IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

JUNE ALLEN STARR, SR. — APPELLANT

V. — NO. 2007-KA-1878-COA

FILED
MAY 09 2008
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Justin T Cook, MS Bar No. [redacted]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for June Allen Starr, Sr.

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JUNE ALLEN STARR, SR. **APPELLANT**

V. **NO. 2007-KA-1878-COA**

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. June Allen Starr, Sr., Appellant
3. Honorable Anthony (Tony) Lawrence, III, District Attorney
4. Honorable Dale Harkey, Circuit Court Judge

This the 9th day of May, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Justin T Cook
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

OTHER AUTHORITIES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JUNE ALLEN STARR, SR. — APPELLANT

V. — NO. 2007-KA-1878-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF ISSUE

ISSUE:

WHETHER THE APPELLANT'S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN POLICE OFFICERS PROCEEDED WITH A CUSTODIAL INTERROGATION HAVING NOT OBTAINED A MIRANDA WAIVER. OR, IN THE ALTERNATIVE, WHETHER THE APPELLANT'S WAIVER WAS MADE "VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY."

STATEMENT OF INCARCERATION

June Allen Starr, 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.**

STATEMENT OF THE CASE

This appeal proceeds form the Circuit Court of Jackson County, Mississippi, a judgment of one count of murder against June Allen Starr, following a trial on August 14-15, 2007, honorable

Kathy King Jackson, Circuit Judge, presiding. Mr. Starr was subsequently sentenced to twenty (20) years imprisonment in the custody of the Mississippi Department of Corrections.

STATEMENT OF THE FACTS

On April 29, 2006, at approximately 8:00 at night, officers for the Jackson County Sheriffs's Department responded to a shots fired call at Knowlcrest Drive in Escatawpa, Mississippi. (T. 74). As an officer arrived, he was flagged down by individuals on the street who pointed him in the direction of 4301 Knowlcrest Drive. (T. 74-75). The officer pulled into the driveway and was immediately met by the Appellant, June Allen Starr (T. 75). The officer testified that he could smell alcohol on the Appellant immediately. (T. 76). As that officer was questioning the Appellant, he noticed a pool of blood on the floor of the garage and what he classified as "drag marks" going up the stairs and into the house. (T. 75). The officer then went up the stairs, opened the door, and noticed a woman, Brenda Starr, lying unconscious on the floor with a gun shot wound. (T. 75). Brenda Starr had been the appellant's wife for nearly twenty (20) years. (T. 94). According to the officer's testimony, the woman became conscious and, when asked who had shot her, she responded, "Allen, Allen. He know." (T. 75-76). Upon searching the residence, officers found a gun in the house's laundry area. (T. 88).

The Appellant was brought to a temporary trailer for interrogation purposes. (T. 118). The trailer lacked video recording capacity. (T. 118). The only recording of the Appellant's interrogation was audio. (T. 118). The Appellant did not verbally waive his ***Miranda*** rights. (Exib. 8). Furthermore, the Appellant refused to sign the ***Miranda*** waiver form. (T. 122). On the stand, however, a police investigator testified that the Appellant gave a nod to indicate that he understood the ***Miranda*** waiver. (T. 122). Nevertheless, police interrogated the Appellant at approximately 10:54 that evening. (T. 117). After delivering several versions of the story, the

statement ended.

The Appellant was subsequently indicted for the crime of aggravated domestic assault. (C.P. 6, R.E. 6). The Appellant was tried, and, after deliberating, a jury returned a guilty verdict against the Appellant. (C.P. 71, R.E. 10). The Appellant was subsequently sentenced to twenty (20) years imprisonment in the custody of the Mississippi Department of Corrections. (C.P. 71, R.E. 10).

On August 22 2007, the Appellant filed a Motion for New Trial and J.N.O.V., claiming that the verdict was contrary to both the evidence and the law. (R.E. 76-76, R.E. 11-12). On August 31, 2007, the trial court denied the motion. (C.P. 78, R.E. 13). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a notice of appeal. (C.P. 82-83, R.E. 14-15).

