IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-CA-01341-COA

JULIUS WESLEY KIKER — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

(ORAL ARGUMENT NOT REQUESTED)

APPEAL FROM THE CIRCUIT COURT OF GEORGE COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant hereby 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 Honorable Court may evaluate possible disqualification or recusal:

Julius Wesley Kiker, Appellant;

Honorable Robert P. Krebs, George County Circuit Judge;

Honorable Anthony Lawrence, III, District Attorney, George County;

Percy S. Stanfield, Jr., Jackson, Mississippi, Attorney for the Appellant.

Respectfully submitted,

JULIUS WESLEY KIKER, APPELLANT

BY: _____

PERCY S. STANFIELD, JR. [redacted]
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONS

STATEMENT OF THE ISSUES

1. Whether the fact that Attorney Sidney Barnett, attorney for Julius Wesley Kiker, was simultaneously representing a state's witness who testified against Kiker at trial, constituted an actual conflict of interest.

2. Whether Bobby Crawford, who testified for the State against Kiker, was a key witness for the State.

3. Whether the State had a "deal" with Bobby Crawford in exchange for his testimony against Kiker.

4. Whether the performance of Kiker's attorneys, Sidney Barnett and Darryl Hurt, was deficient.

STATEMENT OF THE CASE

Nature of Case, Course of Proceedings, and Disposition Below

This matter was tried before a George County Circuit Court jury in the Summer of 2003 (R. 32; R.E. 5). Kiker was convicted as charged. On July 7, 2005, the Mississippi Court of Appeals affirmed Kiker's conviction and sentence. Id.

On November 8, 2007, the Supreme Court of Mississippi granted an evidentiary hearing on Kiker's collateral application to the Court. ***See Kiker v. State***, No. 2007-M-01367. The hearing was "granted on the issue of whether Kiker's Sixth Amendment rights were violated due to his trial counsel's representation of a witness for the State." Id. The Order of the Supreme Court appears at R. 8-9; R.E. 1-2.

On July 10, 2008, the hearing was held before the Hon Robert P. Krebs. On July 24, 2008, the trial court entered written findings of fact and conclusions of law in support of the trial court's order denying Kiker's application for post-conviction relief. (R. 30-33; R.E. 3-6).

References to the trial transcript in the criminal case (***Kiker v. State***, 2003-KA-02376) shall be designated as "T.Tr.". References to the transcript of the hearing on the instant motion shall be designated as "H.Tr.."

FACTS

Bobby Crawford testified for the State at trial. (T.Tr. 313-24; R.E. 7-18). Crawford testified he was familiar with the defendant, Wesley Kiker. (T.Tr. 313; R.E. 7). Crawford also testified he was familiar with one of Kiker's lawyers, Sidney Barnett. (T.Tr. 322; R.E. 16). When asked if he was under indictment in George County, Crawford responded – ***in the presence of Kiker's jury*** – "[y]ou'll have to ask my lawyer right there, Mr. Barnett." (T.Tr. 322; R.E. 16).

Crawford testified to admissions that Kiker made to him while both men were incarcerated at the George County Jail. (T.Tr. 313-16; R.E. 7-10). Crawford testified that Kiker told him that Kiker and his wife used to fight, that she had mistreated him and he just could not take it anymore. (T.Tr. 315; R.E. 9). Crawford testified that Kiker told him that while Kiker and his wife were fighting, he shot her in the head. (T.Tr. 315-16; R.E. 9-10). Crawford was unsure what year Kiker made these admissions to him. (T.Tr. 319-20; R.E. 13-14).[1]

Crawford testified that he appeared as a witness for the State in the Greene County trial of a defendant named Ed Bruster. (T.Tr. 317-18; R.E. 11-12). Crawford testified that he was held in the George County jail on an accessory to murder charge. (T.Tr. 317; R.E. 11). Crawford testified that the accessory to murder charge was no longer pending and had been "dropped because I was not there." (T.Tr. 318; R.E. 12).[2] Crawford also had charges pending in Greene County for possession of a controlled substance. (T.Tr. 318; R.E. 12).[3] Crawford testified that "way before" he testified for the State against Ed Bruster, his Greene County charges were "throwed out." (T.Tr. 319; R.E. 13).[4] Crawford testified the State had made no promises to him in exchange for his testimony

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[1] Crawford's lawyer would know when he was in the Green County Jail. Kiker's lawyer would know when Kiker was in the Greene County Jail. Unfortnately for Kiker, his lawyer is also Crawford's lawyer.

[2] If this statement is untrue, Crawford's lawyer would know. Unfortunately for Kiker, Crawford's lawyer was silenced by privilege while sitting next to him at defense table.

