

**Case 2008-CA-01446-COA**

**IN THE  
SUPREME COURT OF THE STATE OF MISSISSIPPI**

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**BRIAN YOUNG,**

*Plaintiff-Appellant,*

**-vs-**

**STATE OF MISSISSIPPI,**

*Defendant-Appellee.*

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Appeal from the Circuit Court in and for Jackson County, Mississippi

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**OPENING BRIEF OF APPELLANT**

**ORAL HEARING REQUESTED**

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## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following individuals have an interest in the outcome of this case:

**Brian Young, Plaintiff-Appellant**  
**Lelie Coleman, Victim**  
**Michael Coleman, victim's spouse**  
**George S. Shaddock, trial counsel**  
**Robert A. Ratliff, post conviction counsel**  
**Honorable Dale Harkey, pre-trial judge**  
**Honorable Kathy King Jackson, trial judge**

I hereby certify that, to the best of my knowledge, the preceding list is a complete list of all parties having an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal.

By:

  
Robert A. Ratliff, Esq.  
Attorney for the Appellant

  
John A. Green, Esq.  
Local Counsel

## **TABLE OF CONTENTS**

*Page #*

Certificate of Interested Persons .....	i
Table of Contents .....	ii
Table of Authorities .....	iv
Statement of Jurisdiction .....	1
Statement of Issues .....	
Statement of the Case .....	
Statement of the Facts .....	
Summary of Argument .....	
Arguments and Standards of Review:	
I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST CONVICTION RELIEF BASED UPON THE ABRIDGMENT OF HIS CONSTITUTIONAL RIGHT TO A FAST AND SPEEDY TRIAL .....	
II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST CONVICTION RELIEF BASED UPON THE ABRIDGMENT OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL .....	
III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING PRIOR TO DISPOSING OF HIS POST CONVICTION RELIEF MOTION.	
Conclusion .....	
Request for Oral Argument .....	
Certificate of Compliance .....	
Certificate of Service .....	

## TABLE OF AUTHORITIES

	<i>Page #</i>
<i>Cases:</i>	
<u>Beckwith v. State</u> , 707 So.2d 547 (Miss., 1997) .....	7,8
<u>Barker v. Wingo</u> , 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) .....	9,10
<u>Bishop v. State</u> , 882 So.2d 135 (Miss.,2004) .....	19
<u>Brown v. State</u> , 749 So.2d 82, 90-91 (Miss.1999) .....	19
<u>Caston v. State</u> , 823 So.2d 473 (Miss., 2002) .....	6
<u>Chancellor v. State</u> , 745 So.2d 857 (Miss.App.,1998) .....	19
<u>Covington v. State</u> , 909 So.2d 160(Miss.Ct.App.2005) .....	19
<u>Davis v. State</u> , 743 S02d 326 (Miss 1999) .....	17
<u>Dobbs v. Zant</u> , 506 U.S. 357, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993) .....	15
<u>Gardner v. Florida</u> , 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) .....	15
<u>Hannah v. State</u> , 943 So. 2d 20 (Miss. 2006) .....	21
<u>Hooker v. State</u> , 516 So.2d 1349, 1351 (Miss.1987) .....	7
<u>Hymes v. State</u> , 703 So 2d258 (Miss. 1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998) .....	12,18,20
<u>Johnson v. Duckworth</u> , 793 F.2d 898, 902 (7th Cir.1986) .....	16
<u>Jones v. Barnes</u> , 463 U.S. 745 (1983) .....	14
<u>Kimmelman v. Morrison</u> , 477 U.S. 365, 374 (1986) .....	12
<u>Lambert v. State</u> , 574 So.2d 573, 577 (Miss.1990) .....	18
<u>Lisenba v. California</u> , 314 U.S. 219, 236 (1941) .....	6
<u>McMann v. Richardson</u> , 397 U.S. 759, 771 (1970) .....	12

<u>Miller v. State</u> , --- So.2d ----, 2005 WL 2981485 (Miss.App.,2005) .....	13
<u>Moawad v. State</u> , 531 So.2d 632, 635 (Miss.1988) .....	18
<u>Mohr v. State</u> , 584 so 2d 426, 430 (Miss. 1991) .....	13,19
<u>Moore v. State</u> , 676 So.2d 244 (Miss. 1996) .....	13
<u>Murray v. Carrier</u> , 477 U.S. 478 (1986) .....	12
<u>Osborn v. State</u> , 695 So.2d 570 (Miss. 1997) .....	13
<u>Perry v. State</u> , 419 So.2d 194, 199 (Miss.1982) .....	10
<u>Quitman County v. State</u> , 910 So.2d 1032 (Miss.,2005) .....	20
<u>Rumsfeld v. Padilla</u> , 542 U.S. 426 (2004) .....	8
<u>Smith v. State</u> , 550 So.2d 406, 408 (Miss.1989) .....	9
<u>State v. Woodall</u> , 801 So.2d 678, 684 (Miss.2001) .....	10
<u>Stokes v. Anderson</u> , 123 F.3d 858 (5th Cir. 1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998) .....	12
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .....	13,19
<u>Turner v. State</u> , 858 F.2d 1201, 1205 (6th Cir.1988) .....	16
<u>United States v. Blaylock</u> , 20 F.3d 1458, 1465-66 (9th Cir.1994) .....	16
<u>United States v. Lovasco</u> , 431 U.S. 783, 795-96, 97 S.Ct. 2044, 2051, 52 L.Ed.2d 752 (1977) .....	7
<u>United States v. MacDonald</u> , 456 U.S. 1, 7, 102 S.Ct. 1497, 1501, 71 L.Ed.2d 696 (1982) .....	7
<u>United States v. Marion</u> , 404 U.S. 307, 324, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971) .....	7
<u>United States v. Rodriguez</u> , 929 F.2d 747, 753 (1st Cir.1991) .....	16
<u>United States v. Shaw</u> , 555 F.2d 1295 (5th Cir.1977) .....	7

