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IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-00886-COA

DEREK BRANDON CONWAY **APPELLANT**

VS.

STATE OF MISSISSIPPI **APPELLEE**

BRIEF OF THE APPELLANT

Oral Arguments Not Requested

Appeal from an Order of the Circuit Court of Forrest County, Mississippi, denying the Appellant's Motion for Post-Conviction Relief

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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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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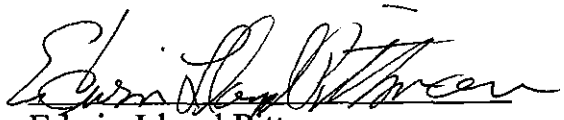
Respectfully submitted this the 24th day of September, 2009.



Edwin Lloyd Pittman

TABLE OF CONTENTS

Page(s)

CERTIFICATE OF INTERESTED PARTIES.....i

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

STATEMENT OF ISSUE.....1

STATEMENT OF THE CASE.....1

ARGUMENT.....3

1. Derek Conway was not provided with effective assistance of counsel at trial, in violation of the Sixth Amendment.....3

2. Trial counsel was admittedly unable to adequately prepare for Conway's trial.....4

3. Trial counsel failed to renew his motion to exclude a doctored videotape provided by the State just prior to trial or move for a continuance.....7

4. Trial counsel failed to object or move for a mistrial or retrial when he became aware that a juror was a former co-worker of Derek Conway's mother and failed to respond in voir dire to questions whether the juror knew any potential witnesses.....9

5. Trial counsel failed to object to the qualifications and testimony of Dr. Stephen Hayne.....10

6. Derek Conway was not provided with effective assistance of counsel on appeal, in violation of the Sixth Amendment, because Appellate Counsel failed to file a timely motion for rehearing of his case before the Mississippi Court of Appeals when the court admitted error occurred at trial.....12

7. Derek Conway was not given a fair trial, in violation of the Sixth Amendment, because he has recently learned of several prejudicial actions taken by witnesses and jurors which warrant a new trial.....14

8. Derek Conway was not provided with procedural due process on appeal, in violation of his state and federal rights, when the Court of Appeals denied his motion for enlargement of time to file a motion for rehearing and his motion to reconsider that ruling, and when the Mississippi Supreme Court denied his petition for writ of certiorari, which included his motion to suspend the rules.....18

CONCLUSION.....20

CERTIFICATE OF SERVICE.....21

APPENDIX "A".....22

TABLE OF AUTHORITIES

Page(s)

CASES

Bell v. State, 360 So. 2d 1206 (Miss. 1978).....10

Conway v. State, ___ So. 2d ___, 2003-KA-02807-COA,
¶¶ 16-20 (Miss. Ct. App. 2005).....6, 12

Conway, ___ So. 2d at ___, 2003-KA-0807-COA,
at "Disposition" ("AFFIRMED – 11/29/2005").....13

Danny A. Coker a/k/a Danny Allen Guibbs v. State of Mississippi,
909 So.2d 1239.....13

Douglas v. State, 525 So. 2d 1312, 1316, 1317 (Miss. 1988).....15

Edmonds v. State, ___ So. 2d ___, 2004-CT-02081-SCT,
at ¶ 7 (Miss. 2007, mandate pending).....10, 11

Geders v. U.S., 425 U.S. 80 , 87, 96 S. Ct. 1330, 1335, 47 L.Ed.2d 592 (1976).....15

Green v. State, 614 So. 2d 926, , 935 (Miss. 1992).....12

Harris v. Mississippi Valley State University, 873 So. 2d 970, 985-86 (Miss. 2004).....20

Odom v. State 335 So. 2d 1381, 1383 (Miss. 1978).....16, 17

State of Mississippi v. Derek Brandon Conway.....1

Stephens v. State, ___ So. 2d ___, 2003-KA-02549-SCT (Miss. 2005).....5

Strickland v. Washington, 466 U.S. 668 (1984).....4

Stringer v. State, 454 So. 2d 468 (Miss. 1984).....4

Turner v. State, ___ So. 2d ___, 1999-DR-01828-SCT (Miss. 2007).....4

STATUTES

Miss. Code Ann. § 13-5-23-79.....10

Miss. Code Ann. § 13-5-69.....10

Miss. Code Ann. § 41-61-55.....11

Miss. Code Ann. § 97-13-19.....2

Miss. Code Ann. § 99-39-5(1)(a).....4, 14

Miss. Code Ann. § 99-39-5(1)(e).....14

Miss. Code Ann. § 99-39-27.....1

RULES

M.R.A.P. 2(a)(2), (b).....20

M.R.A.P. 2 (c).....14, 19, 20

M.R.A.P. 26(b).....19

M.R.A.P. 40(a).....19

Miss. R. Civ. Pro. 47.....10

Miss. R. Evid. 103(a).....12

Miss. R. Evid. Rule 615.....14, 15, 16

STATEMENT OF ISSUES

Derek Conway was not provided with effective assistance of counsel at trial, in violation of the Sixth Amendment.

