IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOUGLAS E. JAY, JR. — APPELLANT

V. — CAUSE NO. 2008-KA-01264-SCT

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF THE APPELLANT

APPEAL FROM THE CIRCUIT COURT OF NEWTON COUNTY, MISSISSIPPI

CAUSE NUMBER 04-CR-044-NWG

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TABLE OF CONTENTS

ALPHABETICAL TABLE OF AUTHORITIES

STATUTES AND RULES:

CASELAW:

STATEMENT OF THE ISSUES

The Appellant herein, Douglas E. Jay, Jr., hereby designates his issues to be considered by this Court. These issues are stated hereinbelow.

ISSUE ONE: THE TRIAL COURT ERRED IN NOT GRANTING THE POST-TRIAL MOTIONS OF THE APPELLANT FOR NEW TRIAL, TO SET ASIDE THE JUDGMENT OF CONVICTION, AND/OR TO ALLOW AN OUT-OF-TIME APPEAL.

ISSUE TWO: THE TRIAL COURT ERRED IN NOT CONDUCTING A HEARING IN REGARD TO THE MENTAL COMPETENCY OF THE APPELLANT.

ISSUE THREE: THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE MADE ON BEHALF OF THE APPELLANT.

ISSUE FOUR: THE TRIAL COURT ERRED IN REFUSING TO GRANT THE MOTION FOR RECUSAL.

ISSUE FIVE: THE TRIAL COURT ERRED IN DENYING TO THE APPELLANT HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL BY CONDUCTING THE TRIAL IN THE ABSENCE OF THE APPELLANT.

ISSUE SIX: TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE TO THE APPELLANT PRE-TRIAL BY NOT ADEQUATELY PURSUING MATTERS OF RECUSAL, SUPPRESSION, AND COMPETENCY, AND POST-TRIAL BY NOT FILING AND PURSUING ANY APPEAL OF RIGHT FOR THE APPELLANT.

ISSUE SEVEN: THE INNDICTMENT WAS ENHANCED IMPROPERLY.

ISSUE EIGHT: THE CUMULATIVE EFFECT OF THE ERRORS AT TRIAL AND POST-TRIAL DENIED TO THE APPELLANT HIS FUNDAMENTAL RIGHT OF DUE PROCESS OF LAW AND CONSTITUTED PLAIN ERROR.

Issue One addresses the trial court's rejection of the post-trial motions, including the authority of this Court to proceed. Issues Two, Three, and Four contend that the trial court erred in certain pre-trial matters. Issue Five involves the trial *in absentia* of the Appellant. Issue Six addresses the deficient performance of trial counsel, and Issue Seven involves the enhancement of sentencing, and Issue Eight concerns the effect cumulatively of the errors below.

REPLY TO ARGUMENT OF APPELLEE

ISSUE ONE: THE TRIAL COURT ERRED IN NOT GRANTING THE POST-TRIAL MOTIONS OF THE APPELLANT FOR NEW TRIAL, TO SET ASIDE THE JUDGMENT OF CONVICTION, AND/OR TO ALLOW AN OUT-OF-TIME APPEAL.

The Brief of the Appellant addressed in part the related issues regarding the deficiencies of trial counsel and the trial in absentia of the Appellant, Douglas Jay, Jr. [hereinafter cited as "Jay", "the Appellant", and/or "the Defendant"]. This Reply Brief will likewise involve some common discussion of these issues, and incorporates such argument as a part hereof, as well as discussed hereinbelow.

The Brief of the Appellee properly noted that the motion for new trial itemized nine (9) items for consideration and that the said motion had not been considered prior to June 18, 2008. (CP48-49; *Brief of Appellee*, pp. 6-7) The Appellee then digresses from its course set prior to June 18, 2008, arguing in its brief that the Appellant simply was seeking an avenue for a second appellate action. (*Brief of Appellee*, pp. 7-8) The State now argues that Jay sought to pursue the motion only as a means of filing the current appeal. (*Brief of Appellee*, p.8)

In making this new argument, the State blithely passed off defense counsel's assertion that Rule 4(e), *Mississippi Rules of Appellate Procedure*, barred appellate jurisdiction until all post-trial motions were resolved and that there were some reasons why the motion had not been heard earlier. (*Brief of Appellee*, p.7) The State then declares that defense counsel merely was seeking an order denying the motion. (*Brief of Appellee*, pp.7-8)

However, the State disingenuously fails to mention that, in the previous action before this Court, Special Assistant Attorney General Laura Tedder raised ***exactly*** the same argument in the State's Motion to Dismiss Appeal and supplemental memorandum. (CP129-136) Indeed, Jay's "Memorandum Regarding Hearing of Motion for New Trial" quoted verbatim the very arguments raised by the assistant attorney general as support for Jay's position before the trial court at the June 18, 2008, hearing. (CP120-128) Jay's memorandum included as an attachment a copy of the said motion and memorandum of the Attorney General's office. (CP 129-136)

Further, defense counsel proceeded to address the history of the motion for new trial and the position of Jay, and, by incorporation, of the Attorney General, in regard to the motion and its merits. (T114-119) At that point, the trial judge cut off counsel, requesting an explanation as to why a ruling on the said motion was warranted. (T119) Only after the trial court cut off defense counsel was the matter of the denial of the motion, and the effect thereof, addressed. (T120-121)

Lastly, at no time was the State's position altered, until the Brief of the Appellee herein. Not only had the Attorney General argue that appellate consideration was premature until all pending motions were resolved, (CP129-136), but Hon. Robert Brooks, Assistant District Attorney, admitted that "there was ***no deadline put on hearing the motion for new trial***". (T121) (emphasis added) Mr. Brooks added that "***how long you had to rule on the motion, the rules are completely absent*** [sic] on that."