SUMMARY OF THE ARGUMENT

When police placed the Appellant in custody, he was read his ***Miranda*** rights. When asked to sign the waiver, he refused to. When asked whether or not he understood his rights, the Appellant responded with "inaudibles" and statements that indicated that he was in no way waiving his ***Miranda*** rights. Because there was no valid ***Miranda*** waiver, the statements given by the Appellant during his custodial interrogation should not have been admitted as evidence in trial. In the alternative, should this honorable Court find that there was an actual waiver, the waiver was not made knowingly, intelligently, or voluntarily. Therefore, this honorable Court should reverse and remand this case for a new trial consistent with the requirements mandated by the constitutions of the United States and the State of Mississippi.

ARGUMENT

ISSUE: WHETHER THE APPELLANT'S FIFTH AMENDMENT RIGHTS WERE

VIOLATED WHEN POLICE OFFICERS PROCEEDED WITH A CUSTODIAL INTERROGATION HAVING NOT OBTAINED A MIRANDA WAIVER. OR, IN THE ALTERNATIVE, WHETHER THE APPELLANT'S WAIVER WAS MADE "VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY."

i. Standard of Review

Because the admissibility of the Appellant's statements to investigators was not objected to at trial, the Appellant must proceed under the doctrine of plain error.[1] If a contemporaneous objection is not made, an appellant must rely on plain error to raise the argument on appeal. ***Watts v. State***, 733 So. 2d 214, 233 (Miss. 1999). "The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." ***Williams v. State***, 794 So. 2d 181, 187. (Miss. 2001)(citations omitted). Moreover, the plain error rule only is applied by Mississippi courts when the error effects an appellant's substantive/fundamental rights. ***Id.***

ii. Miranda is a constitutional rule.

The Fifth Amendment of the United States Constitution provides in pertinent part; "No person shall. . . . be compelled in any criminal case to be a witness against himself." ***U.S. Const. Amend. V.*** The Fifth Amendment's constitutional guarantee is mirrored in Article 3, Section 26 of the Mississippi Constitution which provides, in relevant part, "In all criminal prosecutions the accused shall. . . . not be compelled to give evidence against himself." ***Miss. Const. Art. 3 § 26.***

The requirement that no person be compelled in any criminal case to give evidence or be a witness against themselves was embodied in the United States Supreme Court Case, ***Miranda***

---

1. The fact that the admissibility was not objected to raises significant questions about trial counsel's effectiveness. The record is practically barren of any objections made by the Appellant's trial counsel. However, in the interest of efficiency and presenting this honorable Court with the most cogent and substantial arguments, the Appellant has chosen to solely brief the issue concerning the violation of the Appellant's Fifth Amendment rights. The Appellant respectfully asks that the issue of ineffective assistance of counsel be preserved for separate proceedings.

v. Arizona, which outlined now-familiar rules for police officers to follow when questioning an accused who is in custody. *See,* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Prior to ***Miranda***, the United States Supreme Court evaluated the admissibility of a defendant's confession under a voluntariness test. This test had its roots in the common law, as the courts of both England and the United States recognized that coerced confessions were inherently untrustworthy. *See, e.g.*, ***King v. Rudd***, 1 Leach 115, 117-18, 122-23, 168 Eng. Rep. 160, 161, 164 (K.B. 1783) (Lord Mansfield, C.J.)(concluding that the English courts excluded confessions obtained by threats or promises).[2]

As time progressed, the United States Supreme Court recognized two constitutional bases for the requirement that confessions be found voluntary before being admitted into evidence. The Supreme Court concluded that the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment both demand that confessions be voluntary. *See, e.g.*, ***Bram v. United States***, 168 U.S. 532, 542 (1897)(holding that the voluntariness test "is controlled by that portion of the Fifth Amendment ... commanding that no person 'shall be compelled in any case to be a witness against himself'"); ***Brown v. Mississippi***, 297 U.S. 279 (1936)(reversing a conviction under the Due Process Clause because it was based on a confession obtained through physical coercion).[3]

---

2. See, also, ***King v. Warickshall***, 1 Leach 262, 263-64, 168 Eng. Rep. 234, 235 (K.B. 1783)(ruling "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape ... that no credit ought to be given to it; and therefore it is rejected"); ***King v. Parratt***, 4 Car. & P. 570, 172 Eng. Rep. 829 (N.P. 1831); ***Queen v. Garner***, 1 Den. 329, 169 Eng. Rep. 267 (Ct. Crim. App. 1848); ***Hopt v. Territory of Utah***, 110 U.S. 574 (1984); ***Pierce v. United States***, 160 U.S. 355, 357 (1986).

