COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HERMAN JACKSON JR. APPELLANT

US. NO. 2007-KP-01039-COA

STATE OF MISSISSIPPI APPELLEE

FILED

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REPLY BRIEF FOR THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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SUBSCRIBED AND SWORN TO BEFORE ME this the 29th day of _____ 2007

NOTARY PUBLIC

LATASHA CLAY JONES COUNTY, MS NOTARY PUBLIC My Commission Expires April 30, 2011

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HERMAN JACKSON JR. — APPELLANT

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STATE OF MISSISSIPPI — APPELLEE

## STATEMENT OF THE CASE

## REPLY BRIEF OF APPELLANT

DURING the June 2005 TERM of the Grand Jury, for the circuit court for the Eleventh Judicial District of Grahoma County, Mississippi Herman Jackson Jr. a/k/a Herman Jackson III a/k/a Main was indicted in COUNT I for Possession of a certain controlled substance, Marijuana in an amount between 30 grams and 250 grams, a Schedule I controlled Substance as provided for by Section 41-29-115(a)(4) of the Mississippi Code of 1972, Ann. as amended; COUNT II for Possession of a Certain Controlled substance, COCAINE SALT in an amount .1 gram to 2 grams, A Schedule II Controlled Substance as provided for by Section 41-29-115(a)(4) of the Mississippi Code of 1972, Ann. as amended, and as a Second and Subsequent Offender under Miss. Code MCA § 41-29-147. After a Jury Trial Mr. Jackson was Convicted and sentenced ~~to~~ under to statues that was not presented in his Indictment. (SEE INDICTMENT CP. 3-5) and SEE [redacted] Notice of Criminal Disposition CP. 73 to serve One year in Count I and in Count II to serve 8 years in the Mississippi Department of Corrections These sentences were to run Concurrent.

## STATEMENT OF FACTS

Defendant was Ambushed threw trial by Attorney Allen D. Shackelford Judge Albert B. Smith III prosecutors Jennifer Mussel White and Mickey Mallette. Officer Walter J. Duncan and Deputy Wayne Hudgins and the complete Record reflects these Allegations. The Record also reflects that officer Duncan testified falsely under oath. and that false evidence was used to convict the defendant. [redacted]

If Defendant's Trial lawyer had did his Job from the start there would not have been a trial. The Attorney did not help the defendant at all and the complete Record reflects that. The defendant made Allegations of Conspiracy. Corruption and Racial Discrimination The defendant has proven these Allegation and the Record reflects these Allegations.

The conclusion of this case was a grave Miscarriage of Justice.

## PLEADINGS

APPELLANT PRO SE representation is a layman at law and ask this Honorable Court to Construe the facts of this case under the Authority of HAINES Vs. KERNER, 404 U.S. 519 92 S.Ct. 594, 30 L.ed 2d 652 (1972) and that Pro se pleadings are to be construed with a lenient eye and are not to be held to the standards of lawyers.

APPELLANT further ask that this Brief be Construed upon the doctrine of excusable error, without being Scrutinzied for the technical excellence of a Attorney.

APPELLANT also ask this Honorable Court even thou there are several errors being raised, he ask that this Honorable Court to reviews the entirety of the Record and Brief upon the doctrine for plain error as well.

ARGUMENT

I.

DEFENDANT DIDNOT HAVE CONSTITUTIONAL EFFECTIVE ASSISTANCE OF COUNSEL AVAILABLE AT TRIAL.

It is obvious Mr. Klingfuss is trying to provide this Honorable court with a smoke screen to detour this Honorable court from the truth or Mr. Klingfuss received a totally different set of Transcripts. Under this Argument 1 and 2) pg. 4 of the states reply brief Mr. Klingfuss only claims the (defendant asserts his attorney had a conflict of interest because his attorney would not file certain motions pre-trial at the request of defendant. Even thou this is one of the defendant errors under Ineffective Assistance of Counsel 1 and 2) of the Appellant Briefs. ~~pgs 2,3,4~~ Mr. Klingfuss failed to mention the other errors under the Appellants Argument.

FOR EXAMPLE ). 1. Mr. Klingfuss failed to mention defendant counsel [redacted] was disloyal to him and told him all type of untruthful things. about his case.

2. Mr. Klingfuss failed to mention the defendant [redacted] repeatly seeked help from his office and the Mississippi Bar Assi. for a investigation into his case because of conspiracy, corruption and Racial decrimination against Att. Shackelford, Judge Smith and the District Attorney office. SEE ~~Appellant Exhibits A-C-D~~ Letters which was sent fifteen days before the defendants trial. The record reflects every Allegation the defendant made against the Attorney see: In pgs. 15-26. And the Appellant did use supporting case law, in the Appellant Brief.