[3] Actually, Crawford gave two answers. First he testified that he was charged with possession of a controlled substance in Greene County. (T.Tr. 318; R.E. 12). Then he testified that he was charged with possession of drug paraphernalia in Greene County. (T.Tr. 318; R. E. 12). One of these statements must be incorrect. Crawford's lawyer would know which one was incorrect. Unfortunately for Kiker, Crawford's lawyer was silenced by privilege while sitting next to him at defense table.

[4] Whether the Greene County charges ever were dismissed and when they were dismissed would be facts known to Crawford's lawyer. Unfortunately for Kiker, Crawford's lawyer was silenced by privilege while sitting next to him at defense table.

against Kiker. (T.Tr. 319; R.E. 13)[5].

At summation, the State specifically relied on the testimony of Crawford. (T.Tr. 507; R.E. 19). The State argued:

> He [Crawford] told us that when he was incarcerated in the jail with the defendant, the defendant admitted and told him, he said he and his wife had been fighting. He got tired of it and shot her in the head. He never said anything about it was an accident or a struggle over the gun. You heard Mr. Crawford tell you that there were no promises or anything like that made to him or anything given to him in exchange for his testimony. He sat there and told you the truth the best he could remember.
>
> T.Tr. 507; R.E. 19.

At the evidentiary hearing held on July 10, 2008, Kiker testified that he was represented at trial by Darryl Hurt and Sidney Barnett. (H.Tr. 5; R.E. 20). Barnett had been appointed to represent Kiker a couple of days after the offense at bar. (H.Tr. 5-6; R.E. 20-21) Hurt was subsequently retained to represent Kiker by Kiker's family about a week or so after Barnett had been appointed. Id. Kiker testified that he believed he was being represented by both Barnett and Hurt. (H.Tr. 6; R.E. 21). On numerous occasions, Kiker would meet with Barnett at Barnett's office. (H.Tr.6-7; R.E. 21-22). Barnett never told Kiker that he represented Crawford and never explained to Kiker why he was representing Crawford and Kiker simultaneously. (H.Tr. 7-8; R.E. 22). The first time

[5] At the time Crawford offered this testimony he had yet to testify to any charge that was currently pending against him. What deal could the State make with Crawford if Crawford had no criminal charges pending? The obvious answer is: none. But the obvious answer necessarily leads to a troubling question. Why is Kiker's other attorney, Darryl Hurt, asking entirely unproductive questions to a witness represented by co-counsel? As made clear in Footnotes 1 through 3, supra, Barnett knows what charges are pending against Crawford (if any) and what deals have been made with Crawford (if any). Assuming that (a) there are no charges pending against Crawford and (b) assuming no deals have been offered to Crawford, why is Hurt pursuing an entirely unfruitful avenue of cross-examination? Barnett is duty-bound to reveal to Kiker and to Hurt all he knows about Crawford to ensure the cross-examination of Crawford is most effective. Of course, this is precisely why Kiker's right to counsel under the federal and state constitution was abrogated by the mere presence of Barnett on his defense team.

that Kiker discovered that Barnett represented Crawford was at his trial when Crawford testified that Barnett was his lawyer. Id. Kiker testified he never waived a conflict of interest and he was never questioned by the trial court concerning the conflict of interest that unfolded at trial and before Kiker's jury. (H.Tr.8-9; R.E. 23-24). Kiker testified that he was not aware of any information that Barnett gave the prosecution concerning Barnett's conflict. (H.Tr.9; R.E. 24).[6] Kiker testified that Barnett never told him that Crawford was a child abuser. (H.Tr. 11; R.E. 25).

Had the trial court intervened and questioned Kiker about his constitutional rights to conflict-free counsel, Kiker testified that he would have told the trial court he wanted two new lawyers. (H.Tr.11; R.E. 25).

Lee Martin, the prosecutor in the trial of Kiker, testified that Hurt was Kiker's lead attorney (H.Tr. 24; R.E. 26) and that he did not consider Crawford to be "a crucial or essential witness." (H.Tr. 25; R.E. 27). Martin testified the State offered no deal to Crawford in exchange for his testimony. (H.Tr. 26; R.E. 28). Martin testified he first became aware that Crawford had pending charges in George County shortly before Crawford testified and when Barnett told him that Crawford had pending charges in George County. (H.Tr. 26; R.E. 28).[7] Asked why Barnett would wait to

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[6] Undersigned counsel referred to the trial transcript during the evidentiary hearing and directed Kiker's attention to T.Tr. 321, ; R.E. 15, wherein the prosecutor objects to cross-examination of Crawford by Hurt and informs the trial court – ***in the presence of Kiker's jury*** – "I have allowed Mr. Hurt some latitude in asking Mr. Crawford about his past criminal history. I think now he had exceeded the scope of what is permissible. *And we were also made aware earlier of a concern of Mr. Barnett, the situation.* I think he's exceeded the scope of what he can ask this defendant about his prior criminal record, and I would object." (T.Tr. 321; R.E. 15). Whatever "situation" Barnett had, it was not relayed to his client, Kiker.

