

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

**KEVIN EUGENE OWEN**

**APPELLANT**

**V.**

**NO. 2008-KA-1469-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

---

**BRIEF OF THE APPELLANT**

---

**MISSISSIPPI OFFICE OF INDIGENT APPEALS**

**Erin E. Pridgen, MS Bar No. [REDACTED]  
301 North Lamar Street, Suite 210  
Jackson, Mississippi 39201  
Telephone: 601-576-4200**

**Counsel for Kevin Eugene Owen**

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEVIN EUGENE OWEN

APPELLANT

V.

NO. 2008-KA-1469-COA

STATE OF MISSISSIPPI

APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Kevin Eugene Owen, Appellant
3. Honorable John Mark Weathers, District Attorney
4. Honorable Robert Helfrich, Circuit Court Judge

This the 13<sup>th</sup> day of January, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



Erin E. Pridgen  
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
301 North Lamar Street, Suite 210  
Jackson, Mississippi 39205  
Telephone: 601-576-4200

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE ISSUES .....	1
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS .....	2
SUMMARY OF THE CASE .....	4
ARGUMENTS .....	5
I. THE TRIAL COURT MISAPPLIED THE LAW WHEN DENYING KEVIN'S MOTION TO SUPPRESS THE PREJUDICIAL SHOW-UP IDENTIFICATION BECAUSE THE IDENTIFICATION WAS SO UNNECESSARILY SUGGESTIVE AND CONDUCTIVE TO IRREPARABLE MISTAKEN IDENTIFICATION AS TO BE A DENIAL OF DUE PROCESS OF LAW. ....	5
II. THE TRIAL COURT MISAPPLIED THE LAW IN FINDING CHARLES STREET WAS AN UNAVAILABLE WITNESS, THUS VIOLATING KEVIN'S CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSERS .....	8
CONCLUSION .....	12
CERTIFICATE OF SERVICE .....	13

## **TABLE OF AUTHORITIES**

### **CASES**

<i>Bell v. State</i> , 928 So. 2d 951 (Miss. Ct. App. 2006) .....	12
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) .....	10
<i>Floyd v. City of Crystal Springs</i> , 749 So. 2d 110 (Miss. 1999) .....	5
<i>Foster v. California</i> , 394 U.S. 440, 443, 89 S. Ct. 1127, 22 L.Ed 2d 402 (1969) .....	6
<i>Hillard v. State</i> , 950 So. 2d 224 ( Miss. Ct. App. 2007) .....	11
<i>Lynch v. State</i> , 877 So. 2d 1254 (Miss. 2004) .....	8
<i>Morris v. State</i> , 963 So. 2d 1170 (Miss. Ct. App. 2007) .....	5
<i>Neil v. Biggers</i> , 409 U.S. 188, 198, 93 S.Ct. 375, 382 (1972) .....	6
<i>Roche v. State</i> , 913 So. 2d 306 (Miss. 1982) .....	6
<i>Turner v. State</i> , 945 So. 2d 992 (Miss. Ct. App. 2007) .....	5
<i>York v. State</i> , 413 So. 2d 1372 (Miss. 1982) .....	6

### **STATUTES**

Mississippi Code Annotated Section 97-3-79 (Rev. 2006) .....	1
--	---

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEVIN EUGENE OWEN

APPELLANT

V.

NO. 2008-KA-1469-COA

STATE OF MISSISSIPPI

APPELLEE

---

BRIEF OF THE APPELLANT

---

**STATEMENT OF THE ISSUES**

**I. THE TRIAL COURT MISAPPLIED THE LAW WHEN DENYING KEVIN'S MOTION TO SUPPRESS THE PREJUDICIAL SHOW-UP IDENTIFICATION BECAUSE THE IDENTIFICATION WAS SO UNNECESSARILY SUGGESTIVE AND CONDUCTIVE TO IRREPARABLE MISTAKEN IDENTIFICATION AS TO BE A DENIAL OF DUE PROCESS OF LAW.**

**II. THE TRIAL COURT MISAPPLIED THE LAW IN FINDING CHARLES STREET WAS AN UNAVAILABLE WITNESS, THUS VIOLATING KEVIN'S CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSERS.**

**STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Forrest County, Mississippi, where Kevin Eugene Owen was convicted of armed robbery, in violation of Mississippi Code Annotated Section 97-3-79 (Rev. 2006). Circuit Court Judge Robert B. Helfrich presided over the jury trial held July 22-24, 2008. The jury rendered a guilty verdict and sentencing took place on July 28, 2008. The court sentenced Owen to serve twenty-five years under the supervision of the Mississippi Department of Corrections. Owen is currently incarcerated with the Mississippi Department of Corrections.

