BEFORE THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2008-CA-00750-SCT

ROBERT LEE TYLER, JR. APPELLANT

V.

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 Justices in this Court may evaluate possible disqualifications or recusal:

1. Robert Tyler, Jr., Appellant;
2. Sanford Knott, counsel for Appellant;
3. Thomas J. Lowe, counsel for Appellant on direct appeal;
4. Johnnie E. Walls, Jr., counsel for Appellant in State v. Tyler, Jr.;
5. Steve Jubera, Assistant District Attorney of Desoto County, Mississippi, counsel for State;
6. Allen B. Couch, Assistant District Attorney of Desoto County, Mississippi, counsel for state at trial of State vs. Tyler, Jr.;

7. The Honorable Robert R. Chamberlain, circuit judge for post-conviction motion; and

8. George Ready, former circuit judge for trial of State vs. Tyler, Jr.

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STATEMENT OF ISSUES

AND NOW the Appellant, Robert Tyler, Jr. puts forth the following issues for review:

ISSUE NO. 1: WHETHER THE LOWER COURT'S FINDING THAT APPELLANT FAILED TO PROVE THAT THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY IN VIOLATION OF SHARPLIN, WAS CLEARLY ERRONEOUS?

ISSUE NO. 2: WHETHER THE LOWER COURT ERRED IN FINDING THAT APPELLANT WAIVED HIS PRESENCE DURING JURY DELIBERATIONS WHEN THE TRIAL JUDGE HAD EX PARTE COMMUNICATION WITH THE JURY?

ISSUE NO. 3: WHETHER BOTH TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO ARGUE THAT APPELLANT WAS DENIED A FAIR TRIAL IN VIOLATION OF DUE PROCESS OF LAW WHEN, DURING DELIBERATIONS, THE TRIAL JUDGE INSTRUCTED THE JURY IN ABSENCE OF THE DEFENSE?

STATEMENT OF THE CASE

The matter before the Court is an appeal from the denial of post-conviction relief after an evidentiary hearing. Robert Tyler, Jr., the Appellant was convicted on or about July 9, 2003 of sexual battery in the Circuit Court of Desoto County, Mississippi. Appellant seeks this Court's review and intervention in order for him to receive a new trial.

On June 27, 2002, a DeSoto County Grand Jury returned an indictment against the Robert Tyler, Jr. (hereinafter "Appellant") for three (3) counts of sexual battery charging him with having sex with a minor in January of 2002. Tyler was represented by Attorney Johnny Walls and the trial was held on or about July 9, 2003. Former circuit judge, George Ready, presided over the case. After the case was submitted to the jury, it sent out a note that it was deadlocked. See R. 15. Without bringing the jury out or having trial counsel or Appellant present, the judge reconvened court, and further instructed the jury, via, the bailiff. The jury later returned a verdict finding Appellant guilty of one (1) count of sexual battery and Appellant was sentenced to serve a term of imprisonment for thirty (30) years.

Attorney Walls, for Appellant, thereafter, filed a motion for judgment notwithstanding the verdict and at the hearing on July 17, 2003, he argued, *inter alia*, that the trial court erred in failing to allow Appellant to move for a mistrial

when the jury sent a note stating that it was deadlocked on all of the charges. [1] The motion was denied on July 17, 2003. On appeal, Appellant was represented by Attorney Thomas J. Lowe who argued matters with respect to jury selection, misconduct of the prosecutor, and the admissibility of Tyler's alleged confession. See Tyler v. State, 911 So. 2d 550 (Miss. App. 2005).

After his conviction was affirmed on May 22, 2005, by the Mississippi Court of Appeals and writ of certiorari was denied by this Court on September 22, 2005, Appellant filed his Petition for Post-Conviction Relief in the Circuit Court of Desoto County, Mississippi claiming that he was denied his right to be present at every critical stage of his trial and ineffective assistance of counsel.[2] Both claims arose from an **ex parte** communication between the judge and the jury during deliberations.

