

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OCTZAVIUS NEKEITH WEAVER

APPELLANT

V.

FILED

NO. 2007-KA-1423-COA

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STATE OF MISSISSIPPI

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APPELLEE

BRIEF OF THE APPELLANT

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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 this Court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Octzavius Nekeith Weaver, Appellant
3. Honorable Robert S. Smith, District Attorney
4. Honorable William Alexander Gowan, Jr., Circuit Court Judge

This the 25th day of FEB, 2008.



Justin T. Cook
Mississippi Office of Indigent Appeals
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APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF ISSUES

ISSUE ONE:

WHETHER THE IDENTIFICATION PROCESS WAS SO SUGGESTIVE AS TO BE
UNRELIABLE.

ISSUE TWO:

WHETHER APPELLANT'S RIGHT TO COUNSEL AS GUARANTEED BY THE
UNITED STATES AND MISSISSIPPI CONSTITUTIONS WAS VIOLATED WHEN A
SHOW UP IDENTIFICATION PROCEDURE WAS PERFORMED AFTER HIS
INVOKING OF THE RIGHT.

ISSUE THREE:

WHETHER THE STATE IMPROPERLY COMMENTED ON DEFENDANT'S POST-
MIRANDA SILENCE.

ISSUE FOUR:

WHETHER TRIAL COUNSEL'S INEFFECTIVENESS DEPRIVED APPELLANT OF
HIS CONSTITUTIONALLY MANDATED RIGHT TO A FAIR TRIAL.

ISSUE FIVE:
ISSUE FIVE: WHETHER THERE WAS CUMULATIVE ERROR THAT DEPRIVED
APPELLANT OF HIS RIGHT TO A FUNDAMENTALLY FAIR AND IMPARTIAL
TRIAL.

STATEMENT OF INCARCERATION

Octzavius Weaver, the Appellant in this case, is presently incarcerated in 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. 2004)*.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of the First Judicial District of Hinds County, Mississippi, and a judgment of conviction for armed robbery and being a felon in possession of a firearm against Octzavius Nekeith Weaver following a jury trial on July 17-18, 2006, honorable William Gowan, County Judge, sitting as Circuit Judge by special appointment, presiding. Mr. Weaver was subsequently sentenced to life imprisonment in the custody of the Mississippi Department of Corrections under *Miss. Code Ann. 99-19-83 (Supp. 2004)*.

FACTS

According to testimony, on May 16, 2006, William Penn (hereinafter referred to as "Mr. Penn") was going to The Green Room, a pool hall in Jackson, Mississippi, to meet a friend. (T. 53). Outside, according to his testimony, Mr. Penn was approached by a man with a gun who demanded his wallet. (T. 53). After taking Mr. Penn's wallet, the individual ran off. (T. 53). Mr. Penn then followed that person and wrote down the license plate number of the car he got into. (T. 54). When the police arrived, Mr. Penn gave the license plate number to them. (T. 54).

Police used dispatch and tracked the vehicle's owner to 2940 Randolph Street in Jackson,

where they went. (T. 76). Upon arriving, police saw the vehicle in question and took two individuals into custody. (T. 76). Police recovered a handgun from the bushes at the residence. (T. 78). In the vehicle, police officers found a card with Mr. Penn's name on it and a spare key to one of Mr. Penn's vehicles that was in his wallet. (T. 80).

After the incident, Mr. Penn drove home to Canton, which, according to his sworn testimony, took him forty-five (45) minutes. (T. 55). There, he received a phone call from police that said "they had him in custody." (T. 55).

When Mr. Penn arrived at the police station, they took him to one room containing one individual, and asked Mr. Penn if that was the individual who robbed him, to which he replied in the negative. (T. 55-56). They then took Mr. Penn to another room containing Octzavius Weaver (hereinafter referred to as "Mr. Weaver"). (T. 56). Mr. Penn responded that the person in that room was the individual that robbed him. (T. 56). Mr. Penn subsequently did a photographic lineup, picking out Mr. Weaver again as the individual that robbed him. (T. 56).