Owen filed his motion for new trial, or in the alternative, motion for JNOV on August 1, 2008. The court denied this motion and Owen timely files this appeal.

### **STATEMENT OF FACTS**

In the late night hours on May 1, 2008, Kevin Owen casually walked down Broadway Street in Hattiesburg, MS, when Hattiesburg Police Department officers unexpectedly stopped him and later accused of a crime that could have landed him in jail for the rest of his life.

Kevin had only lived in Hattiesburg for about 1 ½ years. [Tr. 449] He rented a room at the Broadway Inn on Broadway Drive and worked a local construction job. [Tr. 439] As he walked down the street to visit an acquaintance, two Hattiesburg police officers stopped him and conducted a field contact report. [Tr. 195]

There had been an armed robbery of the local Circle K convenience store, located on the corners of Broadway and Lincoln Drives. [Tr. 136] Officers Zachary Robinson and Earthy Donald were searching the area for possible suspects. [Tr. 194] There was conflicting trial testimony as to whether Officers Robinson and Donald had a description of the suspected robber at the time they stopped Kevin. [Tr. 195, 227] According to Officer Donald, the only description he had at the time he approached Kevin was that the suspect was a white male who was possibly still in the vicinity of the store. [ Tr. 195]

Kevin cooperated and provided his personal information when questioned by the officers. [Tr. 207] The officers left the area and continued to the Circle K to view the store's surveillance tape and to speak with the store's clerk, Paul Holmes.

According to Holmes, he was in the store alone around 1:00a.m., when an armed white male entered the Circle K convenience store and robbed him of \$66.00. [Tr. 136] The robber's face and head were not visible because the man wore a head rag and covered his nose and mouth with his

shirt. [Tr. 137]

The police, along with Holmes viewed the store's surveillance tape many times. [Tr. 139] After viewing the tape, the officers believed Kevin's clothing was similar to the robbery suspect's clothing in the video. [Tr. 197] The officers relocated Kevin still walking on Broadway Street and placed him under arrest. [Tr. 197-98]

The police did not take Kevin to the police precinct to conduct a photo lineup for identification. Instead, the police drove Kevin to the convenience store's parking lot and left him in the back of the patrol car. [Tr. 198] The police did not bring any other suspects to the store for identification. [Tr. 182] The police did not let Kevin out of the car during any time of the identification. [Tr. 180]

Holmes informed the police that Kevin had different color shirt and shorts than the robber. Holmes said the Kevin's demeanor, eyes, skinny legs and shoes were similar to the robber's. Holmes was taken to jail and charged with armed robbery of the Circle K.

During trial preparation, the defense presented the District Attorney's office with photos of the tattoo on Kevin's left forearm, which created an issue of misidentification of the suspect. On the store's surveillance tape, the robber wore a short sleeve shirt with his forearms visible.[State Exhibit 1] The robber did not have a visible tattoo on the video. Kevin Owen, however, had a noticeable tattoo on his left forearm. [ State Exhibit 15]

While the State presented several witnesses that said Kevin received the noticeable tattoo while incarcerated, the defense presented several witnesses that testified Kevin actually received the tattoo in the summer of 2005. [Tr. 378,389, 397]

On the second day of trial, one of the State's witnesses, Charles Street, an convicted felon and jailhouse "snitch" was to testify regarding Kevin's tattoo. However, when he took the stand, he

informed the court that he would not testify because he had breathing difficulties and he was experiencing chest pains and shortness of breath. [ Tr. 334-35] The court stopped the proceedings and had a nurse examine Street. [ Tr. 336] Ruby Bunkheila, a staff nurse with Forest County Sheriff's Department, testified that Street had a heart condition and that his blood pressure was elevated. [Tr. 339] However, she acknowledged that he was coherent and, during the time she spoke with him, he did not have shortness of breath or other symptoms. Street refused to go the hospital and, instead, took medication and went back to the jail. [Tr. 340]

The court, over objection of the defense attorney, deemed Street an unavailable witness. [Tr. 343, 347] The court allowed Street's previously taped conversation regarding Kevin's tattoo to come into evidence. [Tr. 366] This was a taped statement taken at the jailhouse, with only Street and the District Attorney's investigator present. [Tr. 354, 355] The defense was not aware of the taping at the time of the statement.