Derek Conway was not provided with effective assistance of counsel on appeal, in violation of the Sixth Amendment, because Appellate Counsel failed to file a timely motion for rehearing of his case before the Mississippi Court of Appeals when the court admitted error occurred at trial.

Derek Conway was not given a fair trial, in violation of the Sixth Amendment, because he has recently learned of several prejudicial actions taken by witnesses and jurors which warrant a new trial.

Derek Conway was not provided with procedural due process on appeal, in violation of his state and federal rights, when the Court of Appeals denied his motion for enlargement of time to file a motion for rehearing and his motion to reconsider that ruling, and when the Mississippi Supreme Court denied his petition for writ of certiorari, which included his motion to suspend the rules.

STATEMENT OF THE CASE

By Order granting Derek Conway leave to file his motion in Circuit Court of Forrest County, the Mississippi Supreme Court conferred jurisdiction of this matter upon that court for review. Miss. Code Ann. § 99-39-27 (Rev. 2000). This motion for Post Conviction relief was denied in the Forrest County Circuit Court.

Derek Conway now seeks relief from the Jury Verdict and Sentencing of the Defendant by the Court entered in *State of Mississippi v. Derek Brandon Conway*, Cause No. 03-253CR, by the Circuit Court of Forrest County on October 14, 2003. See Exhibit

"A", copy of jury verdict, attached hereto. This matter progressed on appeal under the same caption after being assigned cause No. 2003-KA-02807-COA by the Court of Appeals and Cause No. 2003-CT-02807-SCT by the Mississippi Supreme Court. Aside from the actions taken on his direct appeal, Derek Conway has not filed any previous proceeding in federal or state courts to secure relief from his conviction and sentence.

Derek Conway was represented at trial by Hon. Ray Price, former public defender for Forrest County, Mississippi. He was represented by Hon. Jonathan R. Farris on appeal, a part-time public defender in Forrest County. He thereafter employed present counsel to present and argue motions to reconsider the rulings of the appellate courts and file this motion.

Prior to trial, at a hearing on a motion for continuance, Conway's trial counsel announced Derek Conway did not have the benefit of an attorney who spent a lot of time on his case. When the judge denied the continuance, trial counsel failed to renew the motion after viewing an enhanced videotape produced by the state two working days before trial. Beginning October 13, 2003 and ending the next day, Derek Conway was tried and convicted of depraved heart murder under Miss. Code Ann. § 97-13-19. He was sentence to life imprisonment. During the course of the trial, witnesses for the state and defense were allowed to co-mingle and discuss their testimony. Other persons who were not witnesses were allowed back in the witness sequestration area and visited with the witnesses. A juror was also silent when asked if she knew Derek Conway's mother, a potential witness, during voir dire. This prohibited trial counsel from questioning her about the nature of the relationship between her and Conway's mother. Finally, Stephen

Hayne was allowed to testify as a forensic pathologist without objection or any voir dire from trial counsel.

On appeal, the matter was sent to the Court of Appeals for review. Its judgment was announced November 29, 2005. In its written opinion, the court found admitting an enhanced videotape to be error, but did not reverse on a finding that this error was harmless. Appellate counsel did not timely file a motion for rehearing or notify Derek Conway of his right to file a motion for rehearing until two weeks after the deadline for filing such motion passed. Subsequent efforts to have this matter reviewed again by the Court of Appeals or by the Supreme Court proved fruitless as all such motions were denied without consideration of this matter on the merits.

As noted above, the witnesses were allowed to co-mingle prior to their testimony on the witness stand. It is not known to what extent the witnesses for the state were prepared for trial by the district attorney or to what degree they shared their testimony and otherwise were allowed to tailor their testimony prior to assuming the witness stand. The actual workload of the public defender's office during his trial and appeal is not known to Conway. Nor is the full extent of the effect that Hurricane Katrina had upon the public defender's office ability to adequately represent him during his appeal.

ARGUMENT

1. Derek Conway was not provided with effective assistance of counsel at trial, in violation of the Sixth Amendment.

Mississippi law parallels federal law on ineffective assistance of counsel. A summary of the standards applied to claims of ineffective assistance on motion for post

conviction relief can be found in *Turner v. State*, ___ So. 2d ___, 1999-DR-01828-SCT (Miss. 2007). According to *Turner*:

> The benchmark for judging any claim of ineffectiveness [of counsel] must be 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. A defendant must demonstrate that his attorney's actions were deficient and that the deficiency prejudiced the defense of the case. Unless a defendant makes both showings, it cannot be said that the conviction or [] sentence resulted from a breakdown in the adversary process that renders the result unreliable. The focus of the inquiry must be whether counsel's assistance was reasonable considering all the circumstances.

Id. at ¶ 10 (citing *Strickland v. Washington*, 466 U.S. 668 (1984); *Stringer v. State*, 454 So. 2d 468 (Miss. 1984)) (citations and quotations omitted). Post-conviction relief is available to Conway on the following grounds under Miss. Code Ann. § 99-39-5(1) (a), which provides relief from convictions and sentences imposed in violation of the federal or state constitutions and laws.