SUMMARY OF THE ARGUMENT

Appellant was denied his fundamental right to a fair trial by the improper admission of identification evidence against him. The show up procedure was improper, unreliable and inadmissible at trial. Furthermore, appellant was denied his constitutional right to counsel during the show up identification, also making it inadmissible at trial. Furthermore, during trial, the State improperly commented on appellant's post-*Miradna* silence. Appellant's defense was further prejudiced by trial counsel's ineffectiveness in pre-trial, trial, and post-trial matters. Lastly, when taken in concert, these errors, if harmless on their own, amount cumulatively to a violation of appellant's right to a fair trial and warrant reversal.

ARGUMENT

ISSUE ONE: WHETHER THE IDENTIFICATION PROCESS WAS SO SUGGESTIVE AS TO BE UNRELIABLE.

I. Standard of Review

The standard of review on appeal regarding the admissibility of evidence is abuse of discretion. *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990). Unless a trial court abuses its discretion in admitting the specific evidence, the appellate court will not find error. *Shearer v. State*, 423 So.2d 824, 826 (Miss. 1983).

The standard of review for trial court decision concerning pretrial identification is “whether or not substantial credible evidence supports the trial court’s findings that, considering the totality of the circumstances, in-court identification testimony was not impermissibly tainted.” *Roche v. State*, 913 So.2d 306, 310 (Miss. 2005). The appellate court will only disturb the trial court’s order where there is an absence of substantial credible evidence supporting it. *Id.*

ii. The show up identification process was impermissibly suggestive and, therefore, unreliable.

After the incident, Mr. Penn drove to his home in Canton, and shortly thereafter, received a phone call saying that “they had him in custody.” (T. 55). Mr. Penn then drove to Standard Life building to view Mr. Weaver, who was being detained. (T. 55). There were two suspects in two separate rooms by themselves (T. 64). Mr. Penn went into one room, saw a person, indicated it was not the person who allegedly robbed him. (T. 56). He then proceeded to the other room, where Mr. Weaver was, saw him, and identified him. (T. 56).

On the second day of trial, defense counsel objected to the introduction of the show up identification and photographic lineup identification. (T. 48, R.E. 22). The trial court concluded, “I think that at the appropriate time during the course of this proceeding you certainly can challenge

with regard – or may at least cross-examine as to the adequacy of the identification, and we'll cross that bridge when and if it comes into play" (T. 51, R.E. 25).

Mr. Penn was told that they had the person that robbed him in custody. The circumstances surrounding this identification process clearly contradict standards established by the United States Department of Justice, National Institute of Justice, September 2003 Special Report, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement*,¹ where it is taught that officers should only advise a witness that a possible suspect is being detained so as not to be overly suggestive and create a situation where the witness does not want to contradict the officer.

"The practice of showing suspects singly to persons for the purpose of identification and not part on a lineup has been widely condemned." *Stovall v. Denno*, 388 U. S. 293, 301 (1967); *See also, York v. State*, 413 So. 2d 1372, 1381 (Miss. 1982).

As pointed out in *York*, an unnecessarily suggestive pretrial identification does not alone require exclusion of the identification evidence which may be admitted if the identification is reliable under the totality of the circumstances. *York*, 413 So. 2d at 1381.

An impermissibly suggestive pretrial identification does not preclude an in-court identification by an eyewitness who viewed the suspect at the procedure, unless: (1) from the totality of the circumstances surrounding it (2) the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 1383.

When there are suggestive identification procedures, the reviewing court must look at other indicia of reliability. In *Banks v. State*, the victim was robbed of her purse at knife point and defendant was identified by her at a show up within five minutes. *Banks v. State*, 816 So. 2d 457, 460 (Miss. Ct. App. 2002). The *Banks* Court relied on other indicia of reliability including that the

¹. Available over the Internet at <http://www.ncjrs.gov/nij/eyewitness/188678.pdf>.

defendant was caught with two knives, near the scene of the crime and within a few feet of the victim's purse. *Id.*; See also, *Hackett v. State*, 822 So. 2d 1078, 1082 (Miss. Ct. App. 2002) (concluding that the fact that defendant was caught within thirty minutes of the crime with stolen property was indicia of reliability).