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The motion was actually styled Motion For A Judgment Notwithstanding Jury Verdict, or in the Alternative for a New Trial. The additional grounds were:
1. The court erred in overruling the motion for a directed verdict at the conclusion of the State's case and again at the conclusion of the presentation of all the evidence;
2. That the charges were not supported in fact or by law;
3. That Petitioner's confession was illegally allowed into evidence;
4. That jury instruction was erroneously refused and certain state instructions were erroneously given;
5. That his equal protection rights were violated when he was charged for a crime that would not have been a crime had it been committed against an adult; and
6. That the sentence imposed was unduly harsh.
R. 16-19.

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Leave to file the Petition For Post Conviction Relief was granted by this Court on December 5, 2007.

The evidentiary hearing was held on February 13, 2008.[3] During said hearing, Appellant testified that he never knew during his trial that the jury was deadlocked at one point, that the circuit court had reconvened court in his absence, or that his father, Robert Tyler, Sr. heard the instruction the trial judge gave the jury. It was not until after he was convicted did he know about the note from the jury and reconvening of court. However, as to his father's knowledge of what the trial judge said to the jury, that was not known until after present counsel interviewed the father about his observations at trial.[4]

Next Robert Tyler, Sr. testified that the jury was out for about an hour when he and his wife went back into the courtroom, sat down, but noticed that the bailiff had called for everyone to come in the courtroom. T. 21-23. He stated, further, that the alleged victim and mother were present, but he could not remember if the prosecution was there. T. 23, 27. He did, however, testify that neither Attorney Walls nor his son were present. T. 25. The bailiff passed the note to the judge who read it and then directed the bailiff, "Go back and tell them do not come out until they have a verdict." T. 24. He also testified that one of the individuals at the

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A stipulation was made and approved by the court that there was no transcript that could be found by the court reporter of the relevant communication between the trial judge and jury. T. 2-3.

[4] See attached to Petition For Post-Conviction Relief the sworn affidavit by Appellant. R.38-40.

evidentiary hearing, later identified as Sergeant Lynn Fly of the DeSoto County Sheriff's Department, was a bailiff at the trial of his son. T. 26.

Sergeant Fly testified that he was employed during the time the case went to trial and was a courthouse security bailiff, but that he could not remember the case. With respect to passing notes to and from the jury, he testified that he would not have been the one to do so. According to Fly, the court clerk or civilian bailiff, however, performed this task during 2003. T. 31-34.

George Ready testified that as former circuit judge, he would have had two (2) types of bailiffs: a courthouse security bailiff and jury or civilian bailiff. T. 35-36. While Ready confirmed that Sergeant Fly actually worked on Tyler's trial, he also confirmed that Fly would not have received or passed notes from the jury. T. 46-37. Ready, further, testified that he could not remember what he said to the jury (T. 44), but that he would not have given a Sharplin charge with the first note from the jury. T. 46. His standard practice would have been to write on back of the note and send it back to the jury for it to continue deliberations. If that were not done, he would have instructed the bailiff to tell the jury "continue deliberating or keep deliberating." T. 41-42. On cross-examination, Ready testified that he did not think he would have instructed the jury to not come back out until it reached a verdict nor did he believe that he had ever given said

instruction. T. 48. As to the absence of the defense's presence when he instructed the jury, he testified that he had instructed the parties not to leave the courthouse, that both Attorney Walls and Tyler left the courthouse, and "to the best of his recollection," he and bailiff looked for both in the courthouse. T. 43-44.

At the close of the hearing, the lower court later denied Appellant any relief and this appeal followed.

SUMMARY OF ARGUMENT

After the evidentiary hearings, the lower court denied Appellant post-conviction because it agreed with the State's position that the jury was indeed instructed according to the law. The lower court, specifically, found that Appellant's only fact witness, his father, was impeached in three (3) ways: (1) he could not remember the bailiff who was present at the time of the trial; (2) he could not remember the exact courtroom that the trial occurred in; and (3) he did not remember the exact words of the trial judge until after he was asked by post-conviction counsel.

Appellant would state that, on appeal, each finding of the lower court is subject to clearly erroneous standard. Appellant can satisfactory demonstrate that the lower court committed reversible error given that, first, the record reflects that

Robert Tyler, Sr., the father of Appellant, was not only present when the judge instructed the jury but, in fact, heard the language used and that said language was not disputed by the trial judge who, too, testified. The father, secondly, actually did remember the bailiff at the trial and who, coincidentally, was present at the evidentiary hearing. His memory was corroborated by the trial judge. Third, the fact that the father testified that the trial occurred in a different courtroom, a fact disputed by the trial judge, was completely immaterial given the consistency and clarity of the rest of his testimony. Finally, the lower court's finding as to the timing of the father's statement was not contested by the State. More importantly, the witness never testified that he only remembered after being questioned by counsel concerning the post-conviction motion. The testimony revealed that Appellant only realized that the father actually heard the judge's comments during the interview with counsel. A review of each finding by the lower court must lead this Court to the conclusion that the findings can not withstand judicial scrutiny and each was clearly erroneous.