2. Trial counsel was admittedly unable to adequately prepare for Conway's trial.

Trial counsel admitted on the record three working days prior to Conway's trial that he was unprepared and could not effectively represent Conway. Counsel's colloquy includes the following statements on the record:

> You know, I would further point out just for the benefit of this record for my client in this particular case, that I am a part-time public defender, that I have worked for the first six months of this year with a case load of 200 cases that I have bent over backwards to try to accommodate the State and the Court in every case possible by doing everything I could. I've tried to be at the beck and call of this Court.
>
> We have three judges. We have five district attorneys and assistant district attorneys, and I have held up the best I could against every one of them, Your Honor. I cannot be expected to perform – I have no staff. I have a part-time secretary that works, perhaps, three hours a day. My investigator is helpful to me but, as I said, **our case load has gone from about sixty to seventy to two hundred cases. I just finished very**

> **recently another murder trial[1] which was done on change of venue which took me eight days to try with a break for Sunday. It took me two weeks to prepare for that.** I have a private practice.... But I resent the implication and **I want the supreme court or the court of appeals reviewing this to understand that Mr. Conway has not had the benefit of counsel that's been able to devote a whole lot of attention to his case up until it became apparent that the State intended to carry this case to trial.**

(R. 11-12) (emphasis added). Counsel would explain how he failed to act more quickly in obtaining discovery on behalf of Conway at the continuance hearing this way:

> The reason for that [the motion for examination and testing of physical evidence and for a continuance], Your Honor, is in reviewing the discovery which is still being provided to us as of today, I have some problems still with not having some of it....
>
> When I saw from the discovery in the case – and, honestly, I had thought we were going to be able to possibly work this matter out on a plea, and **when the State said, no, we were not going to work it out on a plea, I examined this file carefully** and saw that there was no forensic testing done on the bottles which were found in and near the truck, **therefore I filed the motion.**

(R. 3, 4) (emphasis added). Trial counsel filed this motion hardly one week before trial, and the matter was not heard until three working days before trial. (R.3). The statements made by a prosecutor for the State further establish a chronology of counsel's trial preparation and highlight how Conway's trial counsel's preparation for trial was deficient:

> Your Honor, I think I need to give the Court a bit of information for clarification. Discovery was provided to counsel opposite on July 11 of this year. That's been three months. The discovery at that particular point in time was as it is now except for the fingerprint examination. Counsel waited until one week before trial to decide that it would be important for his defense that he have an examination made of a squeeze bottle, which is a soft plastic strawberry drink bottle, and a beer bottle....
>
> No requests were made for anything until a week before trial....

---

[1] See *Stephens v. State*, ___ So. 2d ___, 2003-KA-02549-SCT (Miss. 2005).

> It's [sic] still boils down to this. You have three months of discovery and you wait a week before trial and all of a sudden this is deemed important.

(R. 5, 6).

From a review of the record, it is clear that trial counsel only began preparing for this murder trial just over a week before it was set to begin. The reasons are likewise clear. Trial counsel admitted Conway did not have the "benefit of counsel that's been able to devote a whole lot of attention to his case." Counsel, as a part-time public defender carried a work load that would keep four attorneys busy full-time. Counsel had also recently spent two weeks preparing for, and 8 days trying, a high-profile murder case in Desoto County. *Furthermore, the State, at the hearing three working days before trial, had not turned over an enhanced videotape which would be admitted into evidence at trial. (Ex. S-13; R. 118).*[2] *This act made it impossible for counsel to estimate the impact the enhanced tape would have on the jury and adequately prepare to argue for its exclusion or counteract its impact with testimony or other evidence on behalf of Mr. Conway. The Court of Appeals would later find the admission of this evidence to be error. Conway v. State*, ___ So. 2d ___, 2003-KA-02807-COA, ¶¶ 16-20 (Miss. Ct. App. 2005).

Therefore, counsel was admittedly and demonstrably deficient in his preparations for trial. When the circuit court denied his motion for a continuance, Conway's rights to a fair trial and the effective assistance of counsel were compromised. The deficiencies prejudiced Conway's defense because counsel was unprepared for trial; was unable to obtain separate verification of the existence and placement of the fingerprints on the

[2] Although it was admitted into evidence at trial as exhibit S-10, the original videotape was described in the opinion of the Court of Appeals as "unviewable." *Conway*, ___ So. 2d at ___, 2003-KA-02807-COA, at ¶11.

bottles found in the truck; and was unable to obtain separate verification of the accuracy of the enhanced videotape admitted into evidence, shown to the jury, and considered by it in its deliberations. Under all the circumstances, it has been shown that Conway's conviction and sentence resulted from a breakdown in the adversary process that renders the result unreliable. Having met his burden to show ineffective assistance, this court should reverse the jury's verdict and grant Conway a new trial.

3. Trial counsel failed to renew his motion to exclude a doctored videotape provided by the State just prior to trial or move for a continuance.

At the conclusion of the arguments at the hearing on the motion for continuance, the Court made the following statement:

> If there is anything contained in that video that you think you need to renew this motion, I'll hear that Friday morning. But other than that, I'm going to deny your motion.