The facts in the case *sub judice* are distinguishable from both *Banks* and *Hackett*. First, it was at least two hours after the incident that Mr. Weaver was displayed to Mr. Penn. Mr. Penn had been at the crime scene in Jackson, driven home to Canton, received a call from the police, and driven back to downtown Jackson before making the identification; Moreover, in neither *Banks* nor *Hackett* were the victims of crimes told that their subject had been arrested.

Furthermore, it cannot be argued that Mr. Penn's subsequent identification of Mr. Weaver in a photo array constitutes an indicia of reliability.² The faulty show up identification procedure resulted in a tainted photographic array identification on the part of Mr. Penn. Therefore, the array should not be considered an indication of any reliability in Mr. Penn's show up identification of the appellant.

The procedures enumerated in the rules of evidence and Mississippi common law are not idle suggestions. These procedures are mandatory and serve the ultimate goal of justice. "In criminal procedures, due process requires, among other things, that a criminal prosecution be conducted according to established criminal procedures." *Mackbee v. State*, 575 So. 2d 16, 24 (Miss. 1990). The jury was informed that Mr. Penn identified Mr. Weaver shortly after the alleged crime. The admission and subsequent treatment of that identification sealed the fate of Mr. Weaver, who was denied the protections of criminal procedure when he needed them the most.

² There is conflicting testimony as to whether the photo array was displayed to Mr. Penn two weeks after the show up identification or that same day.

Under the totality of the circumstances, then, it appears that Mr. Penn's identification of Mr. Weaver is highly questionable; therefore, the admission of the identification of Mr. Weaver by Mr. Penn was impermissible.

iii. Conclusion

Because the identification procedures performed by the Jackson Police Department were unfairly suggestive, all identification stemming from the show up procedure should have been inadmissible at trial. For those reason, this honorable Court should reverse Mr. Weaver's conviction and remand for a new trial without inadmissible evidence used to convict him.

ISSUE TWO: WHETHER APPELLANT'S RIGHT TO COUNSEL AS GUARANTEED BY THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS WAS VIOLATED WHEN A SHOW UP IDENTIFICATION PROCEDURE WAS PERFORMED AFTER HIS INVOKING OF THE RIGHT.

Among the rights guaranteed under both the United States and Mississippi Constitutions is the right to counsel. The Sixth Amendment of the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right. . . to have the assistance of counsel for his defense." *U.S. Const. Amend. VI*. The parallel provision in the constitution of the State of Mississippi provides as follows: "In all criminal prosecution the accused shall have a right to be heard by himself or counsel..." Miss. Const., Art. III. § 26 (1890); *Page v. State*, 495 So.2d 436, 439 (Miss. 1986); *Cannady v. State*, 455 So.2d 713, 722 (Miss. 1984).

Once the right to counsel attaches, it applies not only to trial, but also to any "critical stage" of the prosecution. *Coleman v. Alabama*, 399 U.S. 1 (1970). See also, *United States v. Ash*, 413 U.S. 300, 321 (1973)(Stewart, J. concurring). The United States Supreme Court has described a "critical stage" as "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." *Gergstein v. Pugh*, 420 U.S. 103, 122 (1975). The United States Supreme Court has further concluded that a critical stage is "any stage of the prosecution,

formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226 (1967). The *Wade* court concluded that a pretrial lineup constitutes a "critical stage" under sixth amendment analysis. *Id.* It should be noted that the Sixth Amendment right to counsel does not apply when police display photographs, including those of the defendant, to witnesses for identification purposes. *See Ash*, 413 U.S. 300.

Under Mississippi Law, a defendant is entitled to counsel at all proceedings after adversarial proceedings have been initiated against him. *Brooks v. State*, 903 So.2d 691, 694 (Miss. 2005). Adversarial proceedings are held to have been initiated when a defendant is arrested. *Nicholson v. State*, 523 So.,2d 68, 74 (Miss. 1988).