Also during the evidentiary hearing, it was clear that during Tyler's trial, the defense was not present during the **ex parte** communication between the trial judge and jury. The lower court, nevertheless, found that Tyler waived his right to be present. This, too, was error as there was no proof that Tyler made a voluntary,

knowing, and intelligent waiver of his right to be present. In fact, the proof demonstrated that Tyler did not even know that the jury had sent out a note until afer he was convicted.

Finally, Appellant Tyler, also, claimed that he received ineffective assistance of trial and appellate counsel given that neither counsel raised that due process of law required him to be present when the judge spoke with jury during deliberations. Appellant's claim for relief here is premised upon the clear statement of the trial judge, during post-trial motions, that he did **not** give a Sharplin instruction to the jury. If this did not signal to counsel that, perhaps, Appellant did not receive a fair trial, then, objectively, counsel failed to render effective legal assistance. Not raising the due process argument at any point or level, left the purity of the jury deliberations in question. This Court is then asked to find that Appellant did not receive effective assistance of counsel.

In the end, Appellant has demonstrated, by a preponderance of evidence, that he was entitled to relief in reference to his post-conviction motion and that the lower court committed error in denying Appellant any relief.

ARGUMENT

THE LOWER COURT'S FINDING THAT AN IMPROPER INSTRUCTION WAS NOT GIVEN TO THE JURY WAS CLEARLY ERRONEOUS

When the trial judge instructed the deadlocked jury, the instruction did not comport with this Court's holding in Sharplin.

Enough time has passed since this Court's decision in Sharplin, for every trial judge to know that when a jury in criminal case is deadlocked, and further deliberations may likely produce a verdict, there are two (2) possible instructions that can be given. See Sharplin v. State, 330 So. 2d 591 (Miss. 1976). The trial judge may instruct the jury to "please continue your deliberation" or may give the following instruction:

> "I know that it is possible for honest men and women to have honest different opinions about the facts of a case, but, if it is possible to reconcile your differences of opinion and decide this case, then you should do so. Accordingly, I remind you that the court originally instructed you that the verdict of the jury must represent the considered judgment of each juror. It is your duty as jurors to consult with one another and to deliberate in view of reaching agreement if you can do so without violence to you individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence to your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous, bu do not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Please continue your deliberations." Id. at 596.

In the case today, the father of Appellant was present when the judge instructed the jury after it sent out a note that a verdict could not be reached. T. 21-25. He testified at the hearing that the trial judge told the bailiff to instruct the jury to go "back and not come out until they can reach a verdict." (T. 24) The

lower court found that if said language had been used, the trial judge would have committed reversible error. R. 44-45. However, the lower court, also, found that the father's testimony was impeached, allegedly, since he "could not remember the bailiff nor the courtroom, but could remember the exact words of a judge several years ago which he did not remember until asked by counsel on post-conviction." R. 47. Instead, the court found the trial judge's testimony credible and more candid and, thereafter, found that Appellant had not proven his case. R. 47. However, as will be seen later, each finding of the lower court was clearly erroneous.

STANDARD OF REVIEW

Post-conviction relief shall be granted whenever there is evidence of material facts, not previously heard, that requires vacation of the conviction or sentence. See Miss. Code Ann. §99-39-5(1)(e)(Supp. 2008). A petitioner must demonstrate that he is entitled to relief by the preponderance of the evidence. Id. Because this is an appeal from the denial of post-conviction relief (after an evidentiary hearing) this Court must review the findings of facts and determine if they were clearly erroneous. Johns v. State, 926 So. 2d 188, 194 (Miss. 2006) (citing Reynolds v. State, 521 So. 2d 914, 918 (Miss. 1988)). Despite there being evidence to support it, a finding of fact is clearly erroneous if, after this Court looks at the entire record, it is left with the definite and firm conviction that a