(R. 13). As noted above, the Court of Appeals found the admission of the videotape into evidence to be error. Thus counsel's failure to renew the motion for continuance the Friday before trial at the Court's invitation was deficient. It is impossible to know what kind of effect the viewing of the enhanced videotape had on the jury's verdict, but the record demonstrates that the videotape played a central role in the State's evidence and arguments. For instance:

> [Saucier] Now let me tell you something else about this case. In the 20-something years that I've been doing this, I've never had this experience, but you will see the murder. That's right. It was on videotape. There were two cameras pointed directly to where this was occurring, and it's not real-time cameras. You understand it wasn't real. The testimony is going to show, I think, 24 hours, so it will be kind of broken up. But you, ladies and gentlemen, will actually witness the truck driving up to the carwash, this defendant getting out of the carwash area, walking over to the truck – he is the aggressor. He is the one that armed himself. And he is the one that fired the shot that killed Kenneth Ray Mooney....

Unfortunately, ladies and gentlemen, you will also see the last movements of Mr. Mooney because after he was shot, his reaction was to jump out of the truck, run about 20 feet, and collapse. And unfortunately you're going to also see the retrieving of Mr. Mooney back into the truck by the two individuals including Mr. Jansen that were with him. You will also see something else in that video. And that is after this defendant shot someone that he knew, he didn't even try t help him. In fact, he went to the Taurus and you will see the Taurus drive away with no assistance being given whatsoever to the victim.... And the interesting thing is you've heard the story – your version, my version, and the truth. Well, he gives a version of what happens, then you ladies and gentlemen, will be able to look at the video. And you, ladies and gentlemen, will be able to tell the truth. (R. 75-76, State's opening argument)

[Saucier] Your Honor, there is not anything better than video, and it's already been introduced into evidence. (R. 120: direct examination of State's witness David Clayton).

[Saucier] I'd now like to show you Exhibit 13, which has been introduced into evidence, and it's a videotape. And you watch it, and you tell me whether or not this videotape has any relevance to what you just testified about. (R. 245-246: direct examination of State's witness Anthony Thames).

[Weathers] Well, let's get back to the carwash. Now, we've seen the videotape, and I'm not going to ask to show it again. I'm not going to put you through that again. But you've seen it several times.
A. Yes
Q. And, in fact, you've been sitting over there with a monitor on your desk, ever time the jury got to see it, every time we got to see it, you got to see it if you wanted to; didn't you.
A. Yes. (R. 367, Cross-examination of Derek Conway)

[Saucier] He was brooding when they drove up. And if you look at that particular video, you'll see how fast he advanced on the truck. There wasn't time for all the yuckiety-yucking and the calling of names and laughing. He almost races out to that truck. (R. 397-98, State's closing argument).

[Weathers] Now, what happened? You can talk about real-time video, slow-time video, or whatever you want. This is one of those events the first time in my life where an event like this has been captured on video. And what does that video show you? Out of that bay like a bull out of a shoot at the rodeo.... And you saw the video time and time again. You heard Thames tell it. You heard Jansen tell it. You heard this guy [Conway] tell it in his confession two days after the event took place after

> he had time to make up his story but before he knew there was a video, and what did he do? ... (R. 411-12, State's rebuttal closing argument).

One might ask what could be more damning or more "harmful" than an enhanced Video being shown to the jury, with the prosecution continuously arguing that the Video showed exactly what happened; even though their Video was not a streaming Video but was a freeze frame by frame that the Court of Appeals found un-viewable and inadmissible.

This way, a central piece of the State's evidence, one whose importance was repeatedly emphasized by the State a piece of evidence, which should have been excluded. Trial counsel was deficient in not renewing the motion for continuance the Friday before trial and Conway was prejudiced when this videotape was admitted into evidence, viewed repeatedly by the jury, and cited by the state numerous times as proof of guilt. Counsel's failure to re-urge the continuance motion rendered ineffective assistance of counsel to Conway, therefore, his conviction should be reversed and this matter remanded for a new trial.

4. Trial counsel failed to object or move for a mistrial or retrial when he became aware that a juror was a former co-worker of Derek Conway's mother and failed to respond in voir dire to questions whether the juror knew any potential witnesses.

During voir dire by the State, Debbie Sumrall, the mother of Derek Conway, was identified as a potential trial witness. (R. 21). At the conclusion of voir dire, Cleta Zeller was seated as a juror. (R. 68). Debbie Sumrall and Cleta Zeller are former co-workers. See Exhibit "B" attached hereto. Cleta Zeller responded when asked if she knew any of the witnesses announced by the State, but did not indicate knowing Debbie Sumrall. (R. 22). Since the rule was invoked prior to testimony, Debbie Sumrall spent the majority of

her time in the witness rooms with no opportunity to view the jury. (R. 77; Exhibit "B"). When she first observed the jury at the verdict and sentencing, she informed trial counsel of this relationship. Exhibit "B". The record is void of any effort by trial counsel to notify the court of this relationship. The failure of trial counsel to object to the presence of Cleta Zeller on the petit jury once he was notified deprived Derek Conway of the effective assistance of counsel, in violation of his right to a fair trial and statutory right to examine jurors. Miss. Code Ann. § 13-5-69.