Under *Jimpton v. State*, law enforcement officers should not conduct an identification proceeding knowing that a defendant's counsel could not be present. *Jimpton v. State*, 532 So.2d 985, 989 (Miss. 1988). The *Jimpton* Court concluded,

"A lineup is a critical stage." An accused enjoys the right to counsel at a lineup because there exists the possibility of irremediable prejudice if counsel is not afforded. Once the right to counsel has attached, "[a]t all critical stages thereafter, the accused is of right entitled to access to counsel, absent a specific, knowing, and intelligent waiver tied to that stage." *Id.* (quoting *Nicholson*, 523 So.2d at 76).

As noted above, show up identifications are highly suggestive and problematic. Not having counsel present when the show up identification was performed would have limited error and protected Mr. Weaver's rights.

According to the testimony of Detective Kent Daniels, Mr. Weaver invoked his right to counsel before the show up procedure occurred. (T. 103). After such testimony, trial counsel objected to the admission of the identification evidence, on the basis that it had occurred after Mr. Weaver exercised his right to an attorney. (T. 110). This objection was overruled by the trial judge.

(T. 147-50, R.E. 17-20).

Because Mr. Weaver had invoked his right to counsel before the show up identification procedure was performed, Mr. Weaver's constitutional rights were violated. The identifications were improper and should have not been allowed into evidence by the trial court. Therefore, this honorable Court should reverse this case and remand it for a new trial where evidence obtained in violation of Mr. Weaver's constitutional rights is not admitted against him.

ISSUE THREE: WHETHER THE STATE IMPROPERLY COMMENTED ON DEFENDANT'S POST-MIRANDA SILENCE.

The Fifth Amendment of the United States Constitution provides that "No person shall be compelled in any criminal case to be a witness against himself..." U.S. Const. amend V. The Mississippi Constitution further provides that "In all criminal prosecutions the accused...shall not be compelled to give evidence against himself;..." Art. III § 26, Miss. Const. The privileges against self-incrimination are embedded in framework of both the State and Federal Constitutions, serving as bedrock constitutional principles under which our system of criminal justice functions.

In *Quick v. State*, the Mississippi Supreme Court concluded, "[i]t is improper and, ordinarily, reversible error to comment on the accused's post-*Miranda* silence." *Quick v. State*, 569 So. 2d 1197, 1199 (Miss. 1990). The *Quick* court further noted,

"[i]n *Doyle*, the U.S. Supreme Court held that if an accused under arrest was given a *Miranda* warning and told that he had a right to remain silent, and the accused did remain silent, that the government thereafter could not use his choice of remaining silent as a weapon during his trial testimony cross-examination to cast suspicion on his guilt or innocence. Simply put, the government cannot use an accused's exercise of a Constitutional right as a weapon to convict him." *Puckett v. State*, 737 So.2d 322, 351 (Miss. 1999)(citations omitted).

While in the case *sub judice*, the improper questioning by the State did not come during cross-examination of the defendant, the same concerns are present, if not heightened. There can be little

doubt that the State's line of question was merely using Mr. Weaver's exercise of his constitutional right as a "weapon to convict him." *Id.*

In this case, there are two instances in particular where the prosecutor commented impermissibly on Mr. Weaver's invoking of his constitutional rights.³ Both occurred during the redirect examination of Detective Kent Daniels of the Jackson Police Department.

The first improper comment was the prosecutor's first question on redirect. The State simply asked Detective Daniels, "Did he ever say he didn't do it?" (T. 108).

The prosecutor's second improper comment, however, was far more egregious. Later, in redirect, the prosecutor asked Detective Daniels, "At any time has Octzavius Weaver provided you with any alibi or any alternative theory to this investigation." (T. 109, R.E. 16). This was immediately objected to by defense counsel, and after an off the record discussion at the bench, the question was withdrawn. (T. 109, R.E. 16). This was a clear instance of the State commenting on the defendant's constitutionally permitted rights. There can be no other interpretation of this prosecutor's question to Detective Daniels. While the question may have been withdrawn, it was still overheard by the jury. The old adage is undoubtedly true in this instance: you can't un-ring a bell.

The State improperly commented on Mr. Weaver's right to remain silent, and, in doing so, highly prejudiced his trial. Therefore, this honorable Court should reverse and remand for a new trial, consistent with the demands of the constitutions of both the United States and the State of Mississippi.