mistake has been made. Id. 194; Bryan v. Holzer, 589 So. 2d 648, 659 (Miss. 1991)(citing UHS-Oualicare, Inc. V. Gulf Coast Community Hospital, Inc., 525 So. 2d 746, 754 (Miss. 1987)). "This Court must examine the entire record and accept that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inference which may be drawn therefrom and which favor the lower Court's findings of fact." Mullins v. Ratcliff, 515 So. 2d 1183, 1189(Miss. 1987)) (citing Cotton v. McConnell, 435 So. 2d 683, 685(Miss. 1983)). The trial judge, as the trier of fact, has the sole authority to evaluate the credibility of the witnesses. John at 194; Mullins at 1189 (citing Hall v. State ex rel Waller, 157 So. 2d 781, 784 (Miss. 1963)).

1. IMPEACHMENT BY NOT REMEMBERING THE BAILIFF

The first objection that the lower court had with witness's credibility was that he could not remember the bailiff who was present during the trial.

Recall that the Tyler, Sr. testified that an individual, later identified as Sergeant Lyn Allen Fly, was the bailiff who was present during the trial of his son. T. 26. Fly, who happened to be at the evidentiary hearing, testified that he was a courtroom security bailiff and employed in that capacity during the time of the trial, but could not remember the trial of Robert Tyler, Jr. However, George Ready, clearly confirmed that Fly worked for him in the trial of the case. T. 46. There was no basis for the Court's findings.

Perhaps, however, the lower court intended to find that the witness erroneously identified Sergeant Fly as the one who transported the jury note to the trial judge. However, that finding, too, was clearly erroneous. At the time the father identified Fly, he actually was responding to the question as to who was in the courtroom at the time the trial judge **read** the note **from** the jury as seen in the following exchange:

"Q. Okay. Was your son present when the judge came in and read the note?
A. No, my son wasn't in here.
Q. Was his attorney present?
A. No, I didn't - - he wasn't in here.
Q. Were the prosecution present, the lawyers who sit on this side?
A. Yeah.
Q. You think they were present?
A. He was there.
Q. Okay. Do you know the prosecutor's name?
A. No. I don't know his name.
Q. All right. And so you remember or do yo not remember who was all there?
Q. I don't remember who all was there.
A. Okay. All right. But you know your son was not there?
Q. I know he wasn't there, and I know his attorney wasn't there, and I know the bailiff.
Q. The bailiff?
A. Yeah.
Q. Is that the bailiff in the courtroom today?
A. (Indicating)
Q. Do you think that's the same bailiff?
A. That's him. That's him. I don't forget faces. That's him.
Q. Okay."

T. 25-26.

The father was on point, as confirmed by Ready, that Fly was working the

trial of the case. Tyler Sr. never identified Fly as the bailiff who transported the note from the jury. In any event, the finding by the lower court that he did not remember the bailiff was clearly erroneous.[5]

2. IMPEACHMENT BY NOT REMEMBERING COURTROOM

The witness's testimony was not impeached despite his alleged misrecollection of the exact location of the courtroom inside the courthouse where the trial occurred.

The issue with respect to the courtroom developed on cross-examination of the Appellant's father when he testified that the bailiff came in through a side door when the jury note was passed. T. 27. Upon asking him to clarify which side door, since there were two, the witness exclaimed that the courtroom he was present in was not the same one of the trial. T. 28. While this fact was not stipulated to, the lower court apparently accepted the testimony of Ready who later testified that, in fact, the courtroom presently was the exact same one as during the trial. T. 41.

Appellant would state that whether the trial occurred in another courtroom

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It should be noted that Ready's testimony as to who transported jury notes was inconsistent with Deputy Fly's recollection. Fly originally testified that transportation of notes from the jury to the judge and vice versa always was done by the clerk. T. 32. He later said that the transportation of the notes would occur, also, by the civilian bailiff. T. 33. Ready stated that the civilian bailiff only would transport the notes or otherwise communicate directly to the jury during deliberations. T. 37.

was immaterial as there was no dispute that Tyler, Sr., was present during the trial. In fact, he testified at the trial. Second, while the witness explained that the jury box and side door, from which the jury exited, were in a different location, there was no contrary evidence that in July of 2003 (i.e., the trial of the case) his memory was inaccurate. The lower court never highlighted any differences between the courtrooms or even suggested what changes were or were not made to the existing courtroom since the trial.