(T121) (emphasis added) Thus, the State maintained that the right to appeal was on hold until the resolution of the pending motion for new trial.

Defense counsel renewed the argument regarding the various issues in the motion for new trial, noting that the said motion had raised issues not raised in the other post-trial motions. (T124-125) The trial court then summarily overruled the motion, first issuing an order approved as to form by both counsel, and a day later issuing an *sua sponte* order stating that the motion had been dismissed for being heard untimely. (RE27-28; CP137-138)

As cited in the Brief of the Appellant, the trial judge did not simply fail to apply the correct standard; the lower court failed to apply ***any*** standard. This point was illustrated by the June 19, 2008, amended order denying the motion for new trial, in which the trial court stated that the motion was not timely heard. This finding did not comport with applicable standards.

The motion had been filed timely on April 26, 2005, (CP48-49) and Rule 4, *Mississippi Rules of Appellate Procedure*, mandates no time frame for the hearing thereof. Assistant Attorney General Tedder and Assistant District Attorney Brooks acknowledged this in their arguments. ***See also Phelps v. Phelps***, 937 So. 2d 974, 977 ¶¶8-10 (Miss. App. 2006)(notice of appeal filed before disposition of pending post-trial motion is without effect until disposition).

The State has iterated the position that the "right result, wrong reason" theory governs this situation. (*Brief of Appellee*,

pp.8-9) However, this premise assumes that the issues were considered and the proper standards applied. As stated above, such did not occur below. Indeed, counsel was directed ***not*** to address the issues presented to the lower court.

The other post-trial motions should have been sustained, as both involved the matter of the improper trial *in absentia* of the Appellant. Further, in the alternative, if this Court were to determine that there is a time frame for the hearing of post-trial motions, the Appellant would argue that waiver of the said rules should be considered, pursuant to Rules 2(c) and 4(g), *Mississippi Rules of Appellate Procedure*.

As previously noted, trial counsel for Jay had timely filed the motion for new trial, but then inexplicably abandoned the motion. Counsel had a duty to pursue the motion, and the failure to do so should not redound to the Defendant below. ***See Allison v. State***, 436 So. 2d 792, 796 (Miss. 1983)(trial counsel, not hired for appeal, filed timely notice, but failed to pursue appeal and was held in contempt). ***See also Triplett v. State***, 579 So. 2d 555, 557-558 (Miss. 1991)(out-of-time appeal allowed where trial counsel did not file appeal, after having agreed to do so).

This Court should reverse the ruling of the lower court in regard to the post-trial motions and rule in favor of Jay. In the event of any finding that there is a time frame for hearing such motions, this Court should waive the procedural rules and rule in favor of the Appellant in regard to the issues raised in the said motions and this appeal.

ISSUE TWO: THE TRIAL COURT ERRED IN NOT CONDUCTING A HEARING IN REGARD TO THE MENTAL COMPETENCY OF THE APPELLANT.

In its brief, the State asserts that the trial court is not obligated to conduct a competency hearing, merely because it had earlier directed an evaluation of the mental state of a defendant facing trial. (*Brief of Appellee*, pp.11-12) Further, the State argues that there was nothing in the record to indicate mental deficiency on Jay's part and that the receipt of the evaluation ***after*** the beginning of the trial was of no import. (*Brief of Appellee*, p.12)

In support of its assertion, the State posits ***Evans v. State***, 984 So. 2d 308 (Miss. App. 2007). According to the State, ***Evans*** held that, if there is no threshold finding by the trial court that a defendant is incompetent to stand trial, then there is no obligation to conduct a competency hearing, notwithstanding a prior order for a mental evaluation. ***Id.*** at 312-313. The State argues in the instant case that the lower court made no such threshold finding. (*Brief of Appellee*, pp.11-12)

The State sails over one salient point in its argument. The ***Evans*** principle cited by the State applies where the preliminary psychiatric evaluation is ordered "***without a reasonable question as to the defendant's competency***". ***Id.*** (emphasis added) As shown in the Brief of the Appellant, such was not the case below.

Dr. Stuart Yablon, Director, The Brain Injury Program, Methodist Rehabilitation Center, specifically wrote that Jay suffered from severe brain trauma, including "cognitive, motor, functional, and sensory deficits" and was "unable to participate

in any court proceedings at this time." (CP9-11A) Defense counsel moved to continue the trial to enable Jay to continue treatment and to receive psychiatric examinations. (CP9-11) There was time in the same court term and in the following terms in June, August, October, and November of 2008. *Brief for the Appellant*, p.26) There was no controversy regarding Jay's brain damage.