³ Before the prosecutor ever commented on Mr. Weaver's post-*Miranda* silence, Detective Kent Daniels, testifying on behalf of the State, made an improper reference. When asked about his involvement in the case, Detective Daniels testified, without objection, "Once they brought the suspect down to the office, I advised him of his *Miranda* rights, which (sic) he said that he didn't want to talk without a lawyer present." (T. 99).

ISSUE FOUR: WHETHER TRIAL COUNSEL'S INEFFECTIVENESS DEPRIVED APPELLANT OF HIS CONSTITUTIONALLY MANDATED RIGHT TO A FAIR TRIAL.

I. Standard of Review

“When a defendant raises an ineffective assistance claim on direct appeal, the question before this Court is whether the judge, as a matter of law, had a duty to declare a mistrial or order a new trial *sua sponte*, on the basis of trial counsel’s performance.” *Roach v. State*, 2001-KA-01244-COA, ¶23 (Miss. Ct. App. 2006)(citing *Colenburg v. State*, 735 So. 2d 1099, 1102 (Miss. Ct. App. 1999)).

The benchmark for judging any claim ineffectiveness of trial counsel is whether counsel’s conduct 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 (1984). In order to successfully claim ineffective assistance of counsel, Mr. Weaver must meet the two-pronged test set forth in *Strickland* and adopted by the Mississippi Supreme Court. *Stringer v. State*, 454 So. 2d 468, 576 (Miss. 1984).

Under the *Strickland* test, Mr. Weaver must prove that (1) his attorney’s performance was defective and (2) such deficiency deprived him of a fair trial. *Id.* at 477. Such alleged deficiencies must be presented with “specificity and detail” in a non-conclusory fashion. *Perkins v. State*, 487 So. 2d 791, 793 (Miss. 1986).

The deficiency and any prejudicial effect are assessed by looking at the totality of circumstances. *Hiter v. State*, 660 So. 2d 961, 965 (Miss. 1995). This review is highly deferential to the attorney and there is a strong presumption that the attorney’s conduct fell within the wide range of reasonable professional assistance. *Id.* Mr. Weaver must show that there is a reasonable probability that, but for his trial attorney's errors, he would have received a different result in the

trial court. *Stringer v. State*, 627 So. 2d 326, 329 (Miss. 1993). With respect to the overall performance of the attorney, “counsel’s failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy.” *Cole v. State*, 666 So. 2d 767, 777 (Miss. 1995). In order to find for Mr. Weaver on the issue of ineffective assistance of counsel, this Court will have to conclude that his trial attorney’s performance as a whole fell below the standard of reasonableness and that the mistakes made were serious enough to erode confidence in the outcome of the trial below. *Coleman v. State*, 749 So. 2d 1003, 1012 (Miss. 1999).

*ii. Trial counsel was ineffective when it failed to provide the defendant with any civilian clothes during the first day of trial.*⁴

You only get one chance to make a first impression. Though a cliché, the saying undoubtedly has some sage-like infallibility to it. Throughout the entire duration of Mr. Weaver’s first day of trial, which consisted of jury selection and opening statements by both sides, he sat at defense table wearing the jumpsuit issued to him by the Hinds County Sheriff’s department.

This issue was first mentioned by the trial court when it said, “I would like to make it known for the record that the defendant in this cause was given an opportunity to dress himself in civilian

⁴ It is important to note that trial counsel has recently had his bar license suspended by the Mississippi Supreme Court. See, *Stewart v. Mississippi Bar*, 969 So.2d 6 (2007). Trial counsel had been the subject of numerous complaints against him before the suspension. *Id.* FN1. Trial counsel’s numerous disciplines have concerned his abandonment of clients. *Id.* This indicates trial counsel’s lack of regard for the rules of procedure as well as the fiduciary relationship central to his profession. Such disregard is evidenced by the numerous instances of ineffectiveness in the case *sub judice*. Furthermore, it should be noted that trial counsel failed to insure that Mr. Weaver was properly arraigned. Appellant notes that arraignment may be waived when the defendant goes to trial. *Bufkin v. State*, 98 So. 452, 454 (1923). However, the fact that trial counsel never challenged the fact that Mr. Weaver was not properly arraigned notes a complete lack of awareness of the proceedings surrounding his client, Mr. Weaver.

clothes and not, you know, in jail garb. The did not avail themselves to that opportunity that was granted them” (T. 6, R.E. 13).