<u>United States v. Wehling</u> , 676 F.2d 1053, 1059 (5th Cir.1982) .....	7
<u>United States ex rel Caruso v. Zelinsky</u> , 689 F.2d 435, 438 (3d Cir.1982) .....	16
<u>Watts v. State</u> , 733 So.2d 214, 236 (Miss.1999) .....	18
<u>Williams v. State</u> , 522 So.2d 201, 209 (Miss.1988) .....	18

### ***Statutes***

United States Constitution, Sixth Amendment .....	8
United States Constitution, Fourteenth Amendment .....	8
Mississippi Code at §99-39-1 .....	1
§99-39-25 .....	21
§99-39-25 .....	1
§ 99-17-1 .....	11
§ 99-17-5 .....	6
Mississippi Constitution of 1890, Article 3, Section 26 .....	8
Title 39 .....	9

### ***Other Authorities***

<i>The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides</i> , Richard C. Dieter, Esq., .Executive Director, Death Penalty Information Center, June 1998 .....	17
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### **STATEMENT OF JURISDICTION**

The circuit court had jurisdiction over this matter pursuant to the Mississippi Uniform Post Conviction Collateral Relief Act, as outlined in the Mississippi Code at §99-39-1. This Court has jurisdiction to hear the appellate review of this matter under §99-39-25 wherein “a final judgment entered under this article may be reviewed by the supreme court of Mississippi on appeal brought either by the prisoner or the state on such terms and conditions as are provided for in criminal cases.

On motion to the Supreme Court of Mississippi, this Court granted Appellant permission to seek post conviction relief on April 13, 2006. Notwithstanding the time parameters of Rule 22 of the Mississippi Rules of Appellate Procedure, no action was taken on Appellant’s motion before the trial court for a substantial time due to Hurricane Katrina and its aftermath. On July 31, 2008, without a hearing, the circuit court summarily ordered that the motion for post conviction relief be denied. (07/31/2008, Order Denying Motion 55). A timely notice of appeal was filed by the Appellant on August 21, 2008.

### STATEMENT OF ISSUES

- I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST CONVICTION RELIEF BASED UPON THE ABRIDGMENT OF HIS CONSTITUTIONAL RIGHT TO A FAST AND SPEEDY TRIAL.
- II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST CONVICTION RELIEF BASED UPON THE ABRIDGMENT OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.
- III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING PRIOR TO DISPOSING OF HIS POST CONVICTION RELIEF MOTION.

### STATEMENT OF THE CASE

Appellant was arrested on July 5, 2000 based upon an affidavit alleging murder. The charge was then enhanced to capital murder by a second affidavit on July 7, 2000, an affidavit executed by Detective Sheila Jenkins of the Pascagoula Police Department. After this prosecutorial enhancement, the State of Mississippi decided to take no action regarding the Appellant. He simply sat in jail. From the month of July of 2000, to August, September, October, Appellant remained in jail. From November of 2000, to December, January, February, March, April, May, and June of 2001, Appellant remained in jail for *over eleven months* before he was ultimately indicted by the Jackson County Grand Jury on July 6, 2001 (CP-4) for the murder of Lelie Coleman.<sup>1</sup>

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<sup>1</sup>"CP-\_" and "T-\_" references refer to matters in the record of the original criminal proceedings.



The indictment, handed down 366 days after he was first arrested for the subject crime, was triggered after Appellant filed a Motion for Reasonable Bail and for a Writ of Habeas Corpus on June 19 and 21 of 2001. These motions were deferred when the indictment was handed down. Appellant then filed a Motion for Discovery and Speedy Trial on July 24, 2001 (CP-6) and a Second Motion to Dismiss the Indictment on August 13, 2001. (CP-9) A hearing was finally held on this case before the Honorable Dale Harkey, and an Appearance Bond was set for the Appellant (CP-18), allowing him to remain out of jail through trial though he had been held in jail, at that point, for over thirteen months, over 57 weeks, over 400 days.