### **SUMMARY OF THE CASE**

The police did not find any physical evidence, other than Owen's clothing and appearance, that would link him to the armed robbery of the Circle K convenience store. The surveillance tape showed a robber leaving the store with money, a gun, a white head rag, wearing a white shirt and blue shorts with a dark stripe. However, when the police arrested Owen, he had no money, no weapon, no head rag, and he was wearing a gray shirt and gray shorts with a dark stripe<sup>1</sup>. Instead of taking him to the police station to take place in a reliable identification procedure, the police took Owen to the parking lot of the convenience store, in the late night hours, to be identified by the store clerk. Owen remained in the back of the squad car, handcuffed, while Holmes came outside of the

---

<sup>1</sup> The police later discovered that Owen wore reversible shorts, with a dark stripe, that were blue on one side and gray on the other.



store to identify him. The police did not bring any other suspects to the store for identification and the clerk never saw a photo line-up of any other suspects. Owen requests this Court to find that his due process rights were violated and reverse and remand this case for a new trial.

Additionally, at trial, the court denied Owen his constitutional right to confront his accusers. The testimony of a con-artist, jail-house “snitch” was admitted into evidence, against the defense attorney’s objections. Owen’s failure to cross-examine this witness destroyed his theory of defense. This Court should find that the trial court misapplied the law in allowing testimony to be entered into evidence, in total violation of the confrontation clause.

### **ARGUMENTS**

#### **I. THE TRIAL COURT MISAPPLIED THE LAW WHEN DENYING KEVIN’S MOTION TO SUPPRESS THE PREJUDICIAL SHOW-UP IDENTIFICATION BECAUSE THE IDENTIFICATION WAS SO UNNECESSARILY SUGGESTIVE AND CONDUCTIVE TO IRREPARABLE MISTAKEN IDENTIFICATION AS TO BE A DENIAL OF DUE PROCESS OF LAW.**

##### ***i. Standard of Review***

The Court reviews issues concerning the admissibility of evidence under an abuse of discretion standard. *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 113 (¶12) (Miss. 1999). Errors in the admission or exclusion of evidence are grounds for reversal if the errors adversely affect a substantial right of a party. *Morris v. State*, 963 So. 2d 1170, 1175 (¶15) (Miss. Ct. App. 2007). The Court reviews constitutional issues *de novo*. *Turner v. State*, 945 So. 2d 992, 999 (¶ 21) (Miss. Ct. App. 2007).

##### ***ii. The show-up identification was impermissibly and unnecessarily suggestive and conducive to an irreparable mistaken identity.***

The police’s show-up identification method assured that Owen would be identified as the robber of the convenience store because he was the only person the police ever presented to the store

clerk for possible identification. The police took Owen, in the middle of the night, to a show-up identification that occurred in the parking lot, outside of the convenience store, at the scene of the crime. Owen sat in the back of the patrol car in handcuffs during the entire process. Holmes, the store clerk, observed Owen through the passenger side window of the patrol car. The issue in question is, when judged by the “totality of the circumstances”, was the conduct of the pretrial identification procedure “so unnecessarily suggestive and conducive to irreparable mistaken identification” as to be a denial of due process of law.

Show-up identifications increase the likelihood of irreparable misidentifications and it is this likelihood that violates Owen’s right to due process under the law. *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 382 (1972). The United States Supreme Court has condemned the police practice of showing suspects singly, as opposed to a part of a lineup, for the purposes of identification. *Foster v. California*, 394 U.S. 440, 443, 89 S. Ct. 1127, 22 L.Ed 2d 402 (1969) (quoting *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 11 L.Ed. 2d 1199 (1967)).

Determining whether the identification procedure was impermissibly suggestive is only the first part of the analysis. *Roche v. State*, 913 So. 2d 306, 311 (¶14) (Miss. 2005). The suggestive identification may still be admissible “ considering the totality of the circumstances surrounding the identification procedure, the identification did not give rise to a very substantial likelihood of misidentification.” *Id.* Citing *York v. State*, 413 So. 2d 1372, 1383 (Miss. 1982).

In evaluating the likelihood of misidentification, the Court should consider the following five factors: 1) the opportunity of the witness to view the criminal at the time of the crimes, 2) the witness’ degree of attention, 3) the accuracy of the witness’ prior description of the criminal, 4) the level of certainty demonstrated by the witness at the confrontation, and 5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. at 199-200, 93 S.Ct 382.

In this case, the likelihood that Holmes misidentified Owen as the robber is very high because the following factors were misapplied:

1. *Holmes did not have an adequate opportunity to view the robber at the time of the crime.*

As seen on the store's surveillance tape of the robbery, the robber disguised most of his face and head during the robbery. Holmes informed the police that he would not be able to identify any of robber's facial or hair features. The robber was only in the store for a few minutes and he displayed a handgun immediately upon entering the store. When the robber entered the store, Holmes was behind the cash register and remained there until the robber left the building.