Trial counsel’s response was as follows: “I’m afraid he did not have any family to provide anything, and I honestly was getting ready for trial and then at the last minute tried to find something at the public defender’s office, and I got down to where I couldn’t find shoes, so we have no choice but to...” (T. 6, R.E. 13).

The prosecutor, noting the prejudicial nature of the situation offered the following, “I will try to provide him with some clothes. If he needs clothing, we might be able to find him something if he wants it.” (T.6, R.E. 13).

The first vision of Mr. Weaver the jury saw when entering the courtroom was that of a man who had been in jail. This is irrefutably prejudicial. Even though Mr. Weaver was, as evidenced by testimony at trial, in different clothes on the second day of trial, it would be impossible for a juror to eliminate the first image of Mr. Weaver from their head.

Moreover, it’s inconceivable that trial counsel would fail to dress Mr. Weaver at least partially in non-jail attire. Trial counsel said that all that he could not find were shoes, so he abandoned the attempt to find Mr. Weaver proper attire. This choice is highly questionable.

The prejudicial effects of presenting an accused before the jury in prison attire need not be measured in the abstract. *Estelle v. Williams*, 425 U.S. 501 (1976). Courts throughout the nation have historically held that an accused shall not be compelled to go to trial in prison or jail attire because of the possible impairment of the presumption of innocence that is so essential to the adversarial system.⁵ *Id.*

⁵ See, *Gaito v. Bierley*, 485 F.2d 86 (3d Cir. 1973); *Hernandez v. Beto*, 443 F.2d 634 (5th Cir. 1971); *Brooks v. Texas*, 381 F.2d 619 (5th Cir.1967).

In *Rush v. State*, the Mississippi Supreme Court concluded,

“It is a common-law right of a person being tried for the commission of a crime to be free from all manner of shackles or bonds, whether of hands or feet, when in court in the presence of the jury, unless in exceptional cases where there is evident danger of his escape or in order to protect others from an attack by the prisoner... if this right of the accused is violated, it may be ground for the reversal of a judgment of conviction.” *Rush v. State*, 301 So. 2d 297 (Miss. 1974).”

A defendant being in shackles and bonds is not dissimilar to a defendant wearing jail attire. Both impair the presumption of innocence.

Trial counsel’s failure to provide Mr. Weaver with proper attire for trial severely impaired the presumption of innocence that is fundamental to the adversarial process. Trial counsel’s ineffectiveness was a *de facto* compelling of Mr. Weaver to appear before the jury in jail attire. Trial counsel’s decision or ineffectiveness goes beyond the bounds of trial strategy and indicates a blatant lack of concern for the fundamental fair trial rights of his client.

iii.. Trial counsel was ineffective for failing to request a suppression hearing for the show up based on it being impermissibly suggestive.

On the first day of trial, defense counsel objected to the introduction of the show up identification and photographic lineup identification. (T. 48). Trial counsel never, however, requested a suppression hearing. During his objection, trial counsel argued, “When I got appointed the case in court that day, [Mr. Weaver’s First Attorney] told me that he had filed a motion [to suppress]. As it turned out, he did not file the motion – which I guess maybe that was my error to not verify. (T. 48, R.E. 22). A proper suppression hearing should have been heard before the jury received any testimony regarding Mr. Penn’s show up identification of Mr. Weaver. Had trial counsel adequately prepared, he would have known that there were issues involving the permissibility of the lineup as is, as well as in respect to its constitutionality surrounding Mr. Weaver’s exercise of his right to counsel. Trial counsel was ineffective in failing to ever argue, pre-trial, that the identification should have been suppressed. By his own admission, it was trial

counsel's error to not verify that the motion to suppress had been filed.

iv. Trial counsel was ineffective for failing to make a motion for a mistrial when the State improperly questioned a witness regarding Mr. Weaver's post-Miranda silence.