[7] Martin and Crawford share a commonality in that they both relied on Barnett for information concerning Crawford's pending charges in George County. As stated above, when Kiker's conflict-free lawyer asked Crawford if Crawford had charges pending Crawford advised Kiker's jury that Kiker's conflict-free lawyer should ask Kiker's conflicted lawyer because Kiker's conflicted lawyer is also "my lawyer." (T.Tr. 322; R.E. 16).

advise the State and the trial court that he represented Crawford on George County charges just before Crawford testified, Martin responded: "I can't tell you what motivated Mr. Barnett. All I can tell you is that he did inform myself and the Court of his representation of Mr. Crawford." (H.Tr. 33; R.E. 30). Martin testified that, in his opinion, Barnett should have advised Kiker that he represented Crawford. (H.Tr. 38; R.E. 32).

Martin testified the State called no eye witness to the offense and denied that the case against Kiker was circumstantial. (H.Tr.32; R.E. 29).[8] Martin testified that he considered Crawford testimony "important." (H.Tr. 36; R.E. 31).[9]

Kevin Bradley, formerly an assistant district attorney with responsibilities in George and Greene Counties, testified that Crawford was indicted in George County in 2002 for possession of a controlled substance and possession of precursor chemicals. (H.Tr. 41; R.E. 33). Crawford pleaded guilty to these charges and to a charge of failure to report as a sex offender on October 25, 2005. (H.Tr. 42-43, State's Exhibit 2; R.E. 34-35). Crawford was represented by Barnett prior to Kiker's case and at this plea. ***Id***. Bradley did not participate in the prosecution of Kiker but took the liberty to testify that there was no agreement for Crawford to testify as a government witnesses against Kiker. (H.Tr.45; R.E. 36).

Amazingly, the State did not call Barnett or Hurt to testify at the evidentiary hearing.

The trial court issued an oral ruling denying Kiker's petition. (H.Tr.63-64; R.E. 37-38). This oral ruling was followed by a written Order. (R. 30-33; R.E. 3-6). The trial court found the following:

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[8] With Crawford's testimony that Kiker made admissions to him and testimony as to the substance of these admissions, the State no longer had a circumstantial case. Crawford's testimony gave the State direct evidence of Kiker's guilt. ***See Stringfellow v. State***, 595 So. 2d 1320, 1322 (Miss. 1992).

[9] See Footnote 8, supra, and Part II(A)(2) of Issue 1.

- Barnett represented Crawford and Kiker at the time Crawford testified against Kiker. (R. 30; R.E. 3).

- Hurt was the lead attorney for Kiker. (R. 30; R.E. 3).

- "[T]he attorneys who represented Julius Wesley Kiker at trial were not deficient and that no prejudice resulted to the Defendant as a result of Sidney Barnett's representation of one witness for the State of Mississippi. (R. 30-31; R.E. 3-4).

- Barnett had no actual conflict of interest with Kiker at the time Crawford testified at Kiker's trial. (R. 30; R.E. 3).

- "That information was not withheld from the jury or the Defendant, Julius Wesley Kiker, and no actual conflict existed especially in light of Darryl Hurt, Sr.'s role as lead attorney. (R. 31; R.E. 4).

- "[T]here was no 'deal' between the State of Mississippi and Bobby Crawford which further proves no actual conflict existed." (R. 31; R.E. 4).

- "When Mr. Kiker knew of the Barnett representation of Crawford, he proceeded on." (H.Tr.64; R.E. 38).[10]

- Crawford was not involved in any manner in the instant crime. (R. 33; R.E. 6).

- The case against Kiker was not circumstantial. (H.Tr. 64; R.E. 38).[11]

- "Crawford was not the 'centerpole' of the State's case in that the State's case was based on testimony of the witnesses to the events of that day and the scientific evidence as set forth by Dr. Hayne." (R. 33; R.E. 6).

This appeal ensues.

[10] What choice did the trial court afford Kiker? ***See*** Part II(A)(5) of Claim 1, ***infra***.

[11] Kiker agrees. The case against him was a direct case precisely and only because of Crawford's testimony against Kiker. ***See*** Footnote 8, ***supra***, and Part II(A)(2) of Claim 1, ***infra***.

SUMMARY OF THE ARGUMENT

Sidney Barnett, attorney for Julius Wesley Kiker, had an actual conflict of interest when he simultaneously represented Kiker as well as Bobby Crawford, a key witness for the State.