3. Through the middle third of the twentieth century, the United States Supreme Court primarily, if not exclusively, based its analysis the admissibility of coerced confessions on due process grounds. *See,* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 223 (1973)(stating that "some 30 different cases decided

In ***Malloy v. Hogan***, the United States Supreme Court held that the Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment, and is, therefore, applicable to the States. ***Malloy v. Hogan***, 378 U.S. 1, 6-11 (1964).

Shortly after Malloy incorporated the Fifth Amendment, ***Miranda*** was decided. In ***Miranda***, the Court noted several of its concerns regarding the advent of modern custodial interrogation by police. The court noted that modern police interrogation brought increased concerns about confessions obtained by coercion. ***Miranda***, 384 U.S. at 445-458. The ***Miranda*** Court noted that because custodial interrogation by police, by its very nature, isolates and puts pressure upon the individual, that "even without employing brutality, the 'third degree' or specific stratagems, ... custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." ***Id.*** at 455.

The Court concluded that the coercion inherent in interrogations obfuscates the line between voluntary and involuntary statements, and therefore increases the risk that an individual will not be "accorded his privilege under the Fifth Amendment ... not to be compelled to incriminate himself." ***Id.*** at 442. Because of the inherent coercion, the ***Miranda*** Court established "concrete constitutional guidelines for law enforcement agencies and courts to follow." ***Id.*** at 442.

Those "concrete constitutional guidelines" established that the admissibility into evidence of any statement during custodial interrogation depends on whether police provided that suspect

---

during the era that intervened between ***Brown*** and ***Esobedo v. Illinois***" were decided based on the application of the due process voluntariness test."). The Due Process analysis was refined to an inquiry examining "whether a defendant's will was overborne" by the circumstances around the giving of a confession. ***Id.*** at 226.

with four warnings. These warnings are that a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has a right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." ***Id.*** at 479.

The constitutional underpinning of ***Miranda*** were called into question in several Supreme Court cases. In ***Michigan v. Tucker***, the court addressed the question of whether or not the fruits of a confession of a defendant not fully informed of his constitutional rights as mandated by ***Miranda*** were inadmissible as "fruit of the poisonous tree." *See,* ***Michigan v. Tucker***, 417 U.S. 433 (1974). In resolving the "fruit" issue, the Supreme Court, per then-associate Justice Rehnquist, asked a foundational question: "[W]hether the police conduct complained of directly infringed upon [a defendant's] right against compulsory self-incrimination or whether it instead violated only prophylactic rules developed to protect that right." ***Id.*** at 439.

The Court's answer was that "[c]ertainly no one could contend that the interrogation faced by [the defendant] bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed." ***Id.*** at 444. The Court, therefore, concluded that "the police conducted here did not deprive [the defendant] of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since ***Miranda***." ***Id.***

The result of the ***Tucker*** Court's, among many lawyers and scholars, was that the failure of police to properly warn a suspect prior to a custodial interrogation does not in and of itself render a confession involuntary due to a Fifth Amendment violation; Rather, the omission of the warnings only violates a judicially-created procedural safeguard that attempted to prevent an actual violation of the Constitution. As the Supreme Court stated in ***Oregon v. Elstad***, "[t]he

Miranda exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation." ***Oregon v. Elstad***, 40 U.S. 298, 306 (1985). This seemingly prophylactic rule was clarified, however, in ***Dickerson v. United States***, where Chief Justice Rehnquist, the author of ***Tucker***, clarified that ***Miranda*** was a "constitutional decision" with "constitutional origin" and "constitutional underpinning." ***Dickerson v. United States***, 530 U.S. 428, 431, FN3, FN5 (2000).