When the State was questioning Detective Kent Daniels regarding the alleged crime committed, it asked two improper questions.⁶ The State first asked, "Did he ever say he didn't do it?" (T. 108). There was no objection by defense counsel. The prosecutor's second improper question, however, was far more egregious. Later, in redirect, the prosecutor asked Detective Daniels, "At any time has Octzavius Weaver provided you with any alibi or any alternative theory to this investigation." (T. 109, R.E. 16). This was immediately objected to by defense counsel, and after an off the record discussion at the bench, the question was withdrawn. (T. 109, R.E. 16). Trial counsel should have immediately moved for a mistrial on the grounds that the prosecutor's line of questioning was improper and highly prejudicial. However, he simply rested on his objection.

In *Quick v. State*, the Mississippi Supreme Court concluded, "[i]t is improper and, ordinarily, reversible error to comment on the accused's post-*Miranda* silence." *Quick v. State*, 569 So. 2d 1197, 1199 (Miss. 1990). This situation is analogous to when prosecutors comment on the defendant's failure to testify.

The prosecutor is prohibited from making both direct comments and those "which could be reasonably construed by a jury as a comment on the defendant's failure to testify." *Griffin v. State*, 558 So. 2d 542, 556 (Miss. 1990). "[O]nce such improper comments are made the defendant is entitled to mistrial. The error is incurable." *Livingston v. State*, 525 So. 2d 1300, 1307 (Miss. 1998).

⁶ Furthermore, defense counsel failed to object when Detective Daniels, in his own testimony, noted that Mr. Weaver had invoked his *Miranda* rights. (T. 99).

The failure to move for a mistrial cannot reasonably be conceived to be an element of trial strategy on the part of defense counsel. Trial counsel had already highlighted the improper question on the part of the State by objecting to it. Therefore, it cannot be argued that the reason there was no motion for a mistrial was to not highlight the testimony. The sole reason for failing to ask for a mistrial was trial counsel's ineffectiveness.

If, as stated in *Livingston* and *Quick*, the cure for the error of improper comments on the right to remain silent is a mistrial, it must be concluded that had defense counsel moved for a mistrial, there would have been an alternative outcome to the proceedings. Therefore, defense counsel's failure to move for a mistrial resulted in extreme prejudice to Mr. Weaver, satisfying the second prong of the *Strickland* inquiry.

Alternatively, if this honorable Court finds that the line of questioning by the State was permissible in light of defense counsel "opening the door," appellant contends that defense counsel would be ineffective in allowing such testimony to occur. This cannot be construed as trial strategy. No effective and reasonable attorney would ask a question that would allow for highly prejudicial testimony and questions by the State. The only reasonable explanation for such actions by trial counsel would be ineffectiveness.

If the cure for the State commenting on silence is a mistrial, then it cannot be reasonably argued that the opening of the door by defense counsel for such testimony could be anything other than prejudicial. If a mistrial is warranted when the state references silence, the degree of prejudice to the defendant is exceedingly large. When, through counsel's ineffectiveness, such testimony is allowable, the prejudice remains the same, and warrants reversible error.

v. Trial Counsel was ineffective for failing to file a motion for a new trial or JNOV.

Trial counsel's failure to file a motion for a new trial or a JNOV is indicative of the

sub-par representation Mr. Weaver was afforded. Trial counsel, as noted by the Supreme Court, has had a repeated history of abandoning its clients. *See, Stewart v. Mississippi Bar*, 969 So.2d 6 (2007). Trial counsel's abandonment of and disregard for the rights of Mr. Weaver show a disinterest that can only be described as ineffective.