The record does not indicate whether the jury venire or petit jury were ever sworn as required by law. *See* Miss. Code Ann. §§ 13-5-23,-79; Miss. R. Civ. Pro. 47. (R. 19-21; 68-70). It is presumed that the trial court properly performed its duties, including swearing in the jury. *See, e.g., Bell v. State*, 360 So. 2d 1206 (Miss. 1978). Assuming juror Zeller was properly sworn, it is possible she did not keep her oath by remaining silent when asked if she knew Debbie Sumrall. This rebuts the assumption that a juror will obey her oath, leading to the possibility that Zeller did not keep other oaths and obey court instructions such as not forming opinions or discussing testimony prior to the submission of the case. The possibility that the jury could be tainted in this manner should not be overlooked as the risk of prejudice to Conway is great.

5. Trial counsel failed to object to the qualifications and testimony of Dr. Stephen Hayne.

Stephen Hayne was called by the State as an expert witness in forensic pathology. (R. 196). The Mississippi Supreme Court has recently found some of his testimony inadmissible as unfounded opinion or speculation. *Edmonds v. State*, ___ So. 2d ___, 2004-CT-02081-SCT, at ¶ 7 (Miss. 2007, mandate pending). The separate opinion from Justice Diaz went further:

> There are serious concerns over Dr. Hayne's qualifications to provide expert testimony. First, he admitted at trial that he was not certified in forensic pathology by the American Board of Pathology because he walked out on the qualifying examination. This means he is unqualified to serve as State Medical Examiner, as our law requires that "[e]ach applicant for the position of State Medical Examiner shall, as a minimum, be a physician who is eligible for a license to practice medicine in Mississippi and be certified in forensic pathology by the American Board of Pathology." Miss. Code Ann. § 41-61-55.

Id. at ¶ 92.

During trial of this matter, Stephen Hayne testified he was board certified as a forensic pathologist. (R. 195). This testimony, at best, is misleading. As the *Edmonds* opinion shows, Hayne is not certified in forensic pathology by the American Board of Pathology. Trial counsel was deficient in accepting, without question or objection, Hayne's qualifications as a forensic pathologist and his tender as an expert.

Conway was prejudiced *as Hayne went on to testify it was more probable a victim seated within a Toyota Tundra pickup to be shot at a specific bullet trajectory than if the victim was standing. This conclusion relied upon assumptions concerning the height of the pickup and the posture of Kenneth Mooney at the time of the shooting. The witness even performed a demonstration at the request of the state in front of the jury suggesting the posture of the victim with gestures indicating the potential height of the shooter with the victim in both a seated and standing posture.* (R. 203-207, 209-212).

These conclusions and, therefore, Hayne's testimony went beyond the expertise of the witness or the witness was not qualified to offer them in the first place. Trial counsel was deficient by not conducting voir dire of the witness concerning his qualifications to offer such conclusions, and by not objecting to the testimony of the witness pertaining to the posture of the victim and the height of the shooter or gun. By allowing Stephen Hayne to be admitted as an expert without objecting to testimony outside the witness'

area of expertise, trial counsel prejudiced his own ability to cross-examine the witness and further prejudiced Conway's right to a fair trial. The verdict of the court should be reversed and this matter re-set for trial.

6. Derek Conway was not provided with effective assistance of counsel on appeal, in violation of the Sixth Amendment, because Appellate Counsel failed to file a timely motion for rehearing of his case before the Mississippi Court of Appeals when the court admitted error occurred at trial.

On November 29, 2005, the opinion on the merits of Derek Conway's direct appeal was handed-down by the Mississippi Court of Appeals. *Conway v. State*, ___ So. 2d ___, 2003-KA-02807-COA, at "Disposition" (Miss. Ct. App. 2005). The court states the trial judge committed error when it allowed the enhanced videotape into evidence. *Id.* at ¶¶ 16-20. It found the error to be harmless. While the court correctly recited the test for harmless error, the opinion does not even address the prejudice done to the defendant by the enhanced videotape's admission into evidence. *Id.* at ¶ 20. The Mississippi Rules of Evidence indicate the harmless error test must include an examination of the effect the evidence had on the substantial rights of the defendant. Miss. R. Evid. 103(a). *See also Green v. State*, 614 So. 2d 926, , 935 (Miss. 1992). Thus it appears that the Court of Appeals did not follow the law when examining the harmlessness of this error.

Furthermore, the Court of Appeals found no error in the trial court's denial of Conway's motion to examine and test the physical evidence. *Conway*, __ So. 2d at ___, 2003-KA-02807-COA, at ¶¶ 10-13. This ruling was based in part on the argument that the testing was irrelevant due to the evidence on the enhanced videotape. *Id.* at ¶ 11. Given the error in admitting this enhanced tape, the ruling on the evidence motion is open to critical review. The presence of these issues and the errors in the Court of Appeals'

analysis, given the importance the State placed upon the enhanced videotape evidence as demonstrated above, were available grounds for a motion to reconsider and a petition for writ of certiorari to the Supreme Court.