The ***Dickerson*** Court grounded its decision regarding the constitutional basis of ***Miranda*** in the language of ***Miranda*** and its progeny themselves. The court concluded that there is language in some of the court's opinions that supports the view that ***Miranda*** is not constitutionally based. ***Id.*** at 438. Chief Justice Rehnquist, however, parsed the language of the ***Miranda*** opinion to show that it was "replete with statements indicating that the majority thought it was announcing a constitutional rule." ***Id.***

Chief Justice Rehnquist found further support for ***Miranda*** being a constitutional rule. He wrote for the court, "[F]irst and foremost of the factors on the other side – that ***Miranda*** is a constitutional decision – is that both ***Miranda*** and two of its companion cases applied the rule to proceedings in state courts." ***Id.*** That is to say, since the United States Supreme Court does not have non-constitutional supervisory authority over state courts, and since the United States Supreme Court enforced the rule it announced in ***Miranda*** in state cases, ***Miranda*** must be a constitutional decision.

The result of ***Dickerson*** is that ***Miranda*** is a constitutional rule. The constitutionality of ***Miranda***, therefore, is essential in the instant case. Because the this honorable Court must find plain error in order to support the Appellant's assertions, it is necessary to note that the rule

violated by the Jackson County Sheriff's department is not one of a prophylactic nature, but, rather, a rule required by the United States Constitution. This certainly weighs in the Appellant's favor, because the error effects the Appellant's fundamental Fifth Amendment right.

iii. There was not a Miranda waiver.

According to the evidence present at trial, when the Appellant was being questioned by officers, the following dialogue occurred:

> Wright: Alright. Alright June, before we ask you any questions you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and have him or her with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions without a lawyer present you still have the right to stop at any time. You also have the right to stop answering at any time until you talk to a lawyer. Do you understand your rights, June?
>
> Starr: (inaudible)
>
> Wright: Do you understand your rights? Okay. What I need you to do, look at me now, reread what I just now read to you. Put your initial on these lines right here and sign right there by the x please.
>
> Starr: (inaudible) what is this telling me man? To send me to prison?

(Exib. 8).

It is clear from the above dialogue that there was not waiver of the Appellant's ***Miranda*** rights. After being read his rights by the police, there was an inaudible response.

This inaudible response was followed by a re-questioning of whether the Appellant understood his rights. If, in the eyes of the officer, the first inaudible response did not constitute a waiver of ***Miranda*** rights, then clearly, it did not.

After being asked again, the Appellant responded in an inaudible manner and then made

statements that indicated that he clearly did not understand the nature of his ***Miranda*** warnings.

The fact that there was no waiver of ***Miranda*** is further supported by the fact that the Appellant did not, in fact, sign the waiver form.

The only evidence presented that there was a valid waiver was the testimony of Investigator Michael White. When being directly examined regarding the interrogation of the Appellant, the following dialogue occurred:

> Q: Before the statement, did you read him his Miranda rights?
>
> A. Yes, I did.
>
> Q. Can you explain to the members of the jury what the Miranda rights are, please?
>
> A. Miranda rights are things that we read to a defendant to make sure that he understands that he doesn't have to speak with us; that he can have his attorney present with him while we are questioning him; and that anything that he says to us can be used in a court of law.
>
> Q. All right. And I believe you have a form you use?
>
> A. Yes. It's a standard form.
>
> Q. Did you read the contents of that form to Mr. Starr?
>
> A. Yes, I did.
>
> Q. Can you hear you read those rights to him on the tape?
>
> A. Yes.
>
> Q. Did he indicate to you, sir, that he understood those rights?
>
> A. Yes. I asked him if he understood those rights and he nodded his head in a yes motion. And then I continued on with my interview.

(T. 118-19).

However, during cross-examination, Investigator Wright, when questioned

regarding the waiver of ***Miranda*** rights revealed the following;

> Q. Mr. Wright, it wasn't clear on the tape. Did Mr. Starr actually sign the release of his Miranda rights?
>
> A. No, sir, he did not sign them.
>
> Q. And did he initial anything along it?
>
> A. No, sir, I don't believe he did. He just shook his head yes, whenever I asked if he understood it.
>
> Q. But he did refuse to sign it; is that correct?
>
> A. Yes.