The order for a mental evaluation was entered, ***on the State's motion***, on April 6, 2005. (CP12-13) The assessment was made on Thursday, April 7, 2005, and the report was filed on Wednesday, April 13, 2005, two (2) days ***after*** the trial on Monday, April 11, 2005. (CP37-41)

Further, on April 11, 2005, the Appellant did not appear for the trial when called by the court. Assuming that the report was filed when received and not held by the Circuit Clerk, the matter of the evaluation requested by the State was still unresolved. Notwithstanding this uncertainty, and notwithstanding the uncontradicted brain injury of the Appellant, the trial judge proceeded to trial and never considered the mental state of the Appellant to assist in his defense.

Thus, as noted in ***Evans***, there was a reasonable question as to the competency of Jay to proceed with his defense. As of April 11, 2005, there still was of record no contradiction to the position of defense counsel, and, indeed, the State itself had sought the mental evaluation ordered by the lower court. The brain damage to Jay and the opinion of Dr. Yablon both created a "reasonable question" necessitating a hearing.

The State further argues that this Court "must assume that the trial court objectively considered all the facts … which bore upon the defendant's competence." (*Brief of Appellee*, p.12) (**quoting *Magee v. State***, 914 So. 2d 729, 736 (Miss. App. 2005). ***Magee*** cited ***Conner v. State***, 632 So. 2d 1239, 1251 (Miss. 1993). However, this rule merely states that a mental evaluation standing alone, with no other indicia of incompetence, does not in itself warrant a competency hearing. In this case, neither ***Evans*** nor ***Magee*** would preclude a competency hearing, as there were ample grounds for further inquiry.

Further, this ***Conner*** cite was a concluding postlude to an rejection of an argument that a trial judge should have ordered *sua sponte* a competency hearing, despite there having been made no request therefor by the defense. In ***Conner***, there had been an evaluation ordered a month after the arrest of the defendant, in advance of the trial. ***Conner***, 632 So. 2d at 1247-1248. A report to the trial judge several weeks later apprised the court of the staff's opinion that the defendant was competent to stand trial. ***Id.*** at 1251.

This Court cited the obligation of lower courts to determine capacity, even on the court's own motion. ***Id.*** at 1248. The Court then cut to the chase: "The real question, therefore, is whether 'reasonable grounds" existed to believe that Conner was insane." ***Id.*** ***Conner*** then cited federal authorities with approval, stating:

> Did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about the

> defendant's competence and alerted him to the possibility that the defendant could neither understand the proceedings, appreciate their significance, nor rationally aid his attorney in his defense?

Id. **(quoting *Lokos v. Capps*,** 625 F.2d 1258, 1261 (5th Cir. 1980)).

The ***Conner*** Court found that there were ample grounds indicating that the defendant was competent, thereby vitiating the need for a hearing. Chief among these grounds was the report from the hospital well in advance of the trial.

To the contrary, the trial court hereinbelow had no such report prior to trial. The lower court did have a report from Dr. Yablon and a request from counsel stating that Jay could not assist with his defense, capped by Jay's absence, inexplicable except in context of his brain injury and faulty perception.

This Court will overturn a finding of competency to stand trial only when "that finding was 'manifestly against the overwhelming weight of the evidence.'" **Bridges v. State**, 807 So. 2d 1228, 1230 ¶10 (Miss. 2002) **(quoting *Emanuel v. State*,** 412 So. 2d 1187, 1188-89 (Miss. 1982)) The standard for competence to stand trial is whether a defendant possesses "sufficient present ability to consult with this lawyer with a reasonable degree of understanding." ***Martin v. State*,** 871 So. 2d 693, 698 ¶17 (Miss. 2004) **(quoting *Dusky v. United States*,** 362 U.S. 402 (1960)).

Drope v. Missouri*,** 420 U.S. 162, 171 (1975) addressed a situation similar to that of the Appellant, wherein the Supreme Court held that a further inquiry was required once the issue became known to the trial court. The failure to do so denied a fair trial to the defendant. ***Id. at 174-175.

Citing ***Conner***, a 1997 decision stated that the test for competency to stand trial

> mandates that a defendant be one "(1) who is able to perceive and understand the nature of the proceedings; (2) who is able to rationally communicate with his attorney about the case; (3) who is able to recall relevant facts; (4) who is able to testify in his own defense if appropriate; and (5) whose ability to satisfy the foregoing criteria is commensurate with the severity and complexity of the case."

Howard v. State, 701 So. 2d 274, 280 (Miss. 1997)(**quoting** ***Conner v. State***, 632 So. 2d 1239, 1248 (Miss. 1993)). Following this inquiry, "[w]here facts appear on the record which, when objectvely considered, reasonably raise the question of a defendant's competence to stand trial or to continue to represent himself, the trial court is obligated by Rule [9.06] to order a competency hearing. ***Howard***, 701 So. 2d at 282.

