IN THE SUPREME COURT OF MISSISSIPPI

CASE NO.: 2008-CA-01341-COA

JULIUS WESLEY KIKER — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

REBUTTAL BRIEF
(ORAL ARGUMENT NOT REQUESTED)

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In this cause, the State encounters a difficult task. When the State's key witness testified at trial, that witness dodged cross-examination by advising the defendant's attorney to direct an impeaching question to his lawyer. Because the key witness's lawyer was also one of the defendant's lawyers, this matter is now before this Court.

In confronting this difficult task, the State could have addressed Kiker's argument. Or the State could ignore Kiker's argument, recast the question before this Court[1] and then seek affirmance.

The State chose the latter course of action.

In doing so, the State ensures reversal for reasons made clear below.

PART A: Introduction

Kiker filed a single-claim brief seeking reversal of the trial court's determination "that Sidney Barnett has no actual conflict with Kiker." (Appellant's Brief [hereinafter "AB"] at 9). Kiker continued: "Barnett had an actual conflict and the trial court did not intervene to resolve the conflict when it arose, at trial, before the jury." Id.[2]

In an effort to promote intelligent discussion by the parties[3] in this important matter, Kiker then divided his single-claim into two parts. In Part One, Kiker offered five separate bases which, individually and collectively, detailed why the trial court's findings were clearly

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[1] Noting that "Barnett's simultaneous representation of Crawford and Kiker is certainly ethically problematic for him" (State's Brief at 4), the State claimed Kiker did not suffer a deprivation of counsel because his conflict-free attorney competently represented Kiker at trial. Id. That question was not before the trial court. See page 2 of Appellant's Brief and this Court's Order of November 8, 2007 (R.E. 1-2) wherein this Court granted an evidentiary hearing "on the issue of whether Kiker's Sixth Amendment rights were violated due to the trial counsel's representation of a witness for the State[,]" and denied an evidentiary hearing on the effectiveness of trial counsel under Strickland v. Washington, 466 U.S. 668 (1984).

[2] This is the sole question before the trial court. See this Court's Order remanding this matter for evidentiary hearing at R.E. 1. The State agrees with this, yet insists upon importing into the sole question an argument that Kiker's conflict-free counsel provided effective representation of counsel under Strickland. See State's Brief at 7 through 9; Appellants Brief at 15 (Part (A)(4), raising the claim that the trial court erred in finding performance of trial counsel survives Strickland as that question was not before the trial court).

[3] Insofar as the State declined to address Kiker's arguments, Kiker's efforts failed.

erroneous. (AB at ii; AB at 10 through 16). Part One was nominated II(A)(1) through II(A)(5). Id. In Part Two, Kiker offered three separate omissions from the trial court's findings which, individually and collectively, rendered the trial court's finding clearly erroneous. (AB at ii through iii; AB 16 through 20). Part Two was nominated II(B)(1) through II(B)(3). Id.

Kiker presented his brief as detailed above to provide the most systematic and cogent presentation of the issues properly before this Court on appeal. Of the ***eight*** issues presented by Kiker, the State bothers to acknowledge only five in its brief.[4] See Part B, infra. Of the five issues the State acknowledges, the State responds to none because the State declined to address the validity of any of Kiker's case authority.[5] See Part B, infra. The case authority the State does put forward in opposition to Kiker's brief does nothing to advance the State's position. See Part C, infra.[6]

PART B: Kiker's brief and the State's decision not to respond to it

In Part II(A)(1) of his Brief, Kiker wrote the trial court's finding that "Barnett had no actual conflict with Kiker" was clearly erroneous and cannot stand. (AB at 10). Kiker cited to no less than thirteen cases in support of his proposition that the trial court's determination was "constitutionally irreconcilable." (AB at 10; AB at 10 through 13). The State did not entertain any of these cases in its brief.[7] Rather, the State merely announced that because one of Kiker's

[4] The State could have adopted Kiker's numbering and addressed the issues as they were nominated by Kiker. The State opted not to, requiring Kiker and this Court to rummage through the State's Brief to determine what arguments have been addressed and where.