Failure to file a motion for a new trial and a JNOV has significant effects limiting the arguments that can be raised on appeal. In *Jackson v. State*, the Supreme Court listed the things that must be present in a motion for a new trial to preserve them for appellate consideration, On the other hand there are certain errors that must be brought to the attention of the trial judge in a motion for a new trial, so that the trial judge may have an opportunity to pass upon their validity before this Court is called upon to review them. Although it is impossible to envision every situation which may arise, the following list will serve to activate our memories:

(1) All new matters, now shown of record and not merely cumulative irregularities, mistakes, surprises, misconduct and newly discovered evidence (*Redmond v. Marshall*, 162 Miss. 359, 137 So. 733 (1931); Miss. Code 1942 Ann. §§ 1536, 1537 (1956)), may be set out in a motion for a new trial.

(2) Motion made upon the ground of inadequate or excessive damages must be made in a motion for a new trial. *Watson v. Holeman*, 169 Miss. 585, 153 So. 669 (1934); *Standard Oil Co. v. Franks*, 167 Miss. 282, 149 So. 798 (1933); *Coccora v. Vicksburg Light and Traction Co.*, 126 Miss. 713, 89 So. 257 (1921).

(3) Motion for new trial must be made where it is contended that the verdict of the jury is against the overwhelming weight of the evidence. *Gilmer v. Gunter*, 46 So.2d 447 (Miss.1950).

(4) The denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground, making the necessary proof to substantiate the motion. *King v. State*, 251 Miss. 161, 168 So.2d 637 (1964); *Cherry v. Hawkins*, 243 Miss. 392, 137 So.2d 815 (1962); *Lamar v.*

State, 63 Miss. 265 (1885).

Jackson v. State, 423 So.2d 129, 131-32 (Miss. 1982).

The right to appeal is a “very valuable right.” *Shah v. Miss. Bar*, 919 So. 2d 59, 64 (Miss. 2005). That right to appeal is at least somewhat predicated on the filing of a motion for a new trial or a JNOV. Failure by trial counsel to file a motion for a new trial and JNOV significantly impaired that “very valuable right” and resulted in prejudice to Mr. Weaver.

vi. Conclusion

Mr. Weaver’s trial counsel was clearly ineffective. This ineffectiveness prejudiced Mr. Weaver to a large degree. The multiple instances of ineffectiveness noted *supra* show trial counsel’s representation of Mr. Weaver far well below the acceptable guidelines, and, as a result, created substantial prejudice. For this reason, this honorable Court, should reverse and remand this case for a new trial where Mr. Weaver may be afforded the opportunity to have effective legal representation.

ISSUE FIVE: WHETHER THERE WAS CUMULATIVE ERROR THAT DEPRIVED APPELLANT OF HIS RIGHT TO A FUNDAMENTALLY FAIR AND IMPARTIAL TRIAL.

The cumulative error doctrine stems from the doctrine of harmless error. *Ross v. State*, 954 So. 2d 968, 1018 (Miss. 2007). It holds that individual errors, not reversible in themselves, may combine with other errors to constitute reversible error. *Hansen v. State*, 582 So.2d 114, 142 (Miss. 1991); *Griffin v. State*, 557 So. 2d 542, 553 (Miss. 1990). The question under a cumulative error analysis is whether the cumulative effect of all errors committed during the trial deprived the defendant of a fundamentally fair and impartial trial. *McFee v. State*, 511 So. 2d 130, 136 (Miss.1987).

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 charge. *Ross*, 954 So. 2d at 1018.

An improper identification, a constitutionally impermissible show up identification, improper comments by the prosecutor regarding the defendant's post-*Miranda* silence and numerous prejudicial errors by trial counsel certainly, alone or when taken in concert, deprived the appellant of his right to a fundamentally fair and impartial 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 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 charges of armed robbery and being a felon in possession of a firearm, 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,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


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CERTIFICATE OF SERVICE

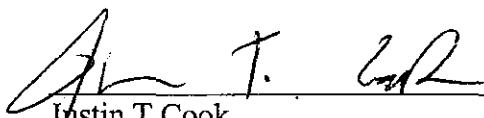
I, Justin T Cook, Counsel for Octzavius Nekeith Weaver, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable William Alexander Gowan, Jr.
Circuit Court Judge
939 North Congress Street
Jackson, MS 39205

Honorable Robert S. Smith
District Attorney, District 7
Post Office Box 22747
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Honorable Jim Hood
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This the 25th day of FEB, 2008.


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