Moreover, Tyler, Sr.'s alleged misrecollection of the courtroom pales in comparison to the overall clarity and consistency of the rest of his testimony. Tyler, Sr. testified clearly, *inter alia*, who in his family was present during the trial; (T. 18-19.) that he could not come into the courtroom until after he testified (T. 19.); that he sat, eventually, on the third bench behind defense table (T. 19.); that he went for lunch during jury deliberations (T. 20-21.); how long the jury deliberated before the jury note was passed (T. 21.); what direction the bailiff came from when he entered the courtroom (T. 23.); who was present when the **ex parte** communication occurred (T. 23, 25-26.); and how long, thereafter, the jury deliberated. T. 25. The father's testimony was not discredited in any way. Therefore, it was a stretch to discredit this witness in light of his complete testimony. Therefore, the court's finding was not only immaterial to the witness's credibility, but it was clearly erroneous.

3. IMPEACHMENT BY NOT REMEMBERING JUDGE'S COMMENT UNTIL INTERVIEWED BY COUNSEL

Lastly, the lower court questioned the credibility of Appellant's witness by finding that the father remembered the trial court's comments to the jury only after being interviewed by counsel involved in Appellant's post-conviction petition. Appellant would state that, once again, the lower court's ruling was clearly erroneous.

During Appellant's testimony, he clarified that he did not know that his father overheard the comments of the trial judge during jury deliberations until after his direct appeals had run and counsel was investigating this case for post-conviction review. T.9; See also R. 38-40. First, this Court should note that there was never a challenge by the State concerning this issue. Second, the father never testified, nor was there any other evidence presented that he **first remembered** the judge's comments only after being questioned by counsel. Later, during oral argument, it was, again, clarified as to when and how information developed. T. 58-59.

The State had ample opportunity to question each witness and raise the timing of the witness's information before the lower court, but chose not to do so. Therefore, the lower court had no basis for its finding that the witness was impeached on this issue and, therefore, the lower court's finding was clearly

erroneous.

THE CREDIBLE EVIDENCE ESTABLISHED PROOF BY A PREPONDERANCE OF THE EVIDENCE THAT APPELLANT WAS ENTITLED TO RELIEF

And now having determined that the lower court improperly discredited Appellant's witness, Appellant's position is clear: the trial judge improperly instructed the jury to reach a verdict when it originally could not do so . To prove this point further, this Court is directed review what the former circuit judge admitted to or did not deny. First, he never denied making the statement to the jury as alleged by Appellant's father or that he had ever instructed any other jury similarly. T. 47, 48. Second, while his standard practice was to instruct a deadlocked jury to continue deliberations, he said that he did not give a Sharplin instruction in this case. T. 41, 46. Third, while his standard practice, also, was to place all jury instructions in writing on back of the jury note, he, again, failed to do so here. T. 42, 44-45. And when asked if he understood that the law required the instructions to be in writing, Ready responded that he did not keep up with such details. T. 42. The lower court correctly noted that had Ready followed the law in reducing the instruction in writing, Tyler would not be in this predicament. R. 46.

By comparison, this Court has benefit of Johns v. State, 926 So. 2d 188 (Miss. 2006). In Johns, this Court was faced with, *inter alia*, whether trial

counsel's memory and standard of practice was properly found to be reliable by the lower court which denied petitioner's post-conviction claim that he received ineffective assistance of counsel. This Court observed that "[t] he only fact of which Jackson was certain was that he did not remember. Jackson could provide testimony on his *standard practice* when preparing for trial, but could hardly provide specifics as to what he did when preparing for John's trial" Id. at 196. This Court later found that the trial court's reliance on the lawyer's testimony as credible was clearly erroneous. Id.

In the case *sub judice*, the lower court, too, had the sole authority to weigh the credibility of the witnesses. A finding, however, in this case that Ready's testimony of his standard of practice and lack of memory to be more reliable than direct testimony of Appellant's witness who knew exactly what was said and when, was clearly erroneous and Appellant, therefore, requests that the Court so finds that he has proven his case by a preponderance of the evidence.