[5] Kiker presumed the State sought and received two extensions of time because the State intended to respond to the merits of his brief. As is made abundantly clear in this reply brief, that presumption has evaporated.

[6] Kiker shall respond to all of the case authority cited by the State in its brief. Kiker submits that this is the purpose of responsive briefing – to respond to the entire argument of counsel opposite rather than simply decree counsel opposite wrong and ask the appellate court to confirm that decision.

[7] If Kiker's citation to any of the numerous cases cited was specious, then why didn't the State capitalize on that?

lawyers had no conflict, Kiker did not suffer a Sixth Amendment deprivation. (State's Brief [hereinafter "SB"] at 6).[8]

In Part II(A)(2), Kiker wrote the trial court's finding that "Crawford was not a key witness" was clearly erroneous and cannot stand (AB at 13). Citing four cases, Kiker defined "key witness" (AB at 13) and then explained that Crawford was a key witness because "the State produced no eye witness to the crime and the only witness who testified as to any admission was Crawford. Therefore, Crawford is not only a key witness in this prosecution, he provided the only evidence in Kiker's trial converting the prosecution from a circumstantial case to a direct case. (AB at 14). The State's response to Part II(A)(2) is, at best, inconsistent. On the one hand, the State responds that even if Crawford is a key witness and, therefore, the trial court erred in determining that Crawford was not a key witness, Kiker is not entitled to relief because the trial court's "ultimate ruling" that Kiker benefitted from conflict-free counsel was correct. (SB at 6). On the other hand, the State contends that Crawford's key witness status – which the State did not bother to dispute – did ***not*** convert the case from a circumstantial case to a direct case because:

> there was ample physical evidence to convict Kiker. The victim's son saw Kiker with a gun in his possession and heard Kiker and his mother arguing. The deputy who came to the scene observed Kiker trying to conceal and dispose of the body and saw Kiker in possession of the gun. There was physical evidence collected at the scene that connected Kiker to the murder. (Tr. 31). These pieces of direct evidence and eye witness testimony precluded a circumstantial instruction. A circumstantial evidence instruction is proper only if the case is based wholly on circumstantial evidence. Sheffield v. State, 749 So. 2d 123, 126 (Miss. 1999). A circumstantial evidence instruction is not proper if the case contains both circumstantial evidence and direct evidence such as eyewitness testimony. Id.

While Kiker dare not surmise which portion of the State's brief is the most intellectually insulting, the above quotation would surely contest for the award. Taking this quotation as

[8] The State cites to no authority for this contention. Similarly, the State ignored authority cited by Kiker which destroys this contention. See Pages 10 through 13 of Kiker's Brief.

facially true entirely for the purposes of argument, neither the son of the victim nor the deputy saw Kiker commit any element of *the crime*. Taking this quotation as true on its face entirely for the purposes of argument, what the victim's son and the deputy personally observed were incriminating circumstances that surround *the crime*. It is intellectually insulting to conflate a "personally observed event" with "eyewitness testimony." The State adds a healthy dose of salt to the wound it created by relying on an inapposite case to support its factual recitation: Sheffield v. State, 749 So. 2d 123, 126 (Miss. 1999), where this Court determined that a circumstantial instruction was inappropriate in a case where the State introduced admissions from the defendant.[9] As stated by Kiker in Footnote 12 of his Brief: "[T]he State's case was circumstantial until Crawford testified to Kiker's admission."

In Part (A)(3), Kiker wrote the trial court's finding that "[t]he State had no 'deal' with Crawford" was clearly erroneous and cannot stand. (AB at 14). Kiker cites no less than six citations supporting this proposition. (AB at 14 through 15). The State does not deny a deal with Crawford, but argues that even if the trial court ruled erroneously, "[t]he trial court's ultimate ruling that Kiker was not entitled to Post-Conviction Collateral Relief was correct, since Kiker had counsel for the duration of trial who had no conflict and *who ably represented him.*" (SB at 6) (emphasis added).[10]

[9] The State adduced admissions in this case. The State adduced the admissions from Crawford. That is why Crawford is a key witness. Does the State fail to understand this rudimentary legal concept? Does the State understand this simple concept and yet elect to frustrate justice through diversion? Had the State bothered to address the case cited by Kiker page 14 of Kiker's brief – Stringfellow v. State, 595 So. 2d 1320, 1322 (Miss. 1992) – the State may have provided itself an opportunity to actually confront the merits of Kiker's argument. Of course, Stringfellow, supra, does not stand alone. Deal v. State, 589 So.2d 1257, 1260 (Miss. 1991) (circumstantial evidence instruction must be included in the jury charge where there is no eyewitness testimony, no dying declaration and no admission).