(T. 122).

In ***Neal v. State***, the Mississippi Supreme Court concluded that the signing of a waiver does not automatically make the subsequent statements voluntary, knowing or intelligent. ***Neal v. State***, 451 So. 2d 743, 753 (Miss. 1984). The *Neal* Court said,

> [T]he mere giving of the ***Miranda*** warnings, no matter how meticulous, no matter how often repeated, does not render admissible any inculpatory statement thereafter given by the accused.... When an accused makes an in-custody inculpatory statement without the advice or presence of counsel, even though warnings and advice regarding his privilege against self-incrimination have been fully and fairly given, the State shoulders a heavy burden to show a knowing and intelligent waiver."

Id.

Therefore, it cannot be relied on by the State that simply the giving of the ***Miranda*** warnings was sufficient enough to render the inculpatory statements made by the Appellant admissible at trial. Because there was no waiver of ***Miranda***, police officers should have ceased questioning the Appellant.

Assessing the totality the circumstances, in the light most favorable to the State, the purported nod amounted to nothing other than an ambiguous response. The Appellant refused to

sign a waiver and gave no verbal response that was in any way indicative of a valid waiver of his ***Miranda*** rights. Grouping those actions with the purported nod does nothing more than cloud whether or not there was a waiver. Two no's and one yes, when taken in concert do not amount to a yes.

Furthermore, as noted below, the Appellant was visibly intoxicated at the time of his interrogation. The purported nod could have simply been the involuntary bob of an intoxicated individual. The investigator should have sought to clarify the purported nod rather than simply passing it off to be a waiver and valid understanding.

Miranda exists for a purpose and is deeply rooted in the bedrock of our criminal jurisprudence. For the investigator to skim over and thumb through the procedures outlined by the United States Supreme Court steers that jurisprudence into troubled waters long held to be un-navigable.

iv. In the alternative, if there was a Miranda waiver, it was not valid, because the rights were not waived "voluntarily, knowingly and intelligently."

Should this honorable Court find that a drunken man's bobbing head constitutes a ***Miranda*** waiver, said waiver is still not valid due to the lack of the essential requirements of such a waiver.

A suspect in a criminal investigation may waive his privilege against self-incrimination and his ***Miranda*** right to counsel before or during interrogation. However, there is a "heavy burden" resting on the prosecutor to demonstrate that the defendant "voluntarily, knowingly, and intelligently waived" his rights.[4] ***Miranda***, 384 U.S. at 475.

---

4. This type of waiver is commonly known as a ***Zerbst*** waiver. *See* ***Johnson v. Zerbst***, 304 U.S. 458 (1938).

In order for a defendant to waive his right against self-incrimination, the waiver must be knowing, intelligent and voluntary. ***Id.*** at 444. The State has the heavy burden to prove beyond a reasonable doubt that the confession was voluntary. ***Cox v. State***, 586 So. 2d 761, 763 (Miss. 1991).

In order to be a valid waiver under ***Miranda***, that waiver must be voluntary, *i.e.*, "the product of a free and deliberate choice rather than intimidation, coercion, or deception." ***Moran v. Burbine***, 475 U.S. 412, 421 (1986). In making a determination of voluntariness, the United States Supreme Court has stated that "[t]here is obviously no reason to require more in the way of a 'voluntariness' inquiry in the ***Miranda*** waiver context than in the Fourteenth Amendment confession context." ***Colorado v. Connelly***, 479 U.S. 153, 169-70 (1986).

As the Mississippi Court of Appeals has noted, in order for a waiver to be voluntary, a defendant must be aware of the nature of his self incrimination rights and the consequences of waiving them. ***Brown v. State***, 839 So. 2d 591, 600 (Miss. Ct. App. 2003). Intoxication does not necessarily render a confession involuntary. ***Baggett v. State***, 793 So. 2d 630, 634 (Miss. 2001).