In ***Conner*** and ***Howard***, no hearings were held on the competency of the defendants, each of whom had been subjects of mental evaluations. Unlike ***Conner***, the ***Howard*** counsel had made several efforts to explain to the court the difficulties in communicating with the defendant. ***Howard***, 701 So. 2d at 281.

In reversing the conviction, in part due to the lack of a competency hearing, the Court observed "that the defendant's court-appointed counsel is in the best position to know whether or not the defendant is mentally capable of executing a knowledgeable waiver of counsel." ***Id.*** (**citing** ***Metcalf v. State***, 629 So. 2d 558, 563 (Miss. 1993)). The Court expanded beyond the issue of waiver of counsel, noting that the same analysis was applicable to the issue of competency to conduct his own trial.

Id. at 284. Further, the record indicated instances of behavior which reasonably raised questions of the defendant's competence. ***Id.*** at 282. Based upon the indications found in the record and upon the concerns expressed by counsel, this Court said:

> The court below could not have known whether Howard was capable of knowingly and intelligently waiving the right to counsel, ***as a competency hearing should have been ordered*** before or during the proceedings. The failure to do so, under these circumstances, constitutes error.

Id. at 284. (emphasis added)

As set forth hereinabove, ample questions were raised in regard to Jay's competence prior to trial. Dr. Yablon's report clearly raised "reasonable doubt" of Jay's ability to perceive the nature of the proceedings and to communicate in a rational manner with counsel. Jay's memory capacity was significantly affected by his brain injury, calling into doubt Jay's ability to assist with and/or testify about issues of fact in his case, including dates, times, events, and names of witnesses. Finally, the complexity and severity of a case with possible sentences of decades in length were not within the ambit of Jay's capacity.

Before trial began on April 11, 2005, defense counsel's motion and Dr. Yablon's report were the only matters of record. Counsel was certainly in a better position to know Jay's ability than the lower court. At the very least, a question was presented. By Fifth Circuit analysis, the court had received information which, considered objectively, would have alerted the court to the need of a hearing. This Court should reverse this cause for further proceedings, including a competency hearing.

ISSUE THREE: THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE MADE ON BEHALF OF THE APPELLANT.

Talismanic terminology has been discounted in the review of probable cause determinations. The mere recitation by an officer that an informant has previously provided information does not suffice under the analysis.

Even where subsequently-found facts support the claims of the informant, the search warrant is to be predicated upon the veracity and reliability of the informant *ante* warrant, along with other information provided to the issuing court. ***State v. Woods***, 866 So. 2d 422, 426-427 ¶14 (Miss. 2003). Without any corroborating evidence in the affidavit showing that the informant was reliable and truthful, there is insufficient probable cause, even though the informant had personally seen the contraband and provided an accurate address. ***Id.*** at 427 ¶¶14, 16. **See *Phinizee v. State***, 983 So. 2d 322, 328 20 (Miss. App. 2007)(affidavit including information from unnamed informants also contained personal observations of officers); ***Roach v. State***, 2007 WL 2367757 ¶¶16; 20-21 (Miss. App. 2007) (officer cited prior use of informant he had just met; that other information was accurate did not overcome lack of indicia of veracity); ***Rainer v. State***, 944 So. 2d 115, 118 (Miss. App. 2006)("reasonableness of official suspicion must be measured by what the officers knew before they initiated the search"). **See also *Florida v. J.L.***, 529 U.S. 266, 271 (2000)(anonymous uncorroborated tip, despite being accurate, did not suggest officers had a reasonable basis of suspecting criminal activity;

"reasonableness of official suspicion must be measured by what the officers knew before they conducted their search.").

In its brief, the State asserts that the information contained in the underlying facts and circumstances was sufficient. (*Brief of Appellee* pp. 13-14) However, as read by both defense counsel (T53-55) and the prosecutor, (T57) only a perfunctory "proven to be trustworthy/reliable information in the past" statement was included. The prosecutor noted that the facts sheet "meets everything in the well-known two-point test." (T57) he then states the entire spectrum of indicia of reliability presented to the issuing judge:

> The next part of the two-point is the -- uh -- veracity. Your Honor, this -- he says -- he vouches for the C.I.'s veracity by stating that he is trustworthy, and the reason that he is trustworthy is that he has given me -- or she, has given me reliable information in the past.

(T57) Thus, the prosecutor acknowledged defense counsel's assertion that the facts sheet failed to mention that any reliable information leading to arrests or convictions. (T54-55)

The State correctly asserts that ***Illinois v. Gates***, 462 U.S. 213 (1983), sets criteria for the analysis of information given to an issuing magistrate. (*Brief of Appellee*, pp.14-15) The ***Gates*** Court, however, decried the use of what it called "bare bones" affidavits with language asserting that officers had "received reliable information from a credible person". 462 U.S. at 239. The Court added that "an affidavit relying on hearsay 'is not to be deemed insufficient on that score, ***so long as a substantial basis for crediting the hearsay is presented***'" and

that "an officer 'may rely upon information received through an informant, rather than upon his direct observations, ***so long as the informant's statement is reasonably corroborated*** by other matters within the officer's knowledge.'" ***Id.*** at 241 (**quoting *Jones v. United States***, 362 U.S. 257, 269 (1960)). (emphasis added) Such corroboration was not present below, as admitted by the prosecutor in his argument to the trial court.