[10] The State's contention that Kiker's conflict-free counsel provided effective representation was not before the trial court and is not before this Court. See Footnote 2, supra.

In Part (A)(4), Kiker argued that the trial court's findings that his trial attorneys performed within professional norms is gratuitous and irrelevant because Strickland v. Washington, 466 U.S. 668 (1984) is inapplicable to an ineffective claim rooted in conflict of interest. (AB at 15). Kiker cites authority for this proposition. The State does not deny that the trial court's Strickland determination was gratuitous and irrelevant. (SB at 6). "[E]ven if the trial court's ultimate ruling that Kiker was not entitled to Post-Conviction Collateral Relief was correct, since Kiker had counsel for the duration of trial who had no conflict and who ably represented him." Id.

In Part(A)(5), Kiker asserted that the trial court's oral finding that "when Kiker knew of the Barnett representation of Crawford, he proceeded on," flew in the face of the very essence of the Sixth Amendment. (AB at 16). Citing authority of every proposition in Part(A)(5), Kiker wrote: "The fact that Kiker first discovered Barnett represented the cooperating witness against him during testimony of that cooperating witness does not mean that Kiker had any idea what he could, or should, do about it. (citations deleted). Indeed, precisely because Kiker has the fundamental right (citations deleted) to counsel, the trial court had the duty to intervene when it was apparent that Kiker's fundamental right was compromised through the actions of his own attorney. The failure to fulfill this duty is the subject matter of Part (B)(1) of this Claim." (AB at 16).

The State did not respond to Part (A)(5) at all.

Nor did the State respond to the explicitly referenced Part(B)(1). Part(B)(1) contains no less than eight citations to case authority. Kiker wrote:

> Assuming the trial court had no duty to protect Kiker's right to counsel after Barnett's tattling to the trial court and State outside Kiker's presence and prior to Crawford's testimony before Kiker's jury (footnote deleted), the trial court surely had a duty to protect Kiker's right to conflict-free counsel at the moment that

> Crawford testified: '[y]ou'll have to ask my lawyer right there, Mr. Barnett.' (citations deleted). The trial court had an additional duty to investigate even a potential conflict insofar as the trial court appointed Barnett to represent Kiker. (citations deleted).

As stated above, the State chose not to address Part(A)(5) and Part (B)(1) in any respect. The trial court's abdication of its role to safeguard representation of the criminal defendant at a felony trial, fully briefed by Kiker, is ignored by the State.

The State does not ignore Part (B)(2) of Kiker's Brief insofar as the State acknowledges that part's existence. The State offers that Kiker "is unable to suggest any avenue of questioning that went unexplored in Hurt's cross-examination of Crawford."[11] Further, the testimony of Lee Martin and Kevin Bradley clearly establishes that there was no 'deal' in exchange for Crawford's testimony against Kiker."[12] (SB at 9).

Kiker referred to the procedure wherein a witness for the State takes the stand and advises one of the defendant's lawyers that an impeachment question to the other lawyer for the defendant as "constitutional mayhem." (AB at 18).

There ***are*** numerous avenues of questioning that may be pursued when a witness invites an attorney to question that witness's lawyer concerning impeaching information. One such avenue is to oblige the witness by calling that witness's attorney to the stand. This avenue was foreclosed in this case precisely and entirely because the lawyer who would have to testify was sitting next to Kiker at the defense table!

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[11] Obviously, the State did not read Footnotes 1 through 5 of Kiker's Brief and their accompanying text.