Although the State argued that it did not have a "deal" with Bobby Crawford in exchange for his testimony against Kiker, neither of Crawford's attorneys cross-examined him on that issue during his testimony at trial. Because of Barnett's representation of Crawford on pending criminal charges, he was precluded from delving into the criminal charges against him because of the existence of the attorney-client privilege.

Bobby Crawford was a key witness for the State. The State produced no eye witness to the crime and Crawford's testimony as to certain admissions by Kiker converted the State's circumstantial case to a direct evidence case. At trial, Kiker was never questioned by his attorneys as to whether he ever made these admissions to Crawford. The jury's guilty verdict was based primarily on Crawford's testimony as to admissions made by Kiker.

During the trial, when Kiker discovered for the first time that Barnett also represented Crawford, the trial court failed to intervene to protect Kiker by questioning him to see if he wanted to waive the conflict or if he wanted separate counsel. In addition, the jury became aware of Barnett's representation of Crawford and thus Crawford's testimony was bolstered in the eyes of the jury.

ARGUMENT

THE TRIAL COURT'S DETERMINATION THAT SIDNEY BARNETT HAD NO ACTUAL CONFLICT WITH KIKER IS CLEARLY ERRONEOUS. BARNETT HAD AN ACTUAL CONFLICT AND THE TRIAL COURT DID NOT INTERVENE TO RESOLVE THE CONFLICT WHEN IT AROSE, AT TRIAL, BEFORE THE JURY. THE TRIAL COURT MUST BE REVERSED.

I. Introduction

A trial court's decision concerning the disqualification of counsel for the defendant shall be reversed only if the decision is an abuse of discretion. ***United States v. Defazio***, 899 F.2d 626, 629 (7th Cir. 1990); ***see also Metcalf v. State***, 629 So. 2d 558, 566 (Miss. 1993) (decision by trial court permitting or not permitting a defendant to appear pro se shall be reviewed for an abuse of discretion); ***see also United States v. LoCascio***, 6 F.3d 924, 931 (2nd Cir. 1993) ***cert. denied*** 511 U.S. 1070 (1994) (***citing Wheat v. United States***, 486 U.S. 153, 163-64 (1988)). The underlying factual determinations relied upon by the trial court shall be reviewed under a clearly erroneous standard. ***Id.*** The determinations of the trial court are never reviewed with the advantage of hindsight. ***Id.*** at 631.

A trial court abuses its discretion when the trial court's ruling is based on an erroneous view of law or is based on a clearly erroneous assessment of the evidence. ***Bocanegra v. Vicmar Servs., Inc.***, 320 F.3d 581, 584 (5th Cir. 2003); ***Kirk v. Pope***, 973 So. 2d 981, 986 (Miss. 2007) (trial court abuses its discretion when trial court makes an error of law); ***see Nelson v. Apfel***, 210 F.3d 799, 802 (7th Cir. 2000) (trial court abuses its discretion when no reasonable person would agree with the actions of the trial court); ***Montgomery v. State***, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (trial court abuses its discretion when trial court's ruling is so clearly wrong as to fall "outside the zone

of reasonable disagreement"). More specifically, an abuse of discretion occurs where the trial court omits to consider a significant factor, relies upon an improper factor or isolates the proper factors only then to clearly err in their evaluation. ***Parra v. Bashas' Inc.***, 536 F.3d 975, 977-78 (9th Cir. 2008); ***Gomez v. Rivera Rodriguez***, 344 F.3d 103, 112 (1st Cir. 2003); ***Arlook v. S. Lichtenberg & Co.***, 952 F.2d 367, 374 (11th Cir. 1992) (abuse of discretion occurs when the trial court "misconstrues its proper role, ignores or misunderstands relevant evidence, and bases its decisions upon considerations having little factual support"). Therefore, what the trial court found and what the trial court omitted to address are the gravamen of this appeal.

Kiker's testimony that he was unaware that Barnett represented Crawford on existing charges pending in George County until Crawford testified to that effect is unrebutted. Yet, the trial court found Barnett was not in actual conflict with Kiker. Because of that, the trial court was relieved from an examination of whether it erred in not inquiring into the predicament that arose at trial when Crawford testified that he was represented on pending charges by the same attorney representing Kiker.