The State finally complied with the Appellant's requests for Discovery on October 5, 2001. (CP-31)

On April 8, 2002, trial commenced before the Honorable Kathy King Jackson and continued for four days. Counsel for the Appellant did not call any witnesses. Further, counsel did not allow Appellant to testify. In light of the State's fourteen witnesses at trial, multiple exhibits, and the defense's failure to put on any material defense, the jury returned a verdict of guilty as to murder. (CP-77) At sentencing, Appellant was given a term of life imprisonment. (CP-78)

Appellant subsequently filed a direct appeal to the Mississippi Supreme Court from the Jackson County Circuit Court. Finding no reversible error, in an opinion dated January 20, 2005, the state supreme court affirmed Appellant's conviction and sentence. Young v. State, 891 So.2d 813 (Miss. 2005) The Appellant has not filed any other motions for post-conviction relief in this matter, in any court, other than the one for which he now seeks judicial review.

The Appellant is currently in the care and custody of the Mississippi Department of Corrections, incarcerated in the East Mississippi Correctional Facility.

## **STATEMENT OF FACTS**

The factual basis of the substantive criminal case lies in the interpersonal acts of three individuals, Lelie Coleman, her husband Michael Coleman, and the Appellant, Brian Young. At the operative times of this case, the Colemans, natives of Louisiana, were living and working in Pascagoula, Mississippi. Lelie Coleman worked at a local, Gulf Coast casino and Michael Coleman worked at West Building Supplies. They lived at the local Budget Inn. Appellant was also a native of Louisiana and was living in Pascagoula, gainfully employed at a local shipyard.

Uncontroverted in the record, Lelie Coleman had a very active social life, engaging in affairs with a number of men while married to Michael. (T-108) One such concurrent affair was with Brian Young. According to undisputed testimony, Lelie Coleman and Brian Young were intimately involved with each other both back in their home state of Louisiana as well as in Pascagoula, leading up to the time of Lelie's death on or about July 1, 2000.

In fact, the testimony at trial (T-131, 132) reflected that on June 30, 2000, Lelie Coleman and Brian Young were together that evening, she returning to her motel in the early morning hours. That morning, July 1st, Michael Coleman left around 6:50 a.m. for work. Young arrived at the motel at approximately 7:15a.m. and went directly to the Colemans' room, and then left soon thereafter around 7:45a.m. Returning from work at approximately 11:30 a.m., Michael Coleman found Lelie dead. Following a brief investigation, the police arrested Brian Young at his apartment in Pascagoula on July 5, 2000. (T-203)

## SUMMARY OF THE ARGUMENT

The criminal defendant in this matter seeks post conviction relief, under Mississippi Code §99-39-1 et seq., based upon the following violations of the Constitution of the United States and the Mississippi Constitution of 1890:

- (a) ***Due Process Abridgment:*** Appellant's conviction was obtained notwithstanding a substantial and prejudicial preindictment delay as well as a violation of an accused's right to a fair and speedy trial, violating the Federal Sixth and Fourteenth Amendments as well as Article 3, Section 26 of the Mississippi Constitution of 1890
- (b) ***Right to Counsel Abridgment:*** Contravening the terms of the Federal Sixth Amendment as well as the Mississippi Constitution of 1890, Appellant's conviction and sentence were tainted as he did not receive effective assistance of counsel during the underlying criminal proceedings as counsel (a) failed to prepare for trial, arrange for witnesses, review and prepare evidence, (b) failed to explain the existence, details, and effect of an offer of a plea agreement, (c) counsel failed to explain a plea to a lesser included offense, and (d) counsel failed to seek relief under the speedy trial statutes.

All of these issues, including the request for an evidentiary hearing to present evidence not reflected in the record, were positively received by this Court, as gatekeeper of post conviction claims under Title 39.

## ARGUMENT AND STANDARDS OF REVIEW

### **I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST CONVICTION RELIEF BASED UPON THE ABRIDGMENT OF HIS CONSTITUTIONAL RIGHT TO A FAST AND SPEEDY TRIAL.**

Both the Federal Constitution and the State Constitution require an adherence to due process in the scope of criminal proceedings. It is that concept of due process that separates the sovereign states and their prosecution of criminal acts from the arbitrary and the unfair. *See, Lisenba v. California*, 314 U.S. 219, 236 (1941) ("denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.")

Two phases of the Appellant's pre-trial custody must therefore be reviewed, the first being the extraordinarily long preindictment detention and the time between indictment and trial when Mr. Young's liberty was limited by the State.