The Mississippi Supreme Court affirmed the lower court's exclusion of a confession where the defendant was so intoxicated that he was maniacal. ***State v. Williams***, 208 So. 2d 172, 175 (Miss. 1968). On the other hand, the Court of Appeals upheld the admission of a confession where there was testimony that the defendant's eyes were not dilated, his speech was not slurred, he was coherent, and did not smell of alcohol. ***Morris v. State***, 913 So. 2d 432, 434 (Miss. Ct. App. 2005).

The Mississippi Supreme Court upheld the admissibility of a confession procured thirteen hours after the defendant's blood alcohol level measure .16 and his speech was normal. ***Stevens***

v. State, 458 So. 2d 726, 729 (Miss. 1984).

When analyzing the facts of the case *sub judice*, it is clear that the Appellant's condition was more in line with the intoxication in ***Williams***. During direct examination of Officer Edward Clark of the Jackson County Sheriff's Department, there was testimony that the Appellant smelled of alcohol when police arrived on the scene;

> Q. Did he appear to have been drinking – the [Appellant]?
>
> A. I could smell alcohol on him when I pulled up.

(T. 76).

The victim also testified that the Appellant had been drinking on the day in question;

> Q. And how much had Allen drunk that day?
>
> A. I don't know, sir. He don't drink beer, he drink whiskey.
>
> Q. But y'all had both been drinking?
>
> A. Yes, sir.

(T. 104).

The testimony of Investigator Michael Wright was that the Appellant was not "overly intoxicated." (T. 120). However, when asked the question, Investigator Wright responded in the affirmative that he "could tell that [the Appellant] had been drinking." (T. 120). The Appellant, taking the stand, testified "I was under the influence when I arrived to the trailer they carried me to." (T. 129).

The custodial interrogation of the Appellant occurred shortly after the Appellant had been taken into custody. This is a far cry from the thirteen hours the suspect was allowed to regain sobriety in ***Stevens***. The Appellant's level of significant intoxication is further supported by the more than thirty instances of inaudible responses to the interrogation as well as the Appellant's

rambling responses and peculiar syntax.

Because of the Appellant's significant level of intoxication, it can reasonably be concluded that the Appellant's waiver was involuntary. To be knowing and intelligent, a valid "waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." ***Moran***, 475 U.S. at 421.

There was no signed waiver, so the only basis for assuming that there was a waiver at all is from the words shared between the Appellant and police officers. There is no indication through the dialogue between the Appellant and police officers that he had any understanding of "the nature of the right being abandoned and the consequence of the decision to abandon it."

The Appellant's response to whether he understood his ***Miranda*** rights was "(inaudible) what is this telling me man? To send me to prison?" (Exib. 8). Taking the Appellant's statement in the light most favorable to the State, there's no indication that the Appellant knowingly or intelligently waived his ***Miranda*** rights. This is fully evidenced by the fact that the Appellant's response was a question.

Specifically, the Appellant's response to a question of whether he understood the nature of his rights was a question which was inaudible at times. This should be seen as significant evidence that the Appellant did not knowingly or intelligently waive his rights. Nowhere in the record does there appear to be any "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" as required by ***Moran***. For this reason, the Appellant's purported waiver was not knowing and intelligent.

v. Conclusion.

As noted by the Mississippi Supreme Court, a violation of a defendant's Fifth Amendment right against self-incrimination while under custodial interrogation is a "violation of

a fundamental constitutional guarantee." ***Edmonds v. State***, 955 So.2d 787, 805 (Miss. 2007). The violation of the Appellant's Fifth Amendment rights is both fundamental in nature and resulted in a manifest miscarriage of justice. Because there was no waiver of ***Miranda*** rights at all, or, in the alternative, because there was no knowing, intelligent and voluntary waiver, this honorable Court should reverse this conviction 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 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 aggravated domestic assault, 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.

CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for June Allen Starr, Sr., 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 Dale Harkey
Circuit Court Judge
3222 Highland Avenue
Pascagoula, MS 39568

Honorable Anthony (Tony) Lawrence, III
District Attorney, District 19
Post Office Box 1756
Pascagoula, MS 39568

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 9th day of May, 2008.

Justin T Cook
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200