This Court has noted that, post-***Gates***, federal courts still hold "that ***there must be some corroboration*** to support a search warrant which relies upon an unknown confidential informant's statement." ***State v. Woods***, 866 So. 2d 422, 427 ¶19 (Miss. 2003). (emphasis added) Citing several cases, this Court concluded that, "even if ***Gates*** abandoned the requirement of indicia of reliability for unknown CIs, ***courts have still placed great emphasis on corroboration of an unknown CI's information***. ***Id.*** (emphasis added)

The State asserts that the Appellant's reliance upon ***Roebuck v. State***, 915 So. 2d 1132 (Miss. App. 2005) is misplaced because of "one MAJOR difference between the facts" of the two cases. (*Brief of Appellee*, p.15)(emphasis theirs) According to the State, Deputy Mark Spence's assurance to the issuing judge that the informant was trustworthy and had given reliable information in the past made the difference between ***Roebuck*** and Jay's case. (Brief of Appellee, p.15)

However, as declared in ***Gates***, more than such "bare bones" affidavits are required; substantial corroboration is needed. In

the instant case, there was ***no substantial*** corroboration; indeed, there was ***no*** corroboration.

Contrary to the State's assertion, ***Roebuck*** is most instructive in this cause. Further, ***Roebuck*** expands upon the ***Gates*** and ***Woods*** requirements of corroborative information, rather than mere "bare bones" averments. In essence, ***Roebuck*** sets three (3) means of substantially crediting hearsay from an informant:

> That substantial basis has been overcome [1] where *the* ***affidavit contains a statement that an officer has successfully used a confidential informant to prosecute criminal allegations in the past.*** [cit. om.] Similarly, it is sufficient [2] ***where an affidavit contains corroborating evidence to show a confidential informer is truthful and reliable.*** [cit. om.] Where a request for a search warrant relies on information relayed by a confidential informant, probable cause for the issuance of a search warrant exists [3] where law enforcement ***independently corroborates a confidential informer's statements.*** The common factor is that, by affidavit or oral testimony, law enforcement must present in issuing judge with some "indicia of veracity or reliability" supporting the confidential informant's allegation. [cit. om.]

Roebuck at 1137 ¶15. (emphasis added) The Court went further, noting that the mere absence of the word "reliable" was not at fault. Rather,

> [w]e find fault in the search warrant because ***nothing before Judge Graham suggested that the informant's information was reliable or true. Further none of the methods of demonstrating veracity or reliability were before Judge Graham.***

Id. at 1140 ¶25. (emphasis added) ***See Wilbourn v. State***, 394 So. 2d 1355, 1358 (Miss. 1981)(underlying facts and circumstances cannot be supplemented by sworn testimony).

Roebuck provides clear guidance to the deficiencies in the issuance of the search warrant below. Based upon no more than the

bare bones assertion that the informant had been reliable, the officers presented rank hearsay to the magistrate. The warrant should not have been issued, due to the lack of corroborative information establishing credibility of an unknown informant's hearsay statements.

Links in the chain of events support the suppression of the statements from Jay. The improper affidavit led to the improper search warrant, which, in turn, led to the improper search of the Jay residence. After the improper acquisition of the alleged contraband, the officers threatened to arrest the girlfriend of the Appellant for possession of items improperly found and seized by the officers. Jay's statement followed the improper seizure of the items and the pressure applied as to the girlfriend.

As argued previously by Jay, illegality of the search warrant led to the statement. Regarding illegal arrests, this Court has stated that, "if the circuit court should find no probable cause existed, then it shall deem the arrest warrant illegal, and the [defendant's] confession inadmissible under he 'fruit of the poisonous tree' doctrine." ***Conerly v. State***, 760 So. 2d 737, 742 ¶17 (Miss. 2000). The burden of proving each factor of a legal arrest is upon the State, which also bears the burden of persuasion that factors favoring admissibility outweigh those in favor of inadmissibilty. ***Id***. at 741 ¶11.

This Court should rule that the search warrant was improper and should find inadmissible the search and the evidence derived therefrom. Without such evidence, this Court should rule for Jay.

ISSUE FOUR: THE TRIAL COURT ERRED IN REFUSING TO GRANT THE MOTION FOR RECUSAL.

The State has noted that trial counsel did not append to the motion for recusal an affidavit setting forth grounds in favor thereof. (*Brief of Appellee*, p. 17) In the Brief of the Appellant, this matter was addressed. However, the motion was considered by the lower court, with counsel present, thereby moving beyond the threshold requirement of an affidavit. The State did not object, from the record, and the lower court heard the matter. The affidavit requirement was not jurisdictional.