#### ***Preindictment Delay***

The Appellant was arrested, based on an affidavit, on July 5, 2000. He was placed in jail and essentially forgotten. While a pre-indictment delay is generally predicated on the statutes of limitation, murder carries no such time limitation. *See, Miss.Code Ann. §§ 99-1-5* (2000). Accordingly, the Appellant maintains that the subjective analysis of "oppressive delay" required under the due process clauses of the United States and Mississippi Constitutions can be defined by common sense and reasonable experiences. Appellant was deprived of his freedom for 366 days without the benefit of an indictment, without the benefit of confronting his accusers, and without the benefit of due process. *See, Caston v. State*, 823 So.2d 473 (Miss., 2002) These 366

days are not viewed in light of any “bright line” speedy trial rules nor concepts but rather, as the Supreme Court stated in Beckwith v. State, 707 So.2d 547 (Miss., 1997), the time is reviewed by a due process analysis and an analysis of fundamental fairness. *Also see*, United States v. MacDonald, 456 U.S. 1, 7, 102 S.Ct. 1497, 1501, 71 L.Ed.2d 696 (1982)

Consequently, was there a violation of due process, or a fundamental unfairness, in keeping the Appellant in a highly restrictive jail cell for over one year without the benefit of an indictment and all the due process requirements attendant thereto? It is the Appellant’s assertion that 366 days, over one year, is clearly an “oppressive delay” violating his constitutional right to due process.

The Supreme Court of the United States has established a two-prong test for establishing when a due process violation has occurred. In United States v. Marion, 404 U.S. 307, 324, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971) and United States v. Lovasco, 431 U.S. 783, 795-96, 97 S.Ct. 2044, 2051, 52 L.Ed.2d 752 (1977) the Supreme Court held that the defendant must show that (1) the preindictment delay caused actual prejudice to the defendant, and (2) such delay was an intentional device used by the government to obtain a tactical advantage over the accused. See, United States v. Wehling, 676 F.2d 1053, 1059 (5th Cir.1982). To establish that actual prejudice has occurred, certain factors are to be considered in evaluating the effect of delay on a due process claim. United States v. Shaw, 555 F.2d 1295 (5th Cir.1977) According to Shaw, “due process analysis must focus on factors such as the length of the delay, the reason for the delay and the prejudice which the delay may have caused the accused.”” *Id.* at 1299. Hooker v. State, 516 So.2d 1349, 1351 (Miss.1987). The Mississippi Supreme Court reaffirmed this two-prong test in Beckwith, 707 So.2d at 569.

Appellant asserts under the first prong that the preindictment delay prejudiced him.

Among other things, memories are dimmed with time, and many witnesses are either dead, re-located, or no longer available to testify. Physical evidence could be degraded as well. Finally, depriving an individual of his liberty rights for over one year must give some *per se* definition to prejudice. See, Rumsfeld v. Padilla, 542 U.S. 426 (2004)

As to the second prong of the test, Appellant asserts that the prosecution delay was not based on any legitimate investigative need nor was there any new evidence. Clearly, just the opposite is present in Detective Sheila Jenkins testimony, when she prepared and filed an affidavit in support of the Appellant's arrest. Finally, every day that Mr. Young spent in preindictment detention gave a tactical advantage to the prosecution. These twelve months, 366 days, wore Mr. Young down. He was figuratively beaten by having his liberty taken away. He was restrained from freedom, an act that common sense and historical experiences support as assisting only the State.

### ***Post-indictment Delay to Trial***

The well-established rules of speedy trial protections only apply to those periods of time when a defendant is charged with an offense. Beckwith v. State, 707 So.2d 547 (Miss.1997). Mr. Young was finally indicted, charged with the offense of murder, on July 6, 2001 (CP-4). While there were several requests for discovery after the indictment, no trial of the Appellant occurred until April 8, 2002.

Mr. Young was denied the right to a speedy trial because the one-year delay between his arrest and his indictment was both presumptively and actually prejudicial. A defendant's right to a speedy trial is guaranteed by the Sixth and Fourteenth amendments to the United States Constitution and under Article 3, Section 26 of the Mississippi Constitution of 1890. This right

must be secured by more than just written constitutions, but it must also be secured by the acts of the judiciary to be effective. Otherwise, convictions, such as the Appellant's, will stand in violation of our fundamental rights.

The United States Supreme Court, in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) established the following factors to be considered in determining if the right to a speedy trial has been violated: (1) length of delay, (2) reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. When the state supreme court addressed the question of what length of time must elapse before prejudice will be presumed, in Smith v. State, 550 So.2d 406, 408 (Miss.1989), the court determined that it may generally be said that any delay of more than eight months is presumptively prejudicial. *Id.* Mr. Young was forced to wait almost ten months between indictment and trial.

Mr. Young was arrested on July 5, 2000. He remained in jail, without bail. He had no family in the area, no attorney to represent him, and the only person he cared about , and who could have assisted him, was the victim. Finally, in June of 2001, he filed a motion for bail, a petition for writ of habeas corpus and a motion to dismiss the charge for denial of his right to a speedy trial. This filing forced the State, on the day of the hearing on these motions, to announce an indictment. Several weeks later, the State finally filed Mr. Young's indictment, on July 6, 2001.

On July 24, 2001, the Appellant filed a motion demanding a speedy trial, followed by an amended motion to dismiss the charge. On August 19, 2001, the trial judge denied the motion to dismiss but was silent as to a court date. Nine months after his indictment and his assertion of his right to a speedy trial, the Appellant was finally allowed his day (actually four days) in court.