WAIVER OF TYLER'S PRESENCE AT THE TIME JURY WAS INSTRUCTED

Before addressing Appellant's claim that due process was violated when the trial judge instructed the jury in the absence of the defense, the lower court found that Appellant, somehow, waived his presence. R. 46.

While an accused can waive his constitutional rights, that can only occur if

there is a voluntary, knowing, and intelligent waiver of said rights. Johnson v. Zerbst, 304 U.S. 458, 464 (Miss. 1938). In the case *sub judice*, there was no waiver of the defense's presence during the **ex parte** communication between the judge and jury.

A review of the facts indicate that after the jury retired to deliberate, Appellant left the courtroom, but not the courthouse as he and wife went and stood on the steps of the courthouse. T. 13. Although trial counsel left the courthouse to go to lunch, he left his cell phone number behind with a bailiff. R. 38-40. When the jury sent out the note that it was deadlocked, the trial judge testified that he and the bailiff looked for Appellant Tyler and his counsel. T. 43. While the trial judge originally claimed that Tyler **left** the courthouse, he later admitted that he only looked for Appellant **inside** the courthouse. Id.[6] Further, there appeared to have been no problem reaching Appellant when the jury finally reached a verdict. Based upon this testimony, the lower court's finding that Appellant waived his right to be present was clearly erroneous.

INEFFECTIVE ASSISTANCE OF COUNSEL

The lower court erred in its finding that neither trial counsel nor appellate counsel was constitutionally ineffective when neither argued that it was a violation

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Interestingly enough, Ready commented, during the post trial motion, that he looked forAttorney Walls not Tyler. R. 12.

of due process for the trial judge to instruct the deadlocked jury outside the presence of the defense.

The Sixth Amendment to the United States Constitution guarantees that every criminal defendant is entitled to the assistance of counsel in presenting their defense. The Supreme Court has stated that "the right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy of our adversary process." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986).

To establish ineffective assistance of counsel, a defendant must satisfy a two-prong test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984); Obsorn v. State, 695 So. 2d. 570 (Miss. 1997). Under this two-prong test, the defendant must first show that counsel's performance fell below an objective standard of reasonableness as defined by professional norms. This means that the defendant must show that his attorney made errors "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 688 U.S. at 694. Second, once a defendant satisfies the first prong, he must allege, with specificity and detail that counsel's deficient performance so prejudiced his defense, he was deprived of a fair trial. Id. There must be "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). This means a "probability sufficient to undermine the confidence in the outcome." Id. A defendant must show "with specificity and detail" both parts of the Strickland test to establish a prima facie case of ineffective assistance of counsel. Cole v. State, 666 So. 2d. 767, 775 (Miss. 1995) (citing Perkins v. State, 487 So. 2d. 791, 793 (Miss. 1986).

The right to effective counsel extends to appeals. See Evitts v. Lucey, 469 U.S. 387, 406, 83 L. Ed. 2d. 821, 105 S. Ct. 830 (1985); Douglas v. California, 372 U.S. 353, 83 S. Ct. 814 (1963) (an accused is entitled to assistance of counsel on an appeal as a matter of right); Harrell v. State, 386 So. 2d. 390 (Miss. 1980). The two (2) prong test in Strickland is, also, utilized to establish a claim that appellate counsel was ineffective for failing to pursue a claim on direct appeal is the same Strickland standard. See Strickland, 466 U.S. at 688. 694; see also Smith v. Robbins, 528 U.S. 259, 120 S. Ct. 746, 764, 145 L. Ed. 2d. 756 (2000) (holding that a habeas applicant must demonstrate that "counsel was objectively unreasonable" in failing to file a merit's brief addressing a non-frivolous issue and that there is "a reasonable probability that, but for his counsel's unreasonable failure, he would have prevailed on his appeal"); Foster v. State, 687 So. 2d. 1124, 1138 (Miss. 1996) (the standard is the same for appellate performance as it is for trial performance).

Next, we will review the reasonableness of trial and appellate counsel's

performances. Then, we will review how said performances affected the outcome.