SEE: [7] Counsel's function in representing a Criminal defendant is to assist defendant, and hence counsel owes client duty of loyalty, a duty to avoid conflicts of interest. U.S.C.A. Const. Amend. 6. 104 S.Ct. 2052, 466 U.S. 668, Strickland v. Washington (U.S. Fla. 1984)

3. Mr. Klingfuss want to lead this Honorable Court to believe that Trial Counsel did object to Trooper Duncan false testimony SEE APPELLEES reply Brief Pg. 8 12-13-14 again Mr. Klingfuss is trying

to throw up a Smoke Screen Mr. Klingfuss say, Failure to Object to the testimony of Officer Duncan. Short answer:-trial counsel did object to the testimony of Officer Duncan and it was sustained. Tr. 61-62. So much for that argument. Let's address this issue because I am puzzled. There was only one objection made by the Trial counsel as to the testimony of Officer Duncan and that objection did not have nothing to do with false testimony. SEE Tr. pgs. 61-62 "Mr. Shackelford I'm going to object I don't believe there's any proof this was Marijuana." "THE COURT: Sustained" it is obvious the only person taking words out of context in the transcripts and parsing others, is Mr. Klingfuss.

4. Again Mr. Klingfuss is trying to throw up a Smoke screen as to pg. 9 of the Appellee Reply Brief 18) Alleged Comments by defense Counsel. Tr. 24. Mr. Klingfuss is refering to the comments made by Trial Counsel during a Attorney visit on January 4, 2007 made fifteen days before the defendants Trial. The comments the defendant talks about in the Appellant brief on pg. 9 happen during trial.

5. Mr. Klingfuss failed to mention that the Appellant filed a motion verbally during pretrial proceedings for ineffective assistance of Counsel SEE Tr. pgs. 23-26) also see: Appellant Brief pg. 9-10

6. Mr. Klingfuss also failed to mention Trial counsel filed a bogus motion for Judgement Notewith Standing verdict. By using a witness names that never testified at the Appellant trial. SEE: (C.R. Pg. 12) also see Appellant Brief pg. 10

7. Mr. Klingfuss also claim on pg. 9) 16) Failure to present any defense he only points to the Examination made by the Appellant of officer Duncan. Mr. Klingfuss points to Tr. pgs. 93-135. Mr. Klingfuss failed to mention anything about the Cross examination Trial Counsel conducted of officer Duncan which amounted to nothing See: Tr. pgs. 64-68.

Mr. Klingfuss wants this Honorable court to believe that all of the counsel deficiencies was strategic ones.

The Supreme Court of Mississippi stated in Triplett v. State 666 So. 2d 1356 1995 Miss. Noting that one or two of defense counsel's failures could have been minimized as trial strategy, but in combination they could not. the court concluded that defense counsel's performance was so deficient that it constituted ineffective assistance of counsel. The court reversed defendant's conviction and remanded the case for a new Trial. also sees. Moody and Garcia v. State of Mississippi 644 So. 2d 451: 1994 Miss

Issue II.

DEFENDANT WASNOT ADEQUATELY WARNED OF THE PERILS OF SELF-REPRESENTATION

Mr. Klingfuss is again trying to throw up a Smoke Screen and lead this Honorable Court to believe that the Appellant was adequately warned of the perils of Self representation and proceeded with eyes open.

Again Mr. Klingfuss. must have received different Transcripts Mr. Klingfuss points to Tr. 73. Mr. Klingfuss say on pg.11 of the Appellee's brief. A look to the transcript shows defendant was determined and had made up his mind to "fire" his attorney for perceived inadequacies.

The Appellant knew before the Trial Started that the Attorney was placed on his case to railroad him that's why the Appellant tryed to recieve help from the Attorney Generals office and the Mississippi bar Assi. on January 4. 2007 by letters. SEE: Appellants Exhibits A-C-D. And appellant filed a motion verbally to the court during Pre-Trial proceedings for [redacted] ineffective Assistance of counsel but the Trial Court failed to rule on the motion SEE: Tr. pgs. 23-26. The Appellant felt he had Know choice but to proceed on to Trial with the Attorney. After the Attorney failed at bring out officer Duncan was testifing falsly the defendant knew the Attorney was working with the state and Judge Smith. The Appellant felt he had to fire the Attorney to try and prove his innocents even tho the

defendant didnot know the rules of the court or really knows how to defend hisself. Further the defendant dropped out of Highschool in the ninth grade. Therefore the Appellant couldnot have made a knowing and voluntary waiver of his 6th Amendment right to Counsel.

Mr. Klingfuss states the Trial Court fully complied with uniform rules of circuit and County Court Practice 8.05. Mr. klingfuss again must be reading from a different Record. Because the Record doesnot shows the Appellant making a knowing and intelligently waiver and proceeded with eyes open.