II. Discussion

II(A). Findings entered by the trial court are clearly erroneous and cannot stand

II(A)(1). Barnett had no actual conflict with Kiker

The trial court found Barnett represented Crawford on pending criminal charges at the same time that Barnett represented Kiker at trial, yet found that Barnett had no actual conflict of interest with Kiker. This is constitutionally irreconcilable. ***United States ex rel. Stewart*** on behalf of ***Tineo v. Kelly***, 870 F.2d 854, 857 (2nd Cir. 1989) (only guarantee that defendant's interests will be served where defendant's counsel also represents a testifying informant is to dismiss counsel); ***see United***

States v. Combs, 222 F.3d 353, 359 (7th Cir. 2000) ("Combs asked for clarification of what his attorney had done wrong, and the court explained again that Proffitt [Combs's lawyer] had given legal counsel to Temelcoff, the government's key witness against him, and that this representation of the main witness against Combs created a conflict of interest. The court clarified that because of this conflict, the court would not allow Proffitt to continue to represent Combs, and that without a waiver, the court intended to start a new trial in two to three months with new counsel for Combs"); ***United States v. Baker***, 10 F.3d 1374, 1399 (9th Cir. 1993) ***cert. denied*** 513 U.S. 934 (1994) overruled on other grounds at ***United States v. Nordby***, 225 F.3d 1053 (9th Cir. 2000) (trial court did not abuse discretion in dismissing defendant's counsel where counsel previously represented a key government witness against the defendant and "[i]t was reasonable to presume that effective cross-examination of [witness] would include questioning her ability accurately to recall, observe, and testify about [defendant's] activities, and that her drug use would be a significant factor in this impeachment. That [witness's] drug use was a matter of public record does not eliminate the possibility of an unwitting disclosure of confidential communications. [Defendant's attorney] could thus have been faced with either exploiting his prior, privileged relationship with the witness or failing to defend his present client zealously for fear of misusing confidential information"); ***Serra v. Michigan Dept. of Corrections***, 4 F.3d 1348, 135253 (6th Cir. 1993) ***cert. denied*** 510 U.S. 1201 (1994) (no abuse of discretion in dismissing defendant's attorney who previously represented potential witness as that attorney "may have gained information in his representation of [witness] that would have exculpated [defendant] while damaging [witness's] sentencing prospects. In addition to the likelihood that [attorney] had obtained confidential information from [witness], [attorney] also had a continuing duty to not act in a way adverse to his former client's sentencing prospects");

People v. Rufus, 867 N.Y.S.2d 608, 608-09 (4th Dept. 2008); ***see also United States v. Millsaps***, 157 F.3d 989, 995-96 (5th Cir. 1998).

The question before the trial court was: did Barnett have divided loyalties or not? If Barnett had divided loyalties, then Barnett was in actual conflict with Kiker. ***See, e.g., United States v. Moscony***, 927 F.2d 742, 750 (3rd Cir. 1991) ***cert. denied*** 501 U.S. 1211 (1991). If he did, then he had an actual conflict with Kiker. ***United States v. Carpenter***, 769 F.2d 258, 263 (5th Cir. 1985) ("[a] conflict exists when defense counsel places himself in a position conducive to divided loyalties") "When an actual conflict exists, the client is denied effective assistance of counsel, and the attorney may be disqualified." ***United States v. Ross***, 33 F.3d 1507, 1523 (11th Cir. 1994) ***cert. denied*** 515 U.S. 1132 (1995) (***citing United States v. Martinez***, 630 F.2d 361, 362 (5th Cir. 1980) ***cert. denied*** 444 U.S. 843 (1981)). For this reason, prejudice is presumed when defense counsel has an actual conflict with the defendant and, in all but the most extraordinary circumstances, the prejudice mandates a new trial. ***Mitchell v. Maggio***, 679 F.2d 77, 79 (5th Cir. 1982) ***cert. denied*** 459 U.S. 912 (1982).

In addition to Martin's criticism of Barnett's reticence (H.Tr. 38; R.E. 32), Barnett's refusal to tell Kiker of his actual conflict while acquiescing to advise the trial court and counsel opposite of the actual conflict is nothing less than bizarre in light of Barnett's documented enthusiasm for advising his appointed clients of a mere potential conflict of interest. ***See, e.g., Hersick v. State***, 904 So. 2d 116, 122 (Miss. 2004). Mendacious attorneys are nothing new to trial courts. Attorneys unwilling to level with the trial court about potential conflicts have been dismissed without need for further inquiry. ***See, e.g., United States v. Padilla-Martinez***, 762 F.2d 942, 948-49 (11th Cir. 1985) ***cert. denied*** 474 U.S. 952 (1985). ***See generally United States v. Defazio***, 899 F.2d 626, 631-32 (7th

Cir. 1990) (trial court may dismiss attorney for the defendant without need for further inquiry where it is likely that the attorney will be a material witness for the defendant). In the matter at bar, the attorney's deceit was directed toward his client rather than the trial court. This issue is addressed more fully in Part II(B)(1) above.

As stated above, Kiker's testimony that he was unaware that Barnett represented Crawford on existing charges pending in George County until Crawford testified to that effect is unrebutted. The State elected not to call Barnett or Hurt. The trial court found that Barnett represented Crawford on pending criminal charges at the time that Crawford testified against Kiker. The mere fact that Hurt has been found by the trial court to be "lead attorney" is constitutionally insignificant in light of the case authority cited above.