However, appellate counsel failed to timely file any motion to prosecute the appeal. Indeed, it appears from the evidence in Conway's possession that he was first notified of his right to file a petition for rehearing by letter over two weeks after his motion for rehearing was due. See Exhibit "C", letter from public defender to Conway dated December 29, 2005, attached hereto. This letter incorrectly states December 13, 2005, as the date the Court of Appeals rendered the opinion on the merits of his appeal. This date, in fact, is the date his motion for rehearing was due. M.R.A.P. 40(a); see also *Conway*, ___ So. 2d at ___, 2003-KA-0807-COA, at "Disposition" ("AFFIRMED – 11/29/2005"). The current public defender for Forrest County accounts for the delay in Exhibit "D" to the motion and attached to this brief, detailing the effect that Hurricane Katrina had upon her office's ability to file and prosecute appeals after the storm. Even considering this explanation, Appellate Counsel's failure to timely file motions to prosecute Conway's appeal is deficient on its face. This failure was through no fault of Conway. In *Danny A. Coker a/k/a Danny Allen Guibbs v. State of Mississippi*, 909 So.2d 1239, the Court of Appeals said that "a defendant who desires an out of time appeal must show that the failure to timely perfect an appeal was through no fault of his own." The result of this failure prejudiced Conway's ability to seek appellate relief on direct appeal, as seen below.

When appellate counsel filed an untimely motion for an enlargement of time to file the petition for rehearing, it was denied as untimely by the Court of Appeals. Once

Conway retained present counsel, a motion to reconsider the order on the motion for enlargement was filed and denied as 'not allowed' by the Court of Appeals. Conway's petition for writ of certiorari—which included a motion to suspend the rules under M.R.A.P. 2—was denied by the Supreme Court as improper. In spite of the deficiencies of the opinion of the Court of Appeals, appellate counsel's failure to timely file appeal motions resulted in the loss of the opportunity for Conway to obtain relief from that court or apply to the Mississippi Supreme Court for a review on the merits. Appellate counsel for Derek Conway was, therefore, prejudicially ineffective. The jury's verdict should be reversed and a new trial granted on these grounds.

7. Derek Conway was not given a fair trial, in violation of the Sixth Amendment, because he has recently learned of several prejudicial actions taken by witnesses and jurors which warrant a new trial.

During the course of trial, after 'the rule' had been invoked (R. 78), the witnesses for both the state and defense were sequestered in the same witness room or rooms connected by a hallway. The witnesses were allowed to co-mingle and have discussions about the case despite the Court's instructions. Although witness Christina Conway, then wife of Derek Conway, was reprimanded on the record for her participation (R. 318-321), it has only recently come to the attention of Derek Conway that the misconduct was widespread in the witness area. These facts were not previously known to him. Therefore, Derek Conway requests relief under Miss. Code Ann. § 99-39-5(1)(e). Conway also requests relief under Miss. Code Ann. § 99-39-5(1)(a) for the juror misconduct discussed above and below.

Rule 615 of the Mississippi Rules of Evidence, 'the rule' of sequestration, directs that a court shall exclude non-excepted witnesses from hearing the other's testimony.

Miss. R. Evid. 615. This law predates the rules of evidence and its purpose is to (1) restrain witnesses from tailoring their testimony to match that of previous witnesses and (2) aid in detecting less than candid testimony. *Douglas v. State*, 525 So. 2d 1312, 1316 (Miss. 1988) (citing and quoting *Geders v. U.S.*, 425 U.S. 80 , 87, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592 (1976)). Where this rule is violated, the range of sanctions runs from full-bore cross-examination of the offending witness or a cautionary jury instruction to exclusion of the witness' testimony where prejudice would be suffered. *Douglas*, 525 So. 2d at 1317.

Debbie Bishop, one of the witnesses present in the witness sequestration area for the length of the trial states by affidavit the following:

> On the first day of the trial, we were all first taken into a long room like a conference room in the courthouse. Then they moved us to two small rooms down the hall outside the courtroom. They put Paul Ingram, Michael Smith, Joseph Jensen and Anthony Thames in one room, and me, Christina Conway and Heather Essary in the other room. Christina returned to the witness rooms after she testified. She said she was caught by Tommy Fredrick discussing the case in the men's witness room and was carried back before the Judge about what she was talking about. Then they brought her back to the witness room saying her conversation was harmless to the case.
>
> Also while in the witness room, Tracy Wallace [mother of Joseph Jansen] was allowed to come in the witness room to talk to her son, Joseph Jensen. Sgt. Taylor from Forrest County Sheriff's Department came in and told Tracy she was not supposed to be in the witness room. Tracy told him Rusty Keyes gave her permission to come back, so she stayed for a little while and talked to everyone in both rooms. Tracy made a statement that it sure was good to know someone around the courthouse (meaning so she could come back to the witness room to see her son and the others in both rooms). Me and Heather Essary were kept in the witness room during the while trial until the last day of the sentencing and were never called to the witness stand.