REASONABLENESS OF COUNSEL'S REPRESENTATIONS

When neither trial nor appellate counsel even raised that there was a due process violation after discovering that the trial judge ambiguously instructed the jury outside the presence of the defense, their representations were objectively unreasonable.[7]

Without question, Appellant's right to a fair trial includes not only his right to, *inter alia*, cross examine witnesses, subpoena witnesses, testify or not testify, and require proof of guilt beyond a reasonable doubt, it, also, requires that he be present during every critical stage of the proceedings. U.S. CONST. Amend. VI; MS. CONST. Art. 3 §26. Our U.S. Supreme Court has made it clear that a defendant has a constitutional right to be present when his presence "bears, or may fairly be assumed to bear a relation, reasonably substantial to his opportunity to defend." Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); U.S. v Gagnon, 470 U.S. 552, 557 (1985) (citing Snyder). "[It] is a matter of fundamental fairness and **due process** that the defendant is entitled to be apprised of communications between the court and the jury during deliberations." Edlin v. State, 523 So. 2d. 42 (Miss. 1988).

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Given that the Strickland test is applied to both trial and appellate counsel, the remaining discussion will refer to both simply as "counsel" unless otherwise stated.

Turning to the case at hand, trial counsel argued during the hearing on the post-trial motions that the instruction to the jury made outside of his presence prevented him from moving for a mistrial. R. 10-12, 18. Obviously, trial counsel's argument was centered upon U.C.C.R. 3.10 which in pertinent part, provides as follows:

> "If it appears to the court that there is no reasonable probability of agreement, the jury may be discharged without having agreed upon a verdict and a mistrial granted."

However, the argument of trial counsel did not go far enough. The facts facing counsel required a different argument given that, first, counsel did not know what comments were made to the jury outside of his presence, and there was no stipulation, thereof, made by the parties. Second, the trial judge, specifically, commented that he did not give a Sharplin instruction to the jury as seen here:

"BY THE COURT: I'm sure Mr. Walls would have made the standard objection that defense attorneys make. As soon as that note comes out, they move for a mistrial, and it would have been the Court's standard policy. I would not have granted a mistrial on the first note coming out saying that they were deadlocked. We were going to -- especially this type of case, Mr. Walls. We just did another case after that that's the same type of case. It was a sexual battery case.

And the jury went out yesterday at 3:00. They sent me a note after they had been in there an hour saying they were

24 deadlocked. I told them to continue.
25 Their lawyer moved for a mistrial. I kept
26 them in there until 5:30 and then let them
27 go home. I made them come back this
28 morning. They got here at 8:30. They sent
29 out for notes saying they were deadlocked

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1 and it wasn't going to change, and I made
2 them stay here. I think I got -- on the
3 fourth note, we came out. It was
4 lunchtime, and there were two diabetics on
5 the jury -- because of the nature of the
6 case because what it causes for the victims
7 and those type of cases to have to go back
8 on the stand, I always make them
9 deliberate. I gave a Sharplin charge in
10 that other. **That was not necessary in your**
11 **client's case**. So there would have been no
12 difference if yo u had been here and made
13 the motion. Okay?" R. 13-14.

Counsel should have, at this point, inquired into whether there was a proper instruction given. Inquiry here would have demonstrated, what everyone knows now, that neither was an instruction given in writing nor was one recorded by the court reporter. In essence, the alarming statements of the trial judge should have caused even greater alarm by counsel that Appellant's due process right to a fair trial had been violated. Counsel's failure to raise the issue and put forth that there was a violation caused his performance to be objectively unreasonable and did not fall within the ambit of trial strategy. Appellant has, therefore, satisfied the first

part of the Strickland test.

A comment or two (2) must be made about the lack of transcript and written instruction. If counsel had requested the transcript, the lower court would have ordered it. See Brawner v. State, 947 So.2d. 254 (Miss. 2006) (citing Hardy v. United States, 375 U.S. 277, 280, 84 (1964).[8] The transcript would have confirmed or clarified the trial judge's comment on the record that he did not give a Sharplin charge.

Also, Rule 3.07 of the UCCR, provides as follows:

> "The judge may instruct the jury. The court's instructions must be in writing and must be submitted to the attorneys who, in accordance with this rule, must dictate their specific objectives into the record."

Again, trial counsel should have asked for the written instruction. This highlights the depth of the errors committed by counsel. Appellant, even at this point, had a right to effective assistance of counsel.