Mr. Klingfuss also states "A Look to the transcript shows defendant was determined and had made up his mind to "fire" his attorney for Preceived inadequacies. Tr. 73. The Judge did not want to grant defendant's wish, what did allows a hybrid representation.

As stated in U.S. v. DAVIS, 269 F.3d 514, (5th Cir. 2001) [HN9] "There is no constitutional right to hybrid representation." "Standby assistance of counsel, however, does not satisfy the Sixth Amendment right to Counsel, no matter how useful to the court or the defendant. Cannot qualify as the assistance of counsel required by the Sixth Amendment" Faretta v. California 422 U.S. at 834 n. 46. Moreno, 717 F.2d 171, 176 (5th Cir. 1983) The better course for the district court would have been to respond to Davis's complaints against his lawyer rather than suggesting that Davis could represent himself. In United States v. Martin 790 F.2d 1215 (5th Cir. 1986) this court outlined in some detail what a trial Judge must do [HN5] before granting a defendant's request for self-representation. The trial Judge must caution the defendant about the dangers of such a course of action so that the record will establish that "he knows what he is doing and his choice is made with eyes open" In order to determine whether the right to counsel has been effectively waived, the proper inquiry is to evaluate the circumstances of each case as well as the background of the defendant. [redacted] Id. at 1218 (internal citations omitted). [HN6] In particular, the district Court must consider various factors, including: the defendant's age and education, and other background, experience, and conduct. [redacted]

The court must ensure that the waiver is not the result of coercion or mistreatment of the defendant, and must be satisfied that the accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right he is waiving. The conviction of Davis was vacated and remanded for a new Trial.

Mr. Klingfuss failed to present a argument or even mention the appellant was denied a Attorney at his sentencing hearing. Again Mr. Klingfuss went threw the appellant brief and pick out what he wanted to be the mean point. The Appellant stressed this argument in his brief on pgs. 15-16 The argument is supported by case laws. But Mr. Klingfuss failed to address it in his Brief.

There is merit to all of the allegation of errors that the appellant raised in the Appellant Brief. Mr. Klingfuss hopes this Honorable court overlooks the errors as well. Relief should be granted.

ISSUE III.

THE TRIAL COURT DID ERR IN DENYING DEFENDANT'S MOTION TO RECUSE HIMSELF.

Mr. Klingfuss states in the Appellee Brief pg. 12 within the cited point of the transcript the Trial Judge had no memory of any prior alteration with this defendant. Further the Trial court said he had no ill will against defendant and he would be given a fair Trial. Deeper reading of the record reveals that is exactly what transpired. A reasonable and fair minded person cannot earnestly look at the entirety of the Record and agree that the Appellant received a fair Trial from the Trial court Judge regardless of what he might have said on pg. 12. There was a lot of things said by the Trial court Judge that Mr. Klingfuss failed to point out. The fact of the matter is Judge Smith shouldnot have been over the Appellant Trial. Because the Transcripts clearly Show the Trial,

Judge and the Appellant had a altercation on December 2, 2006 during a MOTION TO WITHDRAW hearing. SEE: In pgs. 6-13

The only thing the Transcripts reflects that the Trial Judge was involved in a conspiracy against the defendant. The Appellant didnot receive a fair Trial and the Trial Judge violated all of the appellant Constitutional rights. The Records and Transcripts support the alligation the Appellant made against the trial court Judge in the Appellant Brief. SEE: Appellant brief pgs. 17-28.

Mr. Klingfuss skipped over all of the unlawful things the Trial court did and went on to state: Now, as to defendant's claim he was beaten in from of fifty witnesses and hospitalized,-such is not supported by the record before this court.

Mr. Klingfuss is right this issue is not on the Record in front of this Honorable court. The reason why this issue is not in front of this Court is because Judge Smith made the Court reporter turn the machine off See: In pg. 14 But the matter is on the Record in front of a federal Judge.

After this Honorable court review the Appellant Brief and the Record in it's entirety Relief should be granted

Issue IV.

There IS EVIDENCE IN THE RECORD OF PROSECUTORIAL MISCONDUCT

Again Mr. klingfuss must be reading from different Records and Transcripts. Because the Records and Transcript the Appellant has contradict everything Mr. Klingfuss has mention in his reply brief. Because all of the errors made by the Appellant is supported by the complete Record. The Appellant made Some Serious Allegation in his brief pointed them out and provided case law. But Mr. Klingfuss chose to blow past them and failed to present a argument on the issues. The Appellant ask this Honorable Court to look at the Appellant brief in it's entirety as well as the Record and Transcripts. SEE: Appellant brief pgs. 28-39

Mr. Klingfuss gave one example of a inconsistencies of Officer Duncan testimony. The Example the officer testified he put the wrong date on his report. He admitted his mistake. This does not make the document false or the evidence inadmissible - it is a mistake. Nothing more."

