURT ERRED WHEN, DESPITE OBJECTION BY DEFENDANT, IT ALLOWED TESTIMONY AS TO DEFENDANT'S INTENT

At trial, Defendant objected to testimony by Brian Hill regarding whether Hill believed that Defendant's intent was to hit him with his vehicle, whether Defendant would have made an attempt to run over Hill with his vehicle after he left the driveway and whether, in Hill's opinion, he would have been injured had he been struck with Defendant's vehicle. Defendant's intent was a material issue in the case and it was

error to allow witness opinion and speculative testimony, as to a material issue in the case.

Specifically, the record shows the following testimony took place:

> **A.** [I] fired one shot at the back tire of the vehicle. I …did not hit the tire because I was worried that the vehicle was going to come back and try to run over me again.
>
> **BY MR BECK:** Objection. He can't testify as to what he's worried about. He can testify as to what actually happened.
>
> **BY THE COURT:** Overruled. I'll allow it. (T. 112)

The Court also allowed speculation testimony in regarding what Brian Hill's injuries would have been had he been struck by Defendant's vehicle. Brian Hill testified as follows:

> **Q.** Given the path that the vehicle took, Mr. Hill, if you had not moved, would you have been struck?
>
> **A.** I wouldn't be sitting here today if I wouldn't have moved.
>
> **By Mr. Beck:** Objection. It would be an opinion, Your honor.
>
> **By The Court:** I'll overrule the objection. Obviously Mr. Hill does not know what his actual injuries would have been. However, I think his answer is clear to the jury. I'll overrule the objection. (T. 112)

Similarly, the Court allowed speculation and opinion testimony by Roosevelt Hill regarding Defendant's intent as follows:

> **A.** Because he was in front of him. I guess he was trying to run him over or something.

By Mr. Beck: Objection, Your Honor, that's opinion.

By The Court: I'll overrule the objection as to what he guessed was going on. He can testify what he saw.

It was error to allow the witnesses to speculate as to what Defendant's intentions were and what Brian hill's injuries may have been had he been struck by Defendant's vehicle. The Court properly states the rule, that the witnesses may testify to what they saw or what actually happened. However, in the above noted instances, the Court allowed witnesses, over objection by Defendant, to offer speculative and opinion testimony as to a element of the offense of attempted aggravated assault.

The error was harmful to Defendant because Defendant the determination of his guilt on this charge hinged on credibility of the witnesses. The record shows that the jury struggled in their deliberations with what Defendant's intent actually was and whether or not he was trying to get away from Brian Hill or whether he was trying to strike him with the vehicle. It is clear that this was an issue because the jury sent a note to the judge asking for more information regarding the driveway, the positioning of the vehicles and the distance between Defendant's vehicle and the place where Brian Hill was standing when Defendant left the scene. (R. 322) But for the improper speculation and opinion testimony as to a material issue, the outcome of the case as it relates to the attempted aggravated

CASE NO.: 2007-KA-01268-COA

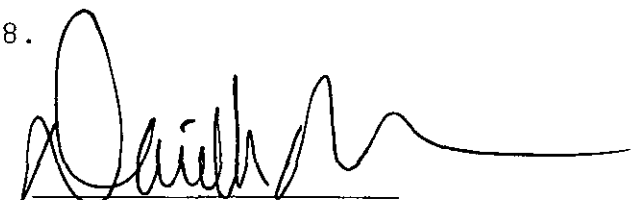
IN THE SUPREME COURT OF MISSISSIPPI

EDGAR LEE COMMODORE, JR.,	)	
	)	
Defendant - Appellant,	)	
v.	)	**ORAL ARGUMENT REQUESTED**
	)	
STATE OF MISSISSIPPI,	)	
	)	
Plaintiff - Appellee.	)	

CERTIFICATE OF FILING

I hereby certify that I, DANIELLE P. ROBERTS, an employee of AXAMLAW, did this day, cause the Brief of Appellant Edgar Lee Commodore, Jr. and Mandatory Record Excerpts to be filed in the Supreme Court of Mississippi by depositing the original and five (5) copies in the United States Mail in an envelope properly addressed to ensure delivery to the Clerk of the Supreme Court of Mississippi and that I caused the envelope to be date stamped by the United States Postal Service.

This 10th day of January, 2008.



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