2. *Holmes' degree of attention to the details of the robbery.*

According to Holmes, he noticed the robber from the time he entered the store until the time he left. If the Court finds that Holmes had an adequate opportunity to view the robber during the crime, it should reason that Holmes attention to the details of the robbery were such that Owens has to be excluded as the robber.

Holmes testified that he did not observe any tattoos on the robber. Holmes stated that if he would have seen a tattoo, he would have informed the police about such tattoo. [R. 176] From the view of the surveillance camera, it is evidence that the robber wore a short sleeved shirt with his forearms exposed. As evident by trial testimony and photographic evidence, Owen has a noticeable tattoo on his left forearm. Holmes did not report to the police seeing any tattoo on the robber.

3. *Holmes previous description of the robber did not match Owen's appearance.*

In addition to the issue of the tattoo, Holmes previous description of the robber did not match Owen's appearance when he was brought to the store for the show-up identification. Although Holmes informed the police that Owen's legs and shoes appeared to be the same as the robber's,

Holmes noted that Owen had on gray shorts, whereas the robber wore blue shorts. Holmes also noted that Owen wore a white shirt, whereas the robber wore a gray shirt in the store.

4. *Holmes told police prior to Owen's arrival that he would not be able to identify the robber.*

Holmes provided contradictory testimony regarding his ability to identify the robber of the store. Holmes previously stated to police that he would not be able to identify the robber. [Tr. 159] However, during the show-up identification, Holmes informed police that he was certain, based on Owen's shoes, legs, eyes, and demeanor, that Owen was the robber.

5. *The length of time between the crime and the confrontation were suggestive of misidentification.*

Finally, there was nearly an hour between the time the robbery occurred and when the police took Owen to the convenience store for the show-up. Although the trial judge placed great weight on this time span in finding this was a sufficient indication of a reliable identification, the police could have easily taken Owen to the police station and placed him in a line-up so that the integrity of the identification would not even have become an issue. Instead, the police took the easy way out. Likewise, the Court fail to correct this error. The trial court should have granted Owen's motion to suppress this impermissibly suggestive show-up as it denied Holmes due process under the law.

## **II. THE TRIAL COURT MISAPPLIED THE LAW IN FINDING CHARLES STREET WAS AN UNAVAILABLE WITNESS, THUS VIOLATING KEVIN'S CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSERS.**

### ***i. Standard of Review***

The Court reviews the trial court's decisions regarding the admissibility of testimonial evidence under the abuse of discretion standard. *Lynch v. State*, 877 So. 2d 1254, 1281 (¶86) (Miss. 2004). The Court may find reversible error when a substantial right of a party is affect and where the defense has made the proper objections or offer of proof at trial. *Id.*

***ii. Charles Street was an available witness and Owen was denied his constitutional right to confront his accuser when Street's unsworn statement was played before the jury.***

The trial court failed to adhere to the guidance of the Constitution of the United States, as well as the Rules of Evidence, when it admitted the uncontested, unsworn statement of a convicted felon, turned jailhouse "snitch" and allowed such statement to be played before the jury. Street had previous convictions for deceit and falsehood. Had the court not found Street to be unavailable, his statement would not have been permitted into evidence. Street's unsworn statement was the only statement the jury heard that alleged Owen actively elicited help in creating a false story about his tattoo as to avoid in-court identification. The issue in question is whether the trial court correctly found that Charles Street was an unavailable witness and whether there was a proper opportunity to cross examine such statement.

The trial judge, in determining Street's unavailable status, admitted Street's statement under the hearsay exception rule found in Mississippi Rules of Evidence 804(a)(4). Rule 804 (a)(4) provides for a hearsay exception if the declarant is "unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." The following colloquy occurred outside the presence of the jury.

**KLEIN(Defense Attorney):** ... I object to the use of the tape (Street's statement).

I object to the use of the synopsis. This man just doesn't want tot testify, Judge. He's available. He sat on the stand for ten minutes telling them (medical staff) all his problems. He could tell us the answers to my questions.

**COURT:** It's my understanding that his blockage is significant.

The nurse just testified that his blood pressure was 170 over 124. I'm not a doctor but I know my doctor gets upset if my bottom number is ninety. Perhaps Mr. Street wouldn't, as you termed it, keel over if he testified, but this Court's not willing to take that chance.