The general rule regarding recusal "is not whether the judge committed any wrongdoing, for example, by acting partial or biased. Rather, ***the issue is whether a 'reasonable person,*** knowing all the circumstances, ***would harbor doubts about [the judge's] impartiality.'"*** ***Davis v. Neshoba County General Hospital***, 611 So. 2d 904, 906 (Miss. 1992)(**quoting** ***Jenkins v. State***, 570 So. 2d 1191, 1192 (Miss. 1990)). The presumption that a judge is unbiased "may only be overcome by evidence which produces a reasonable doubt about the validity of the presumption." ***Shumpert v. State***, 983 So. 2d 1074, 1078 ¶14 (Miss. App. 2008).

Recently, this Court announced that "recusal is required only where the judge's conduct would lead a reasonable person, knowing all the circumstances, to conclude that the 'prejudice is of such a degree that it adversely affects the client.'" ***Mississippi United Methodist Conference v. Brown***, 929 So. 2d 907, 909 ¶6 (Miss. 2006). This reasonable person standard has recently

been applied in the criminal law context. **See *Scott v. State***, 2008 WL 711879 ¶20 (Miss. App. 2008)(error not to recuse after defense counsel had informed judge of defendant's confession).

In considering recusal, this Court looks not only to the motion, but also to the "trial as a whole" to examine all the rulings and to determine if prejudice inured to the movant. ***Jones v. State***, 841 So. 2d 115, 135 ¶60 (Miss. 2003). A review of this record supports the claims of trial counsel.

In addition to grounds cited in the motion, the record reflects the failure of the judge to continue the trial more than fifteen minutes after Jay's absence. The court refused several requests for continuances, due both to Jay's absence and his brain injury. The judge ordered a trial *in absentia* without a preliminary hearing, per caselaw, and denied the motion to suppress, notwithstanding the improper search warrant.

After the State rested, the court asked counsel if Jay would testify, fully aware of his absence. At the sentencing, the trial court stated that Jay had notice of the sentencing hearing, despite the trial *in absentia* and the colloquy with counsel regarding Jay's absence. No hearing as to Jay's competency to stand trial was conducted, pursuant to Rule 9.06, notwithstanding Dr. Yablon's report, and in spite of the filing of Dr. Mark Webb's report two days after the trial.

Further, at the hearing on the motion for new trial on June 18, 2008, the judge explained that trial counsel had not called for hearing the motion because counsel was hired and did not know

of Jay's whereabouts. (T120) Finally, the court entered a *sua sponte* order on June 19, 2008, without notice to defense counsel, declaring that the motion was denied for grounds not recognized by statute or rule. (RE28; CP138)

Proceeding to trial *in absentia* denied Jay the right to confront witnesses, to assist in his defense, and to testify both in the suppression hearing and at trial. Further, the failure to conduct a preliminary hearing as to competency to stand trial put Jay at jeopardy, which was exacerbated by his absence.

Incorporated as part of the consideration of this issue is the argument offered in the earlier brief and in this reply as to Issues Two, Three, and Five, regarding mental competency, admissibility of evidence, and trial *in absentia*. Based upon the record as a whole, recusal was clearly warranted and should be directed, upon reversal.

ISSUE FIVE: THE TRIAL COURT ERRED IN DENYING TO THE APPELLANT HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL BY CONDUCTING THE TRIAL IN THE ABSENCE OF THE APPELLANT.

The State opined that "[t]here can be no explanation for Jay's absence at trial other than his own willful, voluntary, and deliberate actions." (*Brief of Appellee*, pp. 19-20) The State also observed that "a review of the record as a whole indicates that Jay was given a fair trial. No errors, reversible or harmless, were made." (*Brief of Appellee*, p.21)

As to the latter assertion, the Appellant would argue that this conclusion is inaccurate and is within the purview of this Court. The record is replete with denials of a fair trial, as set

forth in this Reply Brief and in the earlier Brief for the Appellant filed herein, which are incorporated herein.

Regarding the former assertion, there are several reasons which could explain Jay's absence. The simplest and most obvious is the reason cited to the trial court by trial counsel and Dr. Stuart Yablon: Jay was brain-damaged and not capable of aiding and assisting in his defense and in thinking clearly.

This Court rendered the decision of ***Jefferson v. State***, 807 So. 2d 1222 (Miss. 2002), creating an exception to ***Sandoval v. State***, 631 So. 2d 159 (Miss. 1994). ***Sandoval*** had held that felony cases should not be tried in absentia. 631 So. 2d at 164. ***Jefferson*** expressly did not overrule ***Sandoval***, but, rather, made an exception in a case in which the defendant had announced in advance his intention to flee and in which the defendant suffered no prejudice. 807 So. 2d at 1226-1227 ¶¶14-15, 17-18.

In the instant proceeding, Jay was diagnosed with brain damage and cognitive and memory defects. Also, Jay's case proceeded to trial in 15 minutes, whereas the trial in ***Jefferson*** was continued twice after his absence for two (2) days. In ***Jefferson***, the absence was premeditated. No proof of such was adduced in Jay's case. Further, the lower court herein no hearing by which any proof regarding Jay's absence could be adduced. In ***Jefferson***, the proof regarding the defendant's absence was obtained via a hearing. Finally, Jay suffered the conviction for all three narcotics counts and received a 31-year sentence, where the defendant in ***Jefferson*** was convicted on a lesser charge.