Since Mr. Klingfuss brought out this one little inconsistencie of Officer Duncan. Let me see can I bring out a more serious inconsistencie FOR EXAMPLE OFFICER DUNCAN Testifing falsely Under oath which leads to perjury and carry a sentence up to 10 years in prison if I am not mistaking. Where Officer Duncan made to reports but testified to something totally different during trial and planting evidence and withholding evidence. Not only did Trooper Duncan testify falsely under oath. Deputy Hudgins Statement and testimony also prove Officer Duncan testified falsely. It can be proven beyond a reasonable doubt that Officer Duncan committed these crimes.

Mr. Klingfuss failed to mention the other errors the Appellant made in the Appellants Brief For example:

1. How the Prosecutors knowingly used and felled to correct the false testimony of Officer Duncan
2. How the Prosecutors suppressed favorable evidence from the Appellant.
3. How Officer Duncan Testimony violated the Mississippi Rule of Evidence 403
4. The Closing Argument of the prosecutors was errous
5. How the prosecutors used False Evidence to illegally get the Appellant found guilty.

All of these errors are in the Appellant's brief SEE: pgs. 28-39 and they are supported by case law and the proof is in the Transcripts."

Therefore relief should be granted.

Issue V. [redacted]

THE INDICTMENT IS DEFECTIVE AND IMPROPER.

Mr. Klingfuss again went threw the Appellant Brief and picked out what he wanted to be the main attraction he stated The whole premise of this allegation of error appears to be that a plea of "nolo contendere" cannot be used to enhance punishment.

Mr. Klingfuss is right again this is a error raised by the Appellant The main error is the Trial court Judge Amendment the Indictment and Changed the essential charging information threw the Jury [redacted] instructions. SEE: [HN3] The missing critical elements from an indictment may not be supplied by proof presented at trial or by Jury instructions that adequately set out the essentials of the Charged crime. White V. State of Mississippi 851 So. 2d 400 ; 2003 Miss App. AISO SEE: THE SUPREME COURT OF MISSISSIPPI stated in Quick V. State 569 So. 2d 1197 (Miss 1990) It is true that the record contains no order indicating an approval of the amendment and actually ordering that the indictment be amended. The instructions as given, however, clearly reflect the new element which was not contained in the original indictment and, as noted above by the trial court, it was evidently this part of the instruction upon which the Jury returned its verdict. under these circumstances we have no alternative but to reverse and remand for further proceedings consistent with this opinion.

Mr Klingfuss pretends First, the record reveals that no objection was made on these grounds at trial. Mr. Klingfuss answer hold no merit because the Trial Attorney did not do his Job this is another reason the Appellant filed for ineffective assistances of Counsel.

Mr. Klingfuss also claims The State could not find an objection on these grounds in the record and it is barred.

The Mississippi Supreme Court States in State V. Berryhill 703 So. 2d 250 ; 1997 Miss [HN6] Challenges to the substantive sufficiency of an indictment are not waivable. Thus, they may

be first raised at anytime including on appeal. The substantive failure of an indictment to charge a crime is not waivable and not subject to amendment. An objection to an indictment that fails to charge an essential element of the crime saught to be charged may be raised for the first time on appeal.

Issue .VI

THE JURY INSTRUCTION WERE IMPROPER. AND THE ISSUES IS NOT PROCEDURALLY BARRED.

Mr. Klingfuss again states Now. looking to the list of supposed error in the reading of the instructions as opposed to the actual instruction. There is no objection in the record and this issue is barred.

The court of Appeals stated in McGee v. State 820 So. 2d 700, (Miss App. 2002) [2] A Jury instruction may be improper if it incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions. Also see Farley v. State 856 So. 2d 654. (Miss. App 2003)

This issue is not barred because the Attorney didnot do his Job. The Appellant only noticed the error when he received his Records and Transcripts.

Relief should be granted on these errors because they are not just mere allegations they are facts and is supported by the record.

[redacted]

This issue should be Analized under the doctrine of plain error and the authority of Duvall v. State 634 So. 2d 524 (Miss. 1994)

## CONCLUSION

Based upon the entirety of the Record and the Appellant Brief on Appeal the Appellant ask this Honorable court to reverse the verdicts of the Jury and the Sentence of the Trial court and discharge the Appellant.

Respectfully Submitted
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# CERTIFICATE OF SERVICE

I, Herman Jackson Jr., Appellant Pro se, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Reply BRIEF OF APPELLANT to the following.

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This the 29 day of January 2007.

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