Exhibit "E", Affidavit of Deborah K. Bishop, attached hereto. She also completed another affidavit discussing the layout of the witness area and the fact that the witnesses

were allowed to discuss, and did discuss matters among themselves while under the sequestration rule. Exhibit "F", Affidavit of Deborah K. Bishop, attached hereto. Julia Essary states the same facts in her attached affidavit. Exhibit "G", Affidavit of Julia Essary, attached hereto. Rose Ingram, a spectator to the trial, also states she 'was in the courtroom, and during breaks could see witnesses talking to each other, and others in the hallway.' Exhibit "H", affidavit of Rose Ingram, attached hereto.

These affidavits demonstrate a violation of the rule of sequestration. While Christine Conway's violation might be insufficient to warrant sanction, the widespread abuse of the rule should be sufficient to warrant reversal. The witnesses for the state and defense were allowed to co-mingle and discuss their testimony with each other and others in the hallway. The mother of one of the state's witnesses was allowed in the sequestration area with the witnesses. These violations of the rule allow for the possibility that the state's witnesses could get their stories straight before assuming the witness stand. Such conduct is prejudicial to Derek Conway's defense, entitling him to sanctions under Rule 615. The conduct also violated his right to a fair trial. The jury's verdict, therefore, should be reversed and this matter re-set for trial.

As noted previously, juror Cleta Zeller was a co-worker with Derek Conway's mother. Her failure to respond to a direct and unambiguous question whether she knew any of the potential witnesses amounted to juror misconduct which violated his right to a fair and impartial trial. In *Odom v. State*, the Supreme Court articulated a test for violations of this nature:

> The failure of a juror to respond to a relevant, direct, and unambiguous question leaves the examining attorney uninformed and unable to ask any follow-up questions to elicit the necessary facts to intelligently reach a decision to exercise a peremptory challenge or to challenge a juror for

> cause. Therefore, we hold that where, as here, a prospective juror in a criminal case fails to respond to a relevant, direct, and unambiguous question presented by defense counsel on voir dire, although having knowledge of the information sought to be elicited, the trial court should, upon motion for a new trial, determine whether the question propounded to the juror was (1) relevant to the voir dire examination; (2) whether it was unambiguous; and (3) whether the juror had substantial knowledge of the information sought to be elicited. If the trial court's determination of these inquiries is in the affirmative, the court should then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond. If prejudice reasonably could be inferred, then a new trial should be ordered.

335 So. 2d 1381, 1383 (Miss. 1978).

The entire jury venire, prior to voir dire, was asked by the Court, "I am informed that the following persons may possibly testify in this case: ... and Debbie Sumrall. Are any of you related by blood or marriage to any of the potential witnesses in this case? Do you know the potential witnesses in this case?" (R. 20-21). Juror Zeller responded to the question, but failed to mention her prior relationship with Debbie Sumrall. (R. 22). She answered no further questions during voir dire.

The question asked was clearly relevant to the voir dire examination and unambiguous. Based upon information obtained from Debbie Sumrall, it is believed that Cleta Zeller has substantial knowledge of the information requested. Therefore, the initial inquiry must be answered in the affirmative. The danger of prejudice is great under these circumstances. Therefore, Derek Conway requests a hearing to determine whether Zeller's presence on the jury prejudiced his defense, warranting reversal of is conviction and a new trial.

8. Derek Conway was not provided with procedural due process on appeal, in violation of his state and federal rights, when the Court of Appeals denied his motion for enlargement of time to file a motion for rehearing and his motion to reconsider that ruling, and when the Mississippi

Supreme Court denied his petition for writ of certiorari, which included his motion to suspend the rules.

On August 29, 2005, after Derek Conway's direct appeal had been submitted to the Court of Appeals for review, a major hurricane, Katrina, made landfall on the Mississippi gulf coast. This storm causes substantial damage to the coast and counties to its north, including Forrest County, within the Second Supreme Court District. The Forrest County public defender's office was closed for three weeks as infrastructure was repaired and replaced, and the attorneys were capable of returning to work. As a consequence, the Mississippi Supreme Court entered order No. 2005-AD-00001, a copy of which is attached hereto as Exhibit "I", on September 6, 2005, to govern appeals from counties affected by the storm. It reads in pertinent part, "[A]ll deadlines falling on or after August 29, 2005, through October 31, 2005, are extended for 90 days from the due dates set by rules, clerk's notices and orders."

The order of the Supreme Court should be interpreted as adding a 90 day extension to all matters pending during the dates set out in Order No. 2005 where such an extension is needed. The facts presented herein demonstrate that cases on appeal, following Katrina, were time affected and an out of time appeal in fairness should have been granted.