Therefore, the trial court's finding that Barnett had no actual conflict with Kiker is clearly erroneous.

II(A)(2). Crawford was not a key witness

A "key witness" is a witness who links the defendant to the crime. ***Giglio v. United States***, 405 U.S. 150, 150-51 (1972); ***see also Agnew v. Leibach***, 250 F.3d 1123, 1126, 1133-34 (7th Cir. 2001) (in a prosecution where the State already presented direct evidence of guilt[12], witness who testifies as to admissions made by defendant is nonetheless a key witness); ***United States ex rel. Gibson v. Ziegele***, 479 F.2d 773, 777-78 (3rd Cir. 1973) ***cert. denied*** 414 U.S. 1008 (1973) (key witness is witness who can testify as to defendant's admission).

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[12] In the matter at bar, the State's case was circumstantial until Crawford testified to Kiker's admissions. ***See*** Footnote 8, ***supra***. In ***Agnew***, the State called a key witness (a law-enforcement officer) to testify as to the defendant's admission after the State called the robbery complainant to identify the defendant. This did nothing to minimize the role of the law-enforcement officer to something other than a "key witness" for the government.

As stated in Part I, 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.

The trial court's finding that Crawford "was not the 'centerpole'" of the State's case is clearly erroneous. Had Crawford not testified, the jury would not have heard Kiker's admission and Kiker would have been entitled to a circumstantial-evidence instruction to his jury. ***Stringfellow v. State***, 595 So. 2d 1320, 1322 (Miss. 1992).

II(A)(3). <u>The State had no "deal" with Crawford</u>

The State consumed a great deal of time at the evidentiary hearing with testimony from former prosecutors familiar with the prosecution of Kiker and the prosecution of Crawford to the effect that the State made no bargain for exchange with Crawford wherein Crawford would testify against Kiker for some benefit.

This testimony is utterly worthless.

As stated above, the determinations occurring at trial are never to be reviewed with the advantage of hindsight. ***DeFazio***, 899 F.2d at 631. The ongoings before Kiker's jury at his trial are material and not the post-verdict viewpoints of former prosecutors. The question of whether or not Crawford had a deal with the State is answered by Kiker's jury and not a duo of former prosecutors. The only material fact is: Crawford was under indictment in a county serviced by the same district attorney's office as George County when Kiker went to trial in George County. Whether and to what degree Crawford fabricated testimony to curry favor with the State is a question exclusively for Kiker's jury. ***Jackson v. State***, 614 So. 2d 965, 972 (Miss. 1993); ***Steve v. State***, 614 S.W.2d 137,

140 (Tex. Crim. App. 1981); ***Bryant v. State***, 748 So. 2d 780, 788 (Miss. App. 1999); ***People v. Buchanan***, 57 A.D.2d 686, 686, 393 N.Y.S.2d 810, 812 (3rd Dept. 1977); ***see also United States v. Boone***, 279 F.3d 163, 192 (3rd Cir. 2002) ***cert. denied*** 535 U.S. 1089 (2002). ***See generally United States v. Platero***, 72 F.3d 806, 814 (10th Cir. 1995).

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.[13] Because of this, the trial court's finding that there was no deal between Crawford and the State is clearly erroneous.

II(A)(4). <u>The performance of attorneys for Kiker was not deficient</u>

This finding of the trial court is irrelevant and entirely gratuitous as it is beyond the Supreme Court's mandate. The Court found "the arguments put forth regarding ineffective assistance of counsel fail to overcome the burden established in ***Strickland v. Washington***, 466 U.S. 668 (1984)." (R. 8; R.E. 1). The performance of counsel for Kiker was never before the trial court. Furthermore, even if a ***Strickland*** issue was before the trial court, the ***Strickland*** standard is inapplicable to an ineffective claim founded in a conflict of interest. ***United States v. Burgos-Chaparro***, 309 F.3d 50, 52 (1st Cir. 2002) ***cert. denied*** 537 U.S. 1135 (2003) (***citing Mickens v. Taylor***, 535 U.S. 162 (2002)). The sole issue before the trial court was "whether Kiker's Sixth Amendment rights were violated due to his trial counsel's representation of a witness for the State." (R. 9; R.E. 2).

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[13] It is reasonable to assume that Martin and Bradley believe that Kiker is guilty as charged. Those beliefs are as worthless as their testimony that there was no deal between the State and Crawford.

