# IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SIRNARDO JAMES MOFFETT — APPELLANT



VS. — NO. 2008-KA-0175

STATE OF MISSISSIPPI — APPELLEE

## BRIEF FOR THE APPELLEE

## APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**SIRNARDO JAMES MOFFETT** **APPELLANT**

**VS.** **NO. 2008-KA-0175**

**STATE OF MISSISSIPPI** **APPELLEE**

# BRIEF FOR THE APPELLEE

## STATEMENT OF THE CASE

The grand jury of the First Judicial district of Hinds County indicted defendant, Sirnardo James Moffett for the crime of Murder as an Habitual Offender in violation of *Miss. Code Ann.* §§ 97-3-19(2)(e) & 99-19-81. (Indictment, cp.5). After a trial by jury, Judge L. Breland Hilburn, presiding, the jury found defendant guilty. (C.p.52). Defendant was sentenced to Life. (Sentence order, cp. 71).

After denial of post-trial motions this instant appeal was timely noticed.

## STATEMENT OF FACTS

Defendant and a co-hort confronted their victim in his driveway. They beat him, stripped him, shot him and threw him in the back of a truck, driving away into the night. There were a couple of eye-witnesses to this killing.

Defendant claimed alibi. The jury found defendant guilty.

## SUMMARY OF THE ARGUMENT

Issue I.

THE TRIAL COURT FOLLOWED THE APPROPRIATE PROCESS WHEN A WITNESS INVOKED THE FIFTH AMENDMENT AGAINST SELF-INCRIMINATION.

Issue II.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

Issue III.

THE RECORD AMPLY SUPPORTS THE JURY VERDICT OF GUILTY.

Issue IV.

THERE WERE NO ERRORS, NEAR ERROR, OR HARMLESS ERRORS – HENCE, THERE CAN BE NO CUMULATIVE ERROR.

## ARGUMENT

### Issue I.

THE TRIAL COURT FOLLOWED THE APPROPRIATE PROCESS WHEN A WITNESS INVOKED THE FIFTH AMENDMENT AGAINST SELF-INCRIMINATION.

Looking to the transcript we have a situation where the defense was aware that the State was going to call a witness, knowing the witness would invoke his right against self-incrimination. The record, developed outside the presence of the jury indicated this witness, the co-indictee Eric Robinson, had earlier plead guilty in a plea bargain. One of the conditions was that Eric Robinson testify at the trial of this defendant. (Tr. 175-183).

The law is clear on this point:

> This Court has recognized that a criminal defendant and the State have the right to call a witness to the stand even though the witness intends to invoke his Fifth Amendment privilege against self-incrimination. Hall v. State, 490 So.2d 858, 859 (Miss.1986).

*Blue v. State,* 674 So.2d 1184, 1234 (Miss. 1996).

And, looking to the record, the defendant's counsel attempted cross-examination and managed to get the transcript of the guilty plea, and the sentence that he got admitted into evidence (for ID purposes) as a way to impeach – and by inference implicate the witness, Eric Robinson, as being the responsible party.

Closing argument of defense is replete with references incorporating this witness by name, action or guilt. Tr. 338-39, 341, 343.

The procedure used by the trial court was correct, and did not prejudice defendant. Consequently, no relief should be granted on this allegation of error.

Issue II.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

> ¶ 20. The Mississippi Supreme Court has adopted the two-pronged ineffective assistance of counsel analysis as announced in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Colenburg, 735 So.2d at 1102(¶ 9). Under the Strickland analysis, a claimant must show that: (1) the counsel's performance was deficient and (2) the deficient performance prejudiced the claimant such that confidence in the outcome of the case was undermined. Alexander v. State, 605 So.2d 1170, 1173 (Miss.1992).
>
> *Deloach v. State,* 977 So.2d 400, 404 (Miss.App. 2008).

Again, as noted above, defense counsel at trial very strategically used the information and the testimony (or non-testimony) of Eric Robinson. In fact this was pretty much laid out for the jury and was used as a basis in jury selection. (For example, c.p. 48).

> ¶ 15. . . . " '[C]ounsel's failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy' and do not give rise to an ineffective assistance of counsel claim." Pruitt v. State, 807 So.2d 1236, 1240(¶ 8) (Miss.2002) (quoting Cole v. State, 666 So.2d 767, 777 (Miss.1995)). Watts's allegations do not overcome the presumption that his attorney, after weighing all of the options available to Watts, reasonably determined that the best option for Watts was to accept the State's offer to plead guilty to murder.
>
> *Watts v. State,* 2008 WL 1869351 (Miss.App. 2008).