As noted above, ***Sandoval*** was not overruled by ***Jefferson***, and, at the time of Jay's trial on April 11, 2005, was good law. This point was expressed in ***Sessom v. State***, 942 So. 2d 234, 237 ¶11 (Miss. App. 2006), wherein the Court of Appeals acknowledged that the trial court had no authority to try the defendant in his absence in May, 2004, because the amended statute permitting such trials was not effective until July 1, 2005.

The State suggests that Jay suffered no prejudice from his absence. (Brief of Appellee, pp. 20-21) This ignores the various comments by the court and trial counsel to the jury. The State even quotes the trial judge's comment that "***if there's any harm that comes from him not being here, he's the one that caused it.***" (Brief of Appellee, p.21; T89)(emphasis added) The court called the absence of Jay to the jury's attention several times, as noted in the earlier brief, and trial counsel even asked the jurors to consider his being "in a predicament" representing an absent client. (T97)

Jefferson deemed a conviction on a lesser offense as proof of "no prejudice". Jay, however, was hammered at sentencing, following his conviction on the three narcotics counts. Jay's absence precluded his taking part, to the extent possible given his condition, in pursuing his motions to suppress and for mental treatment, and from assisting in his sentencing hearing.

This Court should consider the rule set forth in ***Sandoval*** and its progeny, still in effect in April, 2005. In the light thereof, reversal is warranted.

ISSUE SIX: TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE TO THE APPELLANT PRE-TRIAL BY NOT ADEQUATELY PURSUING MATTERS OF RECUSAL, SUPPRESSION, AND COMPETENCY, AND POST-TRIAL BY NOT FILING AND PURSUING ANY APPEAL OF RIGHT FOR THE APPELLANT.

In the Brief for the Appellant, Jay detailed several examples from the record that are illustrative of the defects in representation below by trial counsel. In summary, counsel below failed to pursue the appeal, to call for hearing the motion for new trial, and to comply with recusal requirements.

Trial counsel further failed to address issues regarding suppression of evidence. Counsel made no pretrial motion regarding suppression, waiting instead until trial had commenced to challenge the admission of contraband and a statement.

Counsel requested no hearing as to the mental competency of the Appellant, making only a late motion for a continuance for treatment to continue. Its sentencing impact was also ignored. Counsel thus knew of Jay's condition, as evidenced by the report of Dr. Stuart Yablon. Jay's injuries were received in a beating in September, 2004, and he had been receiving treatment and rehabilitation between the September, 2004, attack and the April 11, 2005, trial. (CP9-13) The motion was filed on Thursday, April 7, 2005, just prior to trial on Monday, April 11, 2005.

Most dramatically, counsel below commented to the jury at least three times as to Jay's absence, despite instructions from the court for the jury to disregard the absence. During voir dire, counsel's comments that "I don't have a client right now" and it "would be unnatural for you not to question why my client might not be here" (T18) amplified the absence of the Appellant.

During closing argument, counsel reminded the jury that he was in predicament "having to represent somebody that's not here." (T97)

Also incorporated herein is the argument made heretofore in this Reply Brief and in the Brief of the Appellant regarding Issues One through Seven, inclusive. These arguments have also noted deficiencies in the performance of trial counsel.

The State accurately cites the standard for review of this issue on direct appeal. This issue is usually reserved for review pursuant to a complaint for post-conviction collateral relief. However, where

> (1) the record affirmatively show ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge.

Colenburg v. State, 735 So. 2d 1099, 1101 ¶5 (Miss. App. 1999)(**citing *Read v. State***, 430 So. 2d 832, 841 (Miss. 1983)). In essence, the trial court may be held to have erred in not having *sua sponte* declared a mistrial due to inadequacy of counsel. ***Id.*** at 1102 ¶8. When an appellate court faces the issue on direct appeal, it looks solely to the record and, if the matter is not apparent of record, the matter is reserved for further review under post-conviction relief provisions. ***Id.*** at 1101-1102 ¶5.

In considering the issue of adequacy of counsel, the test is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. ***Ross v. State***, 954 So. 2d 968, 1003 ¶77 (Miss. 2007). The standard for review thereof is:

> The defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case. [cit. om.] To establish deficient performance, a defendant must show that his attorney's representation fell below an objective standard of reasonableness. [cit. om.] To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. [cit. om.] A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 1003-1004 ¶78. The ***Ross*** Court reversed, due to the failure of defense counsel to conduct adequate investigation into defendant's mental condition and mitigating factors. ***Id.*** at 1006 ¶88. **See *Nealy v. Cabana***, 764 F.2d 1173, 1180 (5th Cir. 1985)(counsel's failures to contact potential witnesses, while not being "shown by a preponderance of the evidence to have determined the outcome of Nealy's trial, … were of sufficient gravity to undermine the fundamental fairness of the proceeding", thus necessitating a new trial).