II(A)(5). "When Mr. Kiker knew of the Barnett representation of Crawford, he proceeded on"

This finding at H.Tr. 64; ; R.E. 38, from the trial court's July 10, 2008, oral ruling flies in the face of the very essence of the Sixth Amendment. "[T]he core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." ***United States v. Ash***, 413 U.S. 300, 309 (1973). The fact that Kiker first discovered Barnett represented the cooperating witness against him during the testimony of that cooperating witness does not mean that Kiker had any idea what he could, or should, do about it. ***Ash, supra***; ***Potter v. Dowd***, 146 F.2d 244, 247 (7th Cir. 1944) (***citing Johnson v. Zerbst***, 304 U.S. 458 (1938) ("[t]he purpose of the constitutional guaranty to the right of counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and assure him the guiding hand of counsel at every step in the proceedings"); ***Kent v. Sanford***, 121 F.2d 216, 217 (5th Cir. 1941) ***cert. denied*** 315 U.S. 799 (1942) (same). Indeed, precisely because Kiker has the fundamental right[14] 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 II(B)(1) of this Claim.

II(B). Findings not made by the trial court

II(B)(1). Once Barnett's actual conflict with Kiker was revealed to Kiker and Kiker's jury during Crawford's sworn testimony, the trial court had a duty to intervene

As indicated above, one of the more troubling components of the trial court's findings is "Mr.

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[14] ***Vielee v. State***, 653 So. 2d 920, 922 (Miss. 1995) (***citing Argersinger v. Hamlin***, 407 U.S. 25, 29-33 (1972)).

Kiker knew of the Barnett representation of Crawford [and] proceeded on." (H.Tr. 64; R.E. 38). This is a stunning, wholesale abandonment of the trial court's duty to protect a criminal defendant unrepresented by conflict-free counsel.

As the State did not call Barnett or Hurt to testify, Kiker's testimony that he was unadvised of Barnett's actual conflict of interest until Crawford testified to that conflict during Kiker's trial is unrebutted. It is further very disturbing that Kiker, while testifying, was never asked by his attorneys to rebut the testimony of Crawford concerning Kiker's admissions to him.

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,[15] 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." (T.Tr. 322; R.E. 16). ***Wheat v. United States***, 486 U.S. 153, 160 (1988) (when trial court detects a conflict of interest, the trial court must take whatever steps are necessary to ascertain whether the conflict warrants separate counsel"); ***see, e.g., United States v. Gallegos***, 108 F.3d 1272, 1281-82 (10th Cir. 1997); **United States v. Duklewski**, 567 F.2d 255, 256-57 (4th Cir. 1977) (trial court must provide defendant an opportunity to intelligently decide whether to waive conflict or not by providing that defendant has the necessary information to make the decision); ***see also Houston v. Schomig***, 533 F.3d 1076, 1081 (9th Cir. 2008); ***McFarland v. Yukins***, 356 F.3d 688, 703-04 (6th Cir. 2004). The trial court had an additional duty to investigate even a potential conflict insofar as the trial court appointed Barnett to represent Kiker. ***See. e.g., United States v. Davidson***, 195 F.3d 402, 407 (8th

[15] Kiker makes this assumption purely for purposes of this appeal. A record of what occurred during Barnett's off-the-record whisperings to the trial court and the State is currently insufficient.

Cir. 1999) ***cert. denied*** 528 U.S. 1180 (2000); **State v. Tejada**, 677 N.W.2d 744, 749-50 (Iowa 2004). ***See generally Benitez v. United States***, 521 F.3d 625, 630-31 (6th Cir. 2008); ***Daniels v. Woodford***, 428 F.3d 1181, 1196-2000 (9th Cir. 2005) ***cert. denied*** 127 S.Ct. 2876 (2007).

The omission of any discussion of the trial court's duty to intervene is clearly erroneous.

II(B)(2). Kiker's jury was exposed to the actual conflict

> *The logic behind it (political triangulation) is that it both takes credit for the opponent's ideas, and insulates the triangulator from attacks on that particular issue.*
>
> http://www.wikipedia.com (term: "triangulation [politics]")

The trial court also fails to address the constitutional mayhem caused by the exposition of Barnett's actual conflict to Kiker's jury. In the presence of Kiker's jury, Crawford told Kiker's conflict-free attorney that he should question Kiker's conflicted attorney about whether there is any evidence impeaching his credibility. Crawford's testimonial maneuver was classic triangulation – "I am testifying truthfully but if you think I am not, just ask my lawyer. He's sitting right next to the defendant. Of course, because my lawyer cannot answer, you'll just have to believe me."