Appellant's constitutional and statutory right to a speedy trial was presumptively and

actually prejudiced by the 366 days that he was incarcerated following his arrest (as discussed above) and his nine months of restricted liberty between indictment and trial. While the Appellant was out on bond during the nine months, his liberty rights were materially and adversely affected. And other than a brief motion for continuance filed in October 2001, and an unrelated order of continuance, entered at his attorney's request in January 2002, it was the State that controlled the scheduling of the trial, ultimately for April, 2002.

Mr. Young pursued his demand for speedy trial before the court, but to no avail. Under Barker, Id., a defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. The U.S. Supreme Court emphasized that failure to assert the right will make it difficult for a defendant to prove denial of a speedy trial. Barker, 407 U.S. at 531-32, 92 S.Ct. 2182. The record is clear that the Appellant made every effort, once indicted, to seek bail and demand a speedy trial. The Mississippi Supreme Court, in State v. Woodall, 801 So.2d 678, 684 (Miss.2001), stressed too the importance of a defendant's request for a speedy trial. See, Perry v. State, 419 So.2d 194, 199 (Miss.1982). The Appellant was proactive and sought the assertion of this right. It was denied by the court's actions and the prosecutor's inactions.

The *Barker* Court identified three interests protected by the right to a speedy trial that are to be considered when determining whether a defendant has been prejudiced by a delay in bringing him to trial: (1) the interest in preventing oppressive pretrial incarceration, (2) the interest in minimizing anxiety and concern of the accused, and (3) the interest in limiting the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532, 92 S.Ct. 2182. These three interests, as articulated by the United States Supreme Court, are all implicated in this case. There is a desire to prevent oppressive pretrial incarceration, yet the Appellant is held in jail for over a



year and after indictment, though on restrictive bail, is still limited in his liberty rights for an additional nine months awaiting trial. There is a stated governmental purpose to minimize the anxiety and concern of the accused, yet Mr. Young is forgotten about for over a year and does not go to trial until twenty-one months after the crime occurred. And finally, there is an articulated principle to limit the *possibility* that the defense will be impaired by any delay. However, the State had no problem in delaying all facets of Mr. Young's due process and with each passing day, increasing the *possibility* of impairment.

The application of Mississippi Code Ann. § 99-17-1 should also be affirmatively pursued. The state legislature has specifically spoken on this issue. If 270 days pass after arraignment, an accused must be tried or released. There is no requirement of prejudice. Further, there is no requirement that a defendant proactively demand a speedy trial. It is the intent of the People of Mississippi, as indicated by this law, that an accused must be tried within 270 days or released.

The prosecution of Mr. Young was slow in coming and clearly was prejudicial under the interests articulated by the *Barker* court. The due process violations in holding a United States citizen, prior to indictment, for over one year is presumptively prejudicial and contrary to due process concepts. The Appellant's conviction and sentence should be reversed on these grounds alone. It was error for the circuit court to deny post conviction relief in light of these abridgements.

In its Order, the Circuit Court summarily states that this issue has no merit, without addressing any of the substantive reasons for this nature. Even though the Supreme Court addressed the matter on direct appeal, the state's High Court must have believed the issue carried some merit or the Court would never have granted the original motion of the Appellant to seek post conviction relief on this claim. When the Supreme Court serves as a gate keeper for

collateral proceedings, the threshold it uses to determine a claim that is frivolous and a claim that is colorable is an important one. If the Supreme Court grants a motion for the trial court to review a petition for post conviction relief, the high court is specifically finding that the application for relief is, on its face, not procedurally barred and that the claims presented offer a substantial showing of a denial of a state or federal right worthy of an evaluation on its merits. Stokes v. Anderson, 123 F.3d 858 (5th Cir. 1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998).

Finally, it is vital, as a matter of *stare decisis*, to reiterate the position of this Court expressed in Hymes v. State, 703 So. 2d 258 (Miss. 1997), when it was made clear that a trial court was not authorized to summarily deny a motion to vacate a conviction and sentence after the Supreme Court granted the movant's application for leave to file motion for post-conviction relief.

## **II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST CONVICTION RELIEF BASED UPON THE ABRIDGMENT OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL**

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, "[t]he 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). Furthermore, the Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 (1970). The right to effective assistance of counsel may be violated by even an isolated error of counsel if

the error is sufficiently egregious and prejudicial. Murray v. Carrier, 477 U.S. 478 (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. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also* Osborn 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 defendant must show that his attorney made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. Strickland, *Id.* Second, once a defendant satisfies the first prong, he must allege, with specificity and detail that counsel's deficient performance so prejudiced his defense so as to deprive him of a fair trial. Strickland, *Id.*; Moore v. State, 676 So.2d 244 (Miss. 1996). It is permissible to proceed directly to the second prong of the test. The standard in Mississippi for the second prong of prejudice to the defense is "a reasonable probability that, but for counsel's unprofessional errors, the result of a 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.*