In a 1987 case, this Court held that reversal was merited by the open-court, bench-trial declaration by trial counsel that the defendant was lying. ***Ferguson v. State***, 507 So. 2d 94, 95 (Miss. 1987). The court found that such conduct embodied inadequacy of counsel, noting that it was "an evil of such magnitude that no showing of prejudice is necessary." ***Id.*** at 97. Such conduct denied the defendant a fair trial. ***Id.***

Before this Court is a record showing inaction, delay, and lack of effort in pursuing obvious courses of action. Compounding the matter was the effective admission of guilt by counsel to the jury in closing arguments. **See *Faraga v. State***, 514 So. 2d 295,

308 (Miss. 1987). This Court should address inadequacy of counsel on direct appeal and rule that trial counsel's performance below was deficient, pursuant to ***Ross*** and ***Colenburg***. Upon such a review, this Court should reverse and remand for a new trial.

ISSUE SEVEN: THE INNDICTMENT WAS ENHANCED IMPROPERLY.

The State argues that ***Hentz v. State*** , 852 So. 2d 70, 76 ¶17 (Miss. App. 2003) is inapplicable to the position of Jay that the enhancement terms should have been included in the charging terms of the indictment below. (*Brief of Appellee*, p.25) The State adds that the Uniform Rules of Circuit and County Court Practice provide that the form is proper, as long as sufficient information is provided thereby. (*Brief of Appellee*, pp. 25-27)

However, ***Hentz*** was cited as support for the position that enhancement should be included with charging terms. (*Brief of the Appellant*, p.50) The ***Hentz*** Court held that the matter had been waived, then, as dictum, noted that the indictment had been valid. The point was made that the proper procedure was, in the future, to include both charging and enhancement terms. In particular, in this cause, the indictment contains several counts, a separate enhancement paragraph, and unclear language as to whether the separate paragraph applies to one or more of the counts charging separate offenses.

The issue is whether the terms appropriately apprise Jay of the charges, and the sentencing potential, facing him. ***Hentz*** says that the language used was not proper. This Court should likewise follow this principle.

ISSUE EIGHT: THE CUMULATIVE EFFECT OF THE ERRORS AT TRIAL AND POST-TRIAL DENIED TO THE APPELLANT HIS FUNDAMENTAL RIGHT OF DUE PROCESS OF LAW AND CONSTITUTED PLAIN ERROR.

The State asserts that the cumulative errors below were not raised at the trial court level. (*Brief of Appellee*, pp.27-28) However, trial counsel filed on April 26, 2005, his "Motion for New Trial", which included a laundry list of errors alleged to have occurred during the proceedings. (CP48-49) This motion was called for hearing and heard on June 18, 2008, and was denied. (RE27-28; CP137-138)

The trial court cut off the argument of defense counsel when the matters were presented on June 18, 2008. (T119) The lower court was interested only in the timing of the hearing, not the hearing itself. (T199-120) To argue that the matters were not raised below is specious. If anything, the reticence of the court to consider the matters is indicative of the cumulative effect of the errors below.

Regardless of any alleged bar, "[t]his Court has recognized an exception to procedural bars when a fundamental constitutional right is involved." ***Conerly v. State***, 760 So. 2d 737, 740 ¶5 (Miss. 2000)(**quoting** ***Maston v. State***, 750 So. 2d 1234, 1237 (Miss. 1999)). "[P]lain errors of sufficient constitutional importance are likely to affect the outcome of a case and may be addressed for the first time by this Court upon appeal."

Cumulative errors may justify reversal if a fair trial is denied. ***Glasper v. State***, 914 So. 2d 708, 728 ¶45 (Miss. 2005). This cause should thus be reversed and remanded for a new trial.

CONCLUSION

Post-trial motions below were not properly considered and were resolved summarily and did not comport with the proper standards for consideration. The merits of the motion for new trial were not given any hearing, as the trial judge flatly stated that he had no interest therein.

Further, this Court should find that no competency hearing was conducted and that the record indicates that such failure was error. Such failure denied Jay a fair trial.

This Court should find that the trial court erred in admitting the contraband and Jay's statement as poisoned fruit. The search warrant was improperly granted, and the resultant items and statements should be inadmissible.

Regarding the conduct of the trial, the trial judge should have recused himself and should not have proceeded to trial *in absentia*, pursuant to ***Sandoval***. An evidentiary hearing to determine the cause of Jay's absence should have been conducted, at the very least.

The Court should also evaluate counsel's performance on direct appeal and find it deficient and a denial of a fair trial. The integrity of the adversarial process clearly was in question.

The indictment was likewise improper, and should be dismissed. Finally, this Court should rule that the cumulative effect of these errors denied Jay a fair trial.

The judgment below should be reversed and rendered. In the alternative, remand for a new trial should be directed.

SUBMITTED on this, the 1st day of April, 2009.

Respectfully,

HENRY W. PALMER
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CERTIFICATE OF SERVICE

This is to certify that I have on this date served true and correct copies of the above and foregoing document upon the following:

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