[12] As stated supra, the State did not deny Part(A)(3) and claimed that even if the trial court erred in finding there was no "deal" between the State and Crawford, the trial court's ultimate determination was correct. This poses a problem for the State. In the final sentence of its Brief, the State writes that there was no deal between Crawford and the State because prosecutors testified that there was no deal. Unfortunately for the State, this statement is contrary to law. Citing six cases – none of which the State bothered to address – Kiker wrote: "While the trial court's finding that Crawford had no 'deal' with the State has a basis in the record, the finding is utterly worthless as the jury – and only the jury – determines whether Crawford had a deal. [footnote: It is reasonable to assume that Martin and Bradley believe that Kiker is guilty is charged. Those beliefs are as worthless as their testimony that there was no deal between the State and Crawford."]" (AB at 15). Once again, as put forth in Footnote 9, supra, does the State fail to comprehend simple conceptions of law or is the State engaging in diversion tactics?

Kiker does not employ the term of art "triangulation" casually. Indeed, precisely because the triangulation was so egregious and occurred before the jury, the trial court had a duty to intervene. In Part (B)(3), Kiker addressed this concern. "Under these facts, the jury trial of Wesley Kiker devolved to a stunt where the State's key witness told Kiker's jury that Kiker admitted to the crime and, when challenged by Kiker's conflict-free lawyer, told that lawyer that he should direct a question concerning his credibility to Kiker's other lawyer. If the integrity of the judicial system is to remain, this cannot ensure." (AB at 20).

Obviously, the State is unconvinced to the point that it saw no reasons to even address Part (B)(3) of Kiker's Brief.

PART C: Placing the merits of Kiker's brief aside (as did the State), what appears in the State's Brief that required affirmance?

The short answer to the above question is: nothing.

The long answer does not require much more exertion as the State cites to only six cases in its Brief. (SB at ii).

Sheffield v. State, 749 So. 2d 123 (Miss. 1999) is discussed supra and does not address the relief sought.

On page 8, the State cites Stringer v. State, 485 So. 2d at 275[13] and to the case cited in Stringer – Holloway v. Arkansas, 435 U.S. 475, 482 (1978)). (SB at 8). The very purpose of the evidentiary hearing in this matter was to determine if a factual basis exists for relief under Stringer. Kiker raised ***eight*** bases for relief in his Brief (Parts (A)(1) through (A)(5) and Parts (B)(1) through (B)(3)). Citation to Stringer and Holloway merely announces the standard upon which Kiker contends he has more than adequately met.

[13] The State never provides a full citation for Stringer. It is: Stringer v. State, 485 So. 2d 274, 275 (Miss. 1986).

The State cites to Strickland v. Washington, 466 U.S. 668 (1984). (SB at 5). Kiker asserts that Strickland does not apply in this matter and, therefore, the trial court's application of Strickland was gratuitous and irrelevant. See Part (A)(4) of Kiker's Brief and this Court's Order remanding the matter for an evidentiary hearing at R.E. 1.

The State cites to Puckett v. Stuckey, 633 So. 2d 978, 980 (Miss. 1993) and Towner v. State, 837 So. 2d 221, 225 (Miss. App. 2003) for the proposition that an appellate court should affirm where the trial court reaches the right result for the wrong reason. (SB at 6 through 7). Kiker agrees. Unfortunately for the State, Kiker isolated and briefed ***eight*** bases for relief -- some of which the State entirely ignored and all of which the State did not respond.

The State cites to no other authority

And the State chose not to refute any authority cited by Kiker.

PART D: Conclusion

The State's response is nothing more than flat contradiction. Kiker respectfully submits that the refusal to respond to argument in favor of rank negation is not advocacy.

Kiker presented eight bases of relief under one claim – the ***only*** claim which this Court permitted an evidentiary hearing. Rather than confront these bases, the State asks this Court to affirm because although Barnett's representation of Kiker and Crawford was "ethically problematic," the joint representation of Kiker by Hunt Baptized the sin. The State cites to no authority for its argument and refused to address Kiker's authority which defeats the State's position.

Wesley Kiker's trial was a mockery of justice. The mockery continues in the State's refusal to take the Sixth Amendment seriously in a brief filed before this Court. Kiker is entitled

to jury trial where he is represented by conflict-free counsel able to confront his accusers. The trial court must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has, this date, delivered via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Rebuttal Brief of Appellant to the following:

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