Mr. Street stated that it was stress. He was having difficulty breathing. I asked if he thought his condition would be different if we recessed and reconvened after lunch. He said he did not think it would make any difference, that he still didn't think he could go through with it because of his medical condition.[Tr. 341-42]

The United States Supreme Court has established that “ the Confrontation Clause of the Federal Constitution’s Sixth Amendment bars the admissibility of out-of-court testimonial statements by an unavailable witness offered in criminal trial to prove the truth of the matter asserted (also known as hearsay) unless the defendant has had a prior opportunity to cross-examine the witness about the statement.” *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). “Testimonial hearsay must be exposed to confrontation by way of cross-examination prior to reaching admissible status...” *Id.*

In this case, even if the Court determines that Street was really unavailable, Street’s statement should still not have been admitted because the defense never had the opportunity to confront Street and question him about his statements. An investigator from the District Attorney’s office taped Street’s statement at the jail. Owen’s trial attorney was not aware of this taping. No attorney was present when the statement was taped to confront or cross-examine Street about his statements.

Street’s statements contained no indicia of reliability. Street was not only a convicted felon

but he had previous crimes for deceit, fraud, and false pretense. [Tr. 343] Street's credibility was at the center of the issue.

In *Hillard v. State*, 950 So. 2d 224, 229-30 (¶¶25-28) (Miss. Ct. App. 2007), the Court reversed and remanded the case based on violations of the confrontation clause where the defense was not given the opportunity to confront its accuser. In *Hillard*, the defendant was indicted for armed robbery of a casino. *Hillard*, 950 So. 2d at 227 (¶11). One of the State's witnesses, Ronnie Quawrells, had been convicted of conspiracy of the same crime prior to Hillard's trial. *Id.* at (¶12). Quawrells implicated Hillard in the robbery. At the time of trial, the State's witness refused to testify and the State sought to enter Quawrells' previous testimony from his trial into evidence at Hillard's trial. Quawrells' testimony was the key evidence that connected Hillard to the robbery of the casino. The Mississippi Court of Appeals, in reversing the case, found that Hillard was never given the chance to cross-examine Quawrells about his statements.

In the present case, Street's prior testimonial statements are similar to the State's witness in *Hilliard*. Street provided the only evidence that Owen actually solicited help in creating a false story about his tattoo as to avoid in-court identification. The remaining state's witnesses all provided weak testimonies at best. Greg Smith testified that he saw Owen with a chapped tattoo but then he admitted to police that, when he first saw Owen's tattoo, it was already healed. [Tr. 323, 328] Sgt. Glen Nobles testified that Owen had a jailhouse tattoo but then admitted that he wasn't even present when Owen was initially booked in the jail. [Tr. 303] Jeff Byrd testified Owen did not have same tattoo on his left forearm when he entered jail but then he testified that he had no independent recollection of Owen's tattoo, other than what was written on the fingerprint identification card. [Tr. 277] Street's testimony is the only statement that clearly shows a link between Owen's tattoo and his alleged attempt to avoid identification.

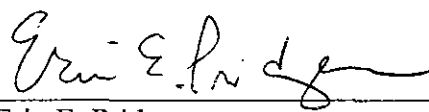
*Bell v. State*, 928 So. 2d 951, 960-61 (¶38-39) (Miss. Ct. App. 2006), is yet another example where the Mississippi Court of Appeals reversed and remanded the case because the defendant did not have the opportunity to cross-examine the witnesses against him. In *Bell*, the Court found that the admission of the prohibited hearsay was not harmless error and reversed the case based on the constitutional requirements to do so. Likewise, this Court should take the same just stance in the current case.

### CONCLUSION

As shown above, the Appellant in this case, Kevin Eugene Owen, was denied due process by being subjected to an impermissibly suggestive show-up identification. He was also denied his constitutional right to confront his accuser, Charles Street. Accordingly, he prays that the Court will reverse his conviction and remand this case to the Circuit Court of Forrest County of a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:   
Erin E. Pridgen  
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
301 North Lamar Street, Suite 210  
Jackson, Mississippi 39205  
Telephone: 601-576-4200



**CERTIFICATE OF SERVICE**

I, Erin E. Pridgen, Counsel for Kevin Eugene Owen, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Robert Helfrich  
Circuit Court Judge  
Post Office Bxo 1914  
Hattiesburg, MS 39403-0309

Honorable John Mark Weathers  
District Attorney, District 12  
Post Office Box 166  
Hattiesburg, MS 39403

Honorable Jim Hood  
Attorney General  
Post Office Box 220  
Jackson, MS 39205-0220

This the 13<sup>th</sup> day of January, 2009.

  
\_\_\_\_\_  
Erin E. Pridgen  
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
301 North Lamar Street, Suite 210  
Jackson, Mississippi 39201  
Telephone: 601-576-4200