DEFICIENT PERFORMANCE AFFECTED OUTCOME OF TRIAL

The second test under Strickland has also been met. But for counsel's representation being unreasonable, the outcome of the trial would have been different. A finding by this Court that Appellant was denied a fundamental right

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It has been said that appellate counsel was presumptively ineffective when he failed to obtain the jury instructions. Hardy v. United States , 375 U.S. 277, 282 (1964).

to a fair trial because of a due process violation is sufficient for Appellant to obtain relief.

Appellant is mindful of this Court's ruling in Young v. State, 420 So. 2d. 1005 (Miss. 1982) wherein the instruction, "continue your deliberations" was given by the trial judge, via bailiff, to a deadlocked jury even in the absence of the defense. This Court found no reversible error because the instruction did not **require** the jury to continue deliberating. Therefore, the defendant's ability to have a fair trial was not prejudiced. Young was cited in De La Beckwith v. State, 707 So. 2d 547(Miss. 1997) wherein, the trial judge gave an instruction to the jury outside the presence of the defense that it could take notes. Again, this Court decided that the defendant was not prejudiced despite the **ex parte** communication.

However, both Young and Beckwith should be limited to its facts given that there was no dispute, ambiguity, or question as to the language of the instruction given to the jury. In Young, the parties stipulated to the language used by the trial judge. See Young v. Herring, 938 F.2d. 543, 556 (5th Cir. 1991) (wherein, the petitioner filed for federal habeas relief which was appealed the 5th Circuit Court of Appeals). In Beckwith, while not knowing how the parties knew of exactly what was said, clearly the nature and language of the **ex parte** communication was not an issue. That was not the case facing trial and appellate counsel *sub judice.* It

was not clear what the trial judge had instructed after the jury became deadlocked as there was no written instruction given or transcript of the instruction found. To compound the problem, the trial judge made inconsistent statements as to what was said to the jury. On one hand, the judge exclaimed that he instructed the bailiff to instruct the jury "to please continue your deliberations." However, later during the hearing, the trial judge commented that he did not give the jury a Sharplin instruction. These ambiguous statements not only raised doubts about what occurred, it proved that the jury was either improperly influenced or not free from being influenced by the trial judge's comments, beyond a reasonable doubt. In fact, this Court has stated that:

> "if they [the jurors] were exposed to improper influences, which might have produced the verdict, the presumption of law is against it purity; and testimony will not be heard to rebut this presumption. It is a conclusive presumption." Collins v. State, 99 Miss. 47, 54 So. 665 (1910).

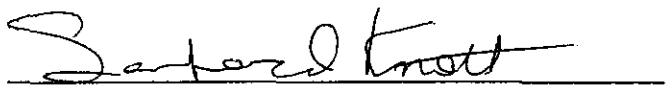
Had trial counsel raised that Appellant was denied due process, a new trial would have been warranted. Despite trial counsel's failure, appellate counsel should have argued the issue under the plain error principle given that Appellant's due process rights were affected. See Tran v. State, 2006-KA-01394-COA (Miss. App. 2008) (plain error is error that affects a defendant's substantive right).

CONCLUSION

FOR THE FOREGOING REASONS, Appellant requests that this Court

reverses the decision of the lower court which denied him relief and order that a new trial on the merits be granted at once.

RESPECTFULLY SUMBITTED,

By: 

Sanford E. Knott, Esquire,
Attorney for Appellant Robert Tyler, Jr.

Of Counsel:
Sanford E. Knott, MSB No. [redacted]
Sanford Knott & Associates, P.A.
P.O. Box 1208
Jackson, Mississippi 39225
Telephone: (601) 355-2000
Facsimile: (601) 355-2600
Email: knottlaw@bellsouth.net

CERTIFICATE OF SERVICE

I, Sanford E. Knott, attorney for Appellant Robert Tyler, Jr., do hereby certify that I have on this date mailed via, United States Postal Services, postage prepaid, a true and correct copy of the foregoing **Appellant's Brief** to the following:

Steven Jubera, Esquire
Office of the District Attorney
365 Losher Street, Ste. 210
Hernando, MS 38632

Office of the Attorney General
550 High Street, Ste. 1200
Jackson, MS 39205

Honorable Robert P. Chamberlin, Jr.
P. O. Box 280

Hernando, MS 38632

So, this the 17th day of November, 2008.

Sanford E. Knott, Esquire