The opinion of the Court of Appeals was handed down on November 29, 2005, after the Thanksgiving holiday. The mandate from that court issued December 20, 2005. On December 29, 2005, appellate counsel filed a motion for enlargement of time. The motion offered as grounds for good cause:

> Appellant's counsel has been in the process of reviewing the court's opinion to determine if just cause warrants the filing of a Motion for

> Reconsideration. However, Counsel's schedule has not allowed him the opportunity complete this review. As such additional time is needed.
>
> The Appellant is currently incarcerated and as such the Appellant's counsel has not had sufficient opportunity to communicate with Appellant regarding the recent opinion of the court. As such additional time is needed.
>
> Counsel respectfully submits that the amount of time requested is reasonable under the circumstances and is not made for purposes of mere delay, nor is it the consequence of lack of attention by the undersigned but rather to an extremely large public defender case load.

Motion # 2005-4072 in Clerk's General Docket (paragraph numbers removed). On the same day this motion was filed, the then appellate counsel sent the attached letter to Derek Conway, first informing him of his right to file a motion to reconsider.

While rule 40 of the Mississippi Rules of Appellate Procedure set a 14 day deadline on filing motions for rehearing, Rule 26 of the same rules states: "The Supreme Court or the Court of Appeals for good cause shown may, upon motion, enlarge the time prescribed by the rules or by its order for doing any act, or may permit an act to be done after the expiration of such time . . . . M.R.A.P. 26(b) (emphasis added). Conway's appellate counsel filed such a motion which contained sufficient evidence of good cause to meet the requirements of Rule 26. The Court of Appeals denied this motion by merely citing Rule 40, apparently without ever considering whether Conway had shown good cause for an enlargement of time.

The Supreme Court upheld this error by treating Conway's petition for writ of certiorari as simply a motion to suspend the rules. As indicated above, Conway made a showing of good cause within his motion for enlargement of time, which the Supreme Court did not address in its order denying his petition for writ of certiorari. Even under Rule 2 of the Mississippi Rules of Appellate Procedure, Conway has met his burden to

show good cause. M.R.A.P. 2(c). Furthermore, Rule 2, before allowing for the discretionary dismissal of an appeal, requires notice of a deficiency and a hearing whereby Conway could show good cause. M.R.A.P. 2(a)(2), (b). Conway was afforded neither in these circumstances.

From the facts recited above, Derek Conway was not given reasonable notice or opportunity to be heard concerning the options available to him on direct appeal. This resulted in a violation of his procedural due process rights under federal and state law. *See Harris v. Mississippi Valley State University*, 873 So. 2d 970, 985-86 (Miss. 2004). Therefore, the Supreme Court was in error denying his Petition for Writ of Certiorari.

CONCLUSION

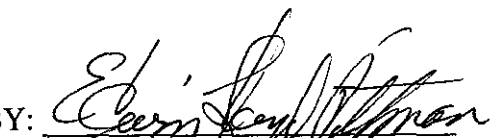
Through no fault of the Petitioner Conway his opportunity for a full review of the Court of Appeals and the Supreme Court were lost to him. The full appellate reviews importance is highlighted and the findings of the Court of Appeals that a Video tape which the court of appeals in it opinions find to be "unreviewable" and wrongfully admitted into evidence over the objection of the Defendant and then the "enhanced" (edited video tape?) was shown to the jury several times and the District Attorney and his assistant continuously referred to and relied on the tape to underguird their argument and statements to the jury all of which accumulated to the detriment of the Petitioner not receiving a fair trial.

Further, the extensive testimony of the witness Haynes as to the position of the deceased and the defendant over the trajectory of the bullet are well beyond his expertise or knowledge and were not objected to by defense counsel and finally the lack of a full appellate review all support the petitioners request for a new trial.

For the reasons discussed above, Derek Conway moves the court for post-conviction relief. Conway generally requests the court enter an order reversing his conviction and vacating his sentence and granting him a new trial on the merits.

Respectfully submitted,

DEREK BRANDON CONWAY

BY: 
Edwin Lloyd Pittman
His Attorney

CERTIFICATE OF SERVICE

I, Edwin Lloyd Pittman, attorney for Derek Brandon Conway, do hereby certify that I have this day served a copy of this foregoing document by United States mail, postage prepaid, to the following:

Hon. Jim Hood
Attorney General, State of Mississippi
P.O. Box 220
Jackson, MS 39201

This the _____ day of _____, 2009.


Attorney for Movant

For the reasons discussed above, Derek Conway moves the court for post-conviction relief. Conway generally requests the court enter an order reversing his conviction and vacating his sentence and granting him a new trial on the merits.

Respectfully submitted,

DEREK BRANDON CONWAY

BY: _____
Edwin Lloyd Pittman
His Attorney

CERTIFICATE OF SERVICE

I, Edwin Lloyd Pittman, attorney for Derek Brandon Conway, do hereby certify that I have this day served a copy of this foregoing document by United States mail, postage prepaid, to the following:

Hon. Jim Hood
Attorney General, State of Mississippi
P.O. Box 220
Jackson, MS 39201

Honorable Bob Helfrich
Forrest County Circuit Court Judge
Post Office Box 309
Hattiesburg, MS 39403

This the 24th day of September, 2009.

_____
Attorney for Movant