Kiker's ability to confront his accusers – in this case, the State's key witness against him was gutted by Barnett's conflict and Crawford's triangulation. Precisely for this reason, the appearance of impropriety that becomes manifest where there is a disclosure of an actual conflict to the defendant's jury is a factor to be weighed in favor of dismissal of the conflicted attorney. **See, e.g., State ex rel. *Baker v. Hatcher***, 624 S.E.2d 844, 854 (W.Va. 2005); ***People v. Collins***, 886 N.E.2d 1248, 1252-53 (Ill. App. 2008) ***appeal denied*** 897 N.E.2d 256 (Ill. 2008); ***see also United States v. Steyskal***, 221 F.3d 1345, (8th Cir. 2000) ***vacated on other grounds*** at 531 U.S. 1109 (2001) (admission of testimony that attorney for defendant also represents a government witness

"problematic"). In the case at bar, that "possibility" became "reality." The trial court's findings of fact are starkly deficient in failing to mention, let alone address, this affront to the Sixth Amendment and Article Three, Section Twenty-Six right to counsel. ***Wheat, supra***; ***Triplett v. State***, 666 So.2d 1356, 1358 (Miss. 1995) (Article Three, Section Twenty-Six of the Mississippi Constitution embraces all of the Sixth Amendment right to counsel protection); ***Williamson v. State***, 512 So. 2d 868, 876 (Miss. 1987) ("[o]ne's right to counsel under Mississippi law attaches earlier in the day than does the federal right [under the Sixth Amendment]").

What exactly was Kiker's jury supposed to do with Crawford's triangulation? Because Barnett is Crawford's lawyer, Barnett knows whether Crawford has a pending charge in George County. And Barnett knows whether Crawford has a deal with the State. And Barnett knows whether Crawford is a liar. Yet, Barnett sits there at defense table and says nothing. Could the jury come to any conclusion other than "Crawford must be telling the truth?" This is precisely the intolerable circumstances which the cases cited above address.

The trial court failed to mention, let alone, weigh the impact of Crawford's testimony in the presence of Kiker's jury. This was clearly erroneous.

II(B)(3). <u>The trial court has a duty to safeguard the integrity of proceedings</u>

Trial courts have an independent interest in ensuring that criminal defendants are represented by attorneys unimpaired with an actual conflict of interest. ***Wheat***, 486 U.S. at 160 (1988). "Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation." ***Id.***; ***United States v. Mays***, 69 F.3d 116, 121 (6th Cir. 1995) ***cert. denied*** 517 U.S. 1246 (1996) (trial court must balance

"the constitutional right of the defendant to representation by counsel of his choosing with the court's interest in the integrity of the proceedings and the public's interest in the proper administration of justice"); ***United States v. Carver***, 114 F.Supp.2d 519, 521 (S.D.Miss. 2000). In light of the fact that it is undisputed that: (1) outside the presence of Kiker, Barnett advised the trial court and the State of a concern he had regarding Crawford prior to Crawford's testimony; (2) Kiker did not know about Barnett's actual conflict until Crawford testified to its existence; (3) at the same moment that Kiker learned of Barnett's actual conflict, Kiker's jury learned of it; (4) Barnett was powerless to gainsay Crawford (assuming there was a basis to do so) and (5) Barnett's presence at defense table with Kiker while unable to address Crawford's triangulation only bolstered Crawford's credibility (whether or not Barnett had a basis to gainsay Crawford or not).

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 endure.

III. Conclusion

The trial court's findings that Barnett had no actual conflict with Kiker, and that Crawford was not a key witness, and that Crawford had no deal with the State to testify against Kiker, and that Kiker acquiesced to conflicted counsel because he found out Barnett had a conflict during his trial and did nothing about it are all clearly erroneous. Therefore, the trial court must be reversed.

Furthermore, as the trial court committed reversible error in ensuring that Kiker had conflict-free counsel (or intelligently waived conflict-free counsel) during the trial cross-examination of Crawford, it was clearly erroneous for the trial court to omit to rely upon this factor in its adverse

decision on Kiker's post-conviction motion.

The trial court also committed clear error in omitting from its discussion Crawford's triangulation in the presence of Kiker's jury and the powerlessness of Kiker's counsel to do anything other than bolster Crawford's credibility by the mere presence, and necessary inaction, of Barnett.

The trial court also committed clear error in omitting from its discussion any mention, and treatment of, the trial court's duty to maintain the judicial integrity of proceedings by ensuring that trials on criminal indictments do not devolve into stunts where government witnesses are immunized from confrontation by conflicted defense counsel.

As a result of these clearly erroneous findings, and clearly erroneous omissions, the trial court abused its discretion.

CONCLUSION

For the foregoing reasons, as well as other reasons that may appear to the Court as just and proper, Wesley Kiker respectfully requests that this Court reverse his conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel of record for Appellant, do hereby certify that I have mailed this date by United States Mail, postage prepaid, a true and correct copy of the above and foregoing ***Brief of Appellant*** to the following:

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SO CERTIFIED, this the 16th day of January, 2009.

PERCY S. STANFIELD, JR.