On several different occasions, counsel for the Appellant, George S. Shaddock, failed to meet the reasonable professional standard established by Strickland. These occasions are as follows:

***Counsel failed to failed to prepare for trial, arrange for witnesses, review and prepare evidence***

Generally, counsel has an obligation to prepare for a trial, to arrange for witnesses, to review and prepare evidence, and, on appeal, to insure that the record is a complete record of the proceedings below. See, Miller v. State, --- So.2d ----, 2005 WL 2981485 (Miss.App.,2005)(lack

of trial preparation and pretrial investigation can support claim of ineffective assistance of counsel)

In the instant matter, Attorney Shaddock did not. He failed to illicit testimony from a witness Shawanda Green, testimony that would have indicated a motive for murder by Michael Coleman. Counsel failed to illicit testimony from Jessie Leger, testimony that would have served as a character witness as to Appellant's innocence. In fact, counsel failed to illicit any testimony from any defense witnesses. As reflected on the affidavit submitted to the trial court below, counsel failed to share discovery with the Appellant, failed to call character witnesses, and failed to inform the Appellant of forensic evidence which, if left uncontroverted as it was at trial, would be damaging to the defense's case. Counsel failed to illicit a time of death argument, available from the forensics of the victim, to support an alibi defense. Mr. Shaddock refused, contrary to the accused's wishes, to put Mr. Young on the stand.

The list of trial errors are numerous. One such trial error involves the forensic evidence associated with the victim's blood. As reflected in the affidavit submitted to the lower court, Mr. Shaddock failed to call a blood splatter expert to address the blood stains on the Appellant's pants. In fact, counsel's failures allowed the jury to maintain the incorrect impression that the blood splatter pattern on the Appellant's slacks arose from the murder victim during the course of the murder. While the State insisted that the Appellant's slacks reflected the victim's blood transferred at the time of the murder, the Appellant had a blood splatter expert who was prepared to testify that the slacks represented a blood splatter pattern consistent with holding a dying victim in the Appellant's arms. In applying the *Strickland* standard to even this single failure, this court must inquire whether the deficient performance supports a conclusion that the outcome of

the trial would have been different but for these errors.<sup>2</sup> See, *Strickland; Jones v. Barnes*, 463 U.S. 745 (1983)

Counsel's trial performance included other failures. Counsel failed to seek suppression of any DNA evidence found on trousers not worn on the day of the crime. Counsel failed to investigate if the victim was raped before death, and whether any other DNA or forensic evidence supported alternative perpetrators. Counsel refused to object to the refusal of the state's crime lab to discuss forensic findings with the defense. In sum, counsel failed to call witnesses, failed to hire experts, failed to challenge adversarially the state's experts, failed to challenge the forensic evidence. Mr. Shaddock was not prepared for this trial, and due to his deficiencies, Mr. Young was found guilty.

To add insult to injury, Mr. Shaddock failed to establish a record, and maintain its existence for appellate review. Transcripts were missing, and no effort was undertaken to insure the completeness of the transcripts. See, *Dobbs v. Zant*, 506 U.S. 357, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993), and *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)(counsel has a professional obligation to forward a complete record for appellate review.)

### ***Counsel failed to discuss a plea offer***

On April 8, 2002, Mr. Shaddock noted to the Appellant that a plea offer was made to the defense prior to going to trial. Notwithstanding Mr. Shaddock's game-day exclamation that "We

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<sup>2</sup>As reflected on (04/13/2006, Post Conviction Motion, Exhibit 2, Pg 39) submitted to the lower court, affiant noted the professional expectation, "I would have expected the defense attorney to have petitioned the court for its own analyst prior to the trial and have that analyst present at court to advise him on the testimony given by the state."

are going to trial even though a plea is offered!", no plea was ever discussed with the Appellant. See, Affidavit of Mr. Young, (04/13/2006, Post Conviction Motion, Exhibit 3, Pg 42) , previously submitted to the lower court. While Mr. Shaddock does not recollect any plea offer being made, see November 22, 2005 letter, (04/13/2006, Post Conviction Motion, Exhibit 4, Pg 45) to the original motion, he does not maintain a recollection that one was not made.

Across the nation, it is established that a defense attorney's failure to notify his client of a prosecutor's plea offer constitutes ineffective assistance of counsel under the Sixth Amendment and satisfies the first element of the *Strickland* test. See, Turner v. State, 858 F.2d 1201, 1205 (6th Cir.1988) (agreeing with the district court that "an incompetently counseled decision to go to trial appears to fall within the range of protection appropriately provided by the Sixth Amendment"), *vacated on other grounds*, 492 U.S. 902, 109 S.Ct. 3208, 106 L.Ed.2d 559 (1989), *reinstated*, 726 F.Supp. 1113 (M.D.Tenn.1989), *aff'd*, 940 F.2d 1000 (6th Cir.1991). See also United States v. Blaylock, 20 F.3d 1458, 1465-66 (9th Cir.1994) ("If an attorney's incompetent advice regarding a plea bargain falls below reasonable standards of professional conduct, *a fortiori*, failure even to inform defendant of the plea offer does so as well"); United States v. Rodriguez, 929 F.2d 747, 753 (1st Cir.1991) ( "there is authority which suggests that a failure of defense counsel to inform defendant of a plea offer can constitute ineffective assistance of counsel on grounds of incompetence alone, even absent any allegations of conflict of interest"); Johnson v. Duckworth, 793 F.2d 898, 902 (7th Cir.1986) ("in the ordinary case criminal defense attorneys have a duty to inform their clients of plea bargains proffered by the prosecution, and that failure to do so constitutes ineffective assistance of counsel under the Sixth and Fourteenth Amendments"); United States ex rel Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir.1982) ("a failure of counsel to advise his client of a pleabargain ... constitutes a gross