Therefore being a reasonable strategy within accepted limits no claim of ineffective assistance can be sustained and no relief should be garnered on this

allegation of ineffective assistance.

Issue III.

THE RECORD AMPLY SUPPORTS THE JURY VERDICT OF GUILTY.

Interestingly, within this penultimate claim of trial court error there is not one citation to law, the constitution, the record or the evidence. Oh, to be sure, there is an ample recitation of what appellate counsel feels was missing but not one specific claim of which of the elements of the offense were unsupported in the record.

So, the State will first raise a procedural bar to review:

> ¶ 31. . . . Arguments advanced on appeal must "contain the contentions of the appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on." M.R.A.P. 28(a)(6). "Failure to comply with [Mississippi Rule of Appellate Procedure] 28(a)(6) renders an argument procedurally barred." Birrages v. Ill. Cent. R.R., 950 So.2d 188, 194 (¶ 14) (Miss.Ct.App.2006).

*Rogers v. State*, 2008 WL 711036 (Miss.App. 2008).

Without waiving the applicability of this procedural bar to review, the State would argue, alternatively, the record amply supports the conviction. There was an eye-witness that identified defendant ((tr. 247) as he beat the victim, and put him in the back of his truck (and that is exactly how they found the dead body). Venue was established. Tr.245. Expert testimony elicited the cause of death and that is was homicide. Tr. 266-277.

> ¶ 50. This Court's standard of review when determining whether a jury verdict is against the overwhelming weight of the evidence is well settled.

> A defendant is not entitled to a new trial "unless [we are] convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice." McLendon v. State, 945 So.2d 372, 385(¶ 40) (Miss.2006) (citation omitted). Additionally, all evidence should be viewed in a light most favorable to the verdict. Jones v. State, 962 So.2d 1263, 1277(¶ 54) (Miss.2007).
>
> *Vickers v. State,* 2008 WL 928536 (Miss.App. 2008).

Based upon the complete transcript, the exhibits and reasonable inferences therefrom ample evidence was presented of such reasonable credibility to support the jury finding of guilty.

Accordingly, if this issue were not procedurally barred it would also be without merit.

Issue IV.

THERE WERE NO ERRORS, NEAR ERROR, OR HARMLESS ERRORS – HENCE, THERE CAN BE NO CUMULATIVE ERROR.

> ¶ 93. "The cumulative error doctrine stems from the doctrine of harmless error ... [which] holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial." Ross v. State, 954 So.2d 968, 1018 (¶ 138) (Miss.2007). However, where there is no error in part, there can be no reversible error to the whole. Gibson v. State, 731 So.2d 1087, 1098(¶ 31) (Miss.1998) (citing McFee v. State, 511 So.2d 130, 136 (Miss.1987)). In this case, there were no errors committed by the trial court, harmless or not, that would warrant reversal. This issue is without merit.
>
> *Vickers v. State*, 2008 WL 928536 (Miss.App. 2008).

It is the position of the State the rationale of *Vickers* is applicable *sub judice*. The procedure of putting a witness on the stand to invoke the fifth before a jury is correct. Further, it was strategically supportive of defendant's case as presented by trial counsel. And, there was ample evidence so the verdict does not manifest an injustice upon defendant.

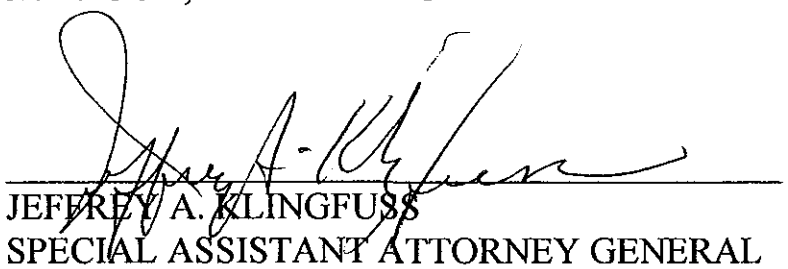
No relief should be granted on this last allegation of error.

## CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the verdict of the jury and sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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## CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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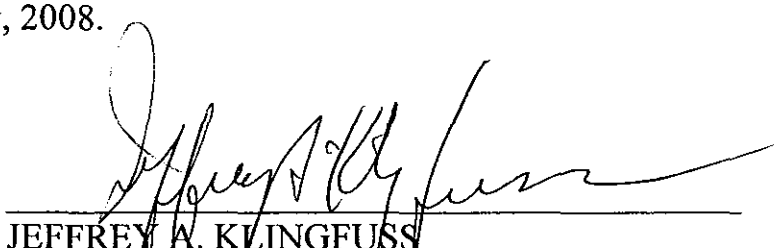
This the 19th day of May, 2008.



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