deviation from accepted professional standards").

Though Mr. Young maintains his innocence, he would have accepted a plea offer such as the one proffered to his counsel. Given the cavalier manner in which he was thrown in jail and kept incarcerated without due process, Appellant had little confidence in the judicial system. Statistics and anecdotal evidence prevails in reflecting that a black defendant has a substantially increased chance of being found guilty and of receiving the death penalty in the murder of a black victim than a non-black defendant.<sup>3</sup>

An evidentiary hearing would reflect that a plea was proffered prior to trial. Further, it would show that Mr. Shaddock never communicated that plea to the Appellant, in violation of Mr. Young's constitutional rights. Mr. Shaddock further never explained any plea offer to a lesser included offense offered to him by the State. *See, Davis v., State*, 743 S02d 326 (Miss 1999) Finally, such a hearing would reflect the prejudice incurred by counsel's failure to transmit the plea to the Appellant.

#### ***Counsel failed to pursue speedy trial claim***

The record is clear that on July 24, 2001, the Appellant filed a Motion for Speedy Trial (CP-6), A hearing was held on this case to address the then pending motions of the Appellant concerning speedy trial, discovery, and bond. The trial court did not rule on the speedy trial motion. Counsel, in a professional act below what is reasonably expected of defense attorneys, refused to request the court to address this matter. He let it go. He failed to establish a record for

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<sup>3</sup>See, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, Richard C. Dieter, Esq., .Executive Director, Death Penalty Information Center, June 1998.

appeal. And as the Mississippi Supreme Court noted in its January 20, 2005 opinion,

Young did not pursue his demand for speedy trial, nor his motion to dismiss, to a ruling by the trial court. Because Young failed to raise this issue in his motion for a new trial, there is no trial court order to review, no findings on the record, and no response from the State as to the pre-indictment delay. at page 818

...

We have repeatedly held that a defendant's failure to assert his right to a speedy trial must be weighed against him. Watts v. State, 733 So.2d 214, 236 (Miss.1999). at page 818

...

Our law is clear that an appellant must present to us a record sufficient to show the occurrence of the error he asserts and also that the matter was properly presented to the trial court and timely preserved. Lambert v. State, 574 So.2d 573, 577 (Miss.1990) (citing Moawad v. State, 531 So.2d 632, 635 (Miss.1988) and Williams v. State, 522 So.2d 201, 209 (Miss.1988)). This issue is without merit. at page 819

Counsel's failure to pursue a speedy trial violation is grounds for a claim of ineffective assistance of counsel. Hymes v. State, 703 So.2d 258 (Miss.1997).

### ***Counsel failed to address a third party confession letter***

In September of 2000, Appellant's counsel received a letter of confession wherein the victim's husband confessed to killing his wife. To this Honorable Court, this little known fact is repeated: in late 2000, a clear confession letter from the victim's husband was sent to the Appellant. With the following brief words, the Appellant's innocence was clear:

"... well like you said I ended Lelia's life because she was a whore (sic) to you

& Malcolm & others, but to tell you the truth I didn't mean to kill her. I was

fed up and I had to do something." See (04/13/2006, Post Conviction Motion, Exhibit 5,

Pg 49) .

This pivotal piece of evidence was immediately turned over to the police investigators for the State with the understanding that the State would have its laboratory examine the letter for fingerprints and DNA in order to establish the author of this exculpatory evidence. See,



(04/13/2006, Post Conviction Motion, Exhibit 6, Pg 52).

However, this testing did not occur. At trial, one of the principal detectives admitted that she did not send the evidence for examination because she thought that too many people had touched it. No laboratory ever had the opportunity to exam this evidence and counsel never objected to this failure, never sought independent examination, and never raised the matter on appeal. *See, Jones v. Barnes*, supra.

### ***Counsel's failures prejudiced Appellant***

In order to present a successful *Strickland* challenge to actual ineffective assistance of trial counsel, Appellant must show that his counsel's performance was so deficient as to constitute prejudice, and that but for the counsel's errors the outcome in the trial court would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also, Covington v. State*, 909 So.2d 160(Miss.Ct.App.2005) (discussing Mississippi law on ineffective assistance of counsel).

While assertions of error without prejudice do not trigger reversal, *Hatcher v. Fleeman*, 617 So.2d 634, 639 (Miss.1993), the second prong of the *Strickland* test requires "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.*

Counsel's errors, singularly and cumulatively, both as a matter of law and logic, sufficiently undermined the confidence in the outcome of the proceedings to meet this standard. In failing to utilize an expert to address forensics, both of the slacks and of the confession letter, the standard of *Strickland* was unfortunately met. *Brown v. State*, 749 So.2d 82, 90-91

(Miss.1999) In failing to call witnesses for the defense, witnesses that affidavits (and an evidentiary hearing) reflect would have provided a vigorous defense, the standard of Strickland was unfortunately met. Chancellor v. State, 745 So.2d 857 (Miss.App.,1998). And in failing to maintain the professional norms of adversarially testing the state's case, through witnesses, forensics, and evidence, the standard of *Strickland* was unfortunately met. See, Bishop v. State, 882 So.2d 135 (Miss.,2004); Quitman County v. State, 910 So.2d 1032 (Miss.,2005).

Not only did defense counsel fail in the foregoing, he failed to offer any evidence in the Appellant's defense. Counsel's inaction in conducting the Appellant's defense amounted to constitutionally deficient performance, and was totally inexcusable. This court should find that counsel's performance in conducting the Appellant's defense was constitutionally deficient, as counsel completely failed to effectively conduct any defense on behalf of the Appellant, and that the Appellant was consequently prejudiced.

Finally, the holding of Hymes is reiterated in that a trial court is not authorized to summarily deny a motion to vacate a conviction and sentence after the Supreme Court granted the movant's application for leave to file motion for post-conviction relief.

### **III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING PRIOR TO DISPOSING OF HIS POST CONVICTION RELIEF MOTION.**

In its Order denying post conviction relief, the circuit court stated that "no action was taken in this matter by the plaintiff. . . to seek a hearing on the matter." This conclusion is factually incorrect. To the extent that the lower court denied relief on this conclusion, the Order should be reversed.

The Appellant repeatedly requested an evidentiary hearing on his motion and, in fact,

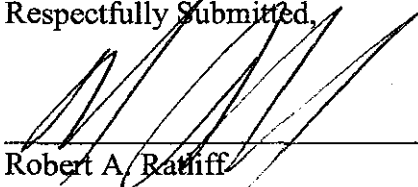
demanded that he was entitled to one. This Court is urged to review the final substantive paragraph of the Appellant's Motion to the circuit court. In that section, the Appellant contends that, at a minimum, he is entitled to an evidentiary hearing on the matters raised in the instant motion. The Appellant submits that resolution of the issues raised will require an examination of evidence beyond the scope of the record. Therefore, the Appellant suggests that a studied examination of the relevant evidence by this Court would best occur in an evidentiary hearing.

Miss. Code Ann. §99-39-23 outlines the parameters for such evidentiary hearings. Caselaw interpreting this statute is consistent that when the record below is required to be expanded to investigate claims of ineffective assistance, an evidentiary hearing is mandated. See, Hannah v. State, 943 So. 2d 20 (Miss. 2006).

### **CONCLUSION**

The Appellant respectfully requests that this Honorable Court reverse the order of the trial court and sustain his motion for post conviction relief, so that he may receive the full scope of constitutional protections guaranteed to him by the constitutions of the United States and the State of Mississippi.

Respectfully Submitted,



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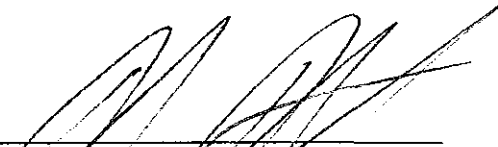
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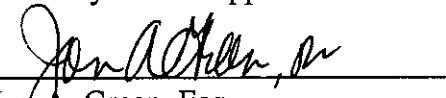
**STATEMENT REGARDING ORAL ARGUMENT**

The Appellant, Brian Young, respectfully requests oral argument in this matter, as he believes that it would assist the court in analyzing the issues raised in this appeal.

**CERTIFICATE OF COMPLIANCE**

Pursuant to the Mississippi Rules of Appellate Procedure, the undersigned counsel certifies that the opening brief for Appellant is less than 50 pages in length and therefore complies with the MRAP rules governing appeal briefs.

  
\_\_\_\_\_  
Robert A. Ratliff, Esq.  
Attorney for the Appellant

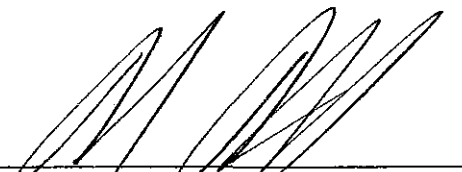
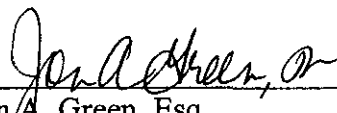
  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Notice of Appeal appended hereto has been sent this 13 day of February 2009, by regular U.S. Mail with sufficient postage affixed thereto to insure delivery thereof to the:

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