IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DARRIAN RAGLAND — APPELLANT

VS. — NO. 2009-KA-1558-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

On March 27, 2004, a nighttime intruder broke and entered the dwelling house of Mrs. Kimberly Yarbrough. Without her consent, the man slipped into her bed, laid down beside her, rubbed his hands through her hair and along her leg, moved his penis "up and down on [her] behind" and informed Yarbrough in no uncertain terms she was fixing to give him "some pussy." (R. 77-78, 89)

Not one whit of doubt existed in the mind of Mrs. Yarbrough as to the burglar's identity. He was Darrian Ragland, a young man Yarbrough had known as a teenager but had not seen for ten (10) years. (R. 81-82, 97)

Ragland, who asserted a general denial coupled with an alibi in defense of the charges (R. 118- 19), claims that no rational and fair-minded juror could have found beyond a reasonable doubt he was guilty of burglary with the intent to commit rape.

Obviously, the conflicting "he said, she said" testimony presented a classic jury issue, and the verdicts returned should not be disturbed.

The effectiveness of trial counsel and the sufficiency and weight of the evidence are the lone issues presented in this appeal from convictions of house burglary with the intent to commit rape and petit larceny.

DARRIAN RAGLAND, a thirty-four (34) year old African-American male (C.P. at 16) and testifying defendant (R. 118-20), prosecutes a criminal appeal from his convictions of burglary of a dwelling house and petit larceny following trial by jury conducted on July 14, 2009, in the Circuit Court of Coahoma County, Albert B. Smith, Circuit Judge, presiding.

During a sentencing hearing conducted on August 13, 2009, and following a presentence investigation and report, Ragland, after a few abbreviated comments proffered in extenuation and mitigation of sentence, was sentenced to serve a term of twenty-five (25) years in the custody of the MDOC for the burglary charged in Count I and to serve six (6) months, consecutive, for the larceny charged in Count II. (R. 158; C.P. at 13-15)

Ragland had been indicted in September of 2004, for the burglary of a dwelling house (Count I) and petit larceny (Count II) in violation of Miss.Code. Ann. §97-17-23 and §97-17-43, respectively. (C.P. at 2)

The indictment, omitting its formal parts, charged in Count I

> "[t]hat DARRION RAGLAND. . . on or about March 27, 2004, . . . did then and there, unlawfully, wilfully, feloniously and burglariously break and enter the dwelling house of Kimberly Yarbrough located at 434 Barnes Avenue, in Clarksdale, MS, by breaking in through a rear window with the intent to commit the crime of rape therein, . . ." (C.P. at 2)

The indictment charged in Count II

> "'t]hat DARRION RAGLAND, on or about March 27, 2004 . . . did take, steal, or carry away a Bersa .380 automatic pistol, with a value of under $500.00, . . ." (C.P. at 2)

Ragland, who had been living and incarcerated out of state for quite some time (R. 156), assails the effectiveness of his trial lawyer as well as the sufficiency and weight of the evidence used to convict him of the crimes charged. He seeks reversal, vacation of his convictions and discharge, but if not discharge, at least a new trial with a new lawyer. (Brief of Appellant at 9-10, 48-49)

Two (2) issues are raised by Ragland on appeal to this Court, *viz.*, (1) trial counsel rendered ineffective assistance before, during, and after trial, and (2) the trial court erred in failing to grant Ragland's motion for judgment notwithstanding the verdict or, in the alternative, Ragland's motion for a new trial. (Brief of Appellant at ii and iii)

The ineffective assistance of counsel claim is controlled fully, fairly, and finally by the law found in the following decisions recently handed down by the Court of Appeals: **McLaurin v. State,** No. 2008-KA-00814-COA decided November 17, 2009 (¶¶ 14-17) slip opinion at 5-6 [Not Yet Reported]; **Drummond v. State,** No. 2008-KP-00313-COA decided October 27, 2009, (¶¶14 and 15) slip opinion at 7-8 [Not Yet Reported]; **Wynn v. State,** 964 So.2d 1196 (Ct.App.Miss. September 4, 2007); **Jones v. State,** 961 So.2d 730 (Ct.App.Miss. February 20, 2007).

STATEMENT OF FACTS

On March 27, 2004, a nighttime intruder broke and entered through a window the dwelling house of Mrs. Kimberly Yarbrough, a married mother of four (4) children residing in Clarksdale. Without Yarbrough's consent, the intruder slipped into her bed, laid down beside her, rubbed his hands through her hair and along her leg, moved his penis "up and down on [her] behind" and informed her in no uncertain terms she was fixing to give him "some pussy." (R. 77-78, 89)

Mrs. Yarbrough, who knew the intruder by his face and positively identified him in her well lighted bedroom, testified she had no doubt whatsoever that her assailant was Darrian Ragland, a man she had grown up with as a teenager but had not seen for ten (10) years. (R. 81-82, 96-97)

Yarbrough's version of the incident is found in the following colloquy:

> Q. [BY PROSECUTOR BLECK:] Can you tell the jury what happened that - - that night?
>
> A. [BY YARBROUGH:] That evening I had made it in kind of early 'cause I had recently got out of the hospital. My two older kids, I had dropped them off at a slumber party. And my two smaller kids, they were three and five at the time. Since the older kids was gone, out to the slumber party, I let the two little kids stay in the room with me because I had just got out of the hospital. So my little girl was on my - - in my bed asleep with me. And my little boy, he had fell asleep on the floor. And I eventually fell asleep. I was awakened when I felt someone get in the bed with me. And I thought it was my little boy 'cause my little boy, he was on the floor. So I never turned over once. And when I felt him get a little close, I was like, "Oh, you done finally decided to get in the bed." And like I said, I never turned over. And after getting a little closer to me, I was like, "dog, you cold?" So I threw the cover back on him. I was like, "Get you some cover."
>
> And so as I laid there, that's when I felt someone's hand in my hair. And I laid there, I was like, "Dog, this a crazy dream." And I felt someone rubbing down my back, rubbing on my leg. And I was just - - I still - - I didn't roll over. I just laid there. I looked out of the corner of my eye and all I could say [sic] with someone with braids in their hair, a white tee shirt, some black jeans. He had some black shoes with some white on the sides with some red shoe strings. And I was like, dog, I bet somebody is in this bed. And I was like, well, no, I'm just dreaming; I'm just dreaming. So I still had sat there. So when I started smelling alcohol, a real strong odor of alcohol like someone had been drinking, and so I was like, dog, somebody is in my bed. So I sat up in the bed and I had looked over, which would be to my left, and he was laying down beside me like.
>
> I said: "What are you doing in my bed?"
>
> He was like, "Shh, be quiet."
>
> I was like, "Be quiet?"
>
> Like "Be quiet. You fixing to give me [some]."
>
> I said, "What?"

"Bitch, you heard me. You fixing to give me some."

And I looked and that's when I went to jump up. And as I was getting ready to jump up, that's when he tried to grab me. And I had looked like in front of me and I didn't see my glimpse [sic], so I ran toward my vanity area and I cut the light on. When I cut the light on, that's when I saw the guy getting up out of my bed trying to pull his pants up.

I'm like "What the hell you doing - - what you doing in my house?" I said, "Just get [out] of my house. Get out of my house right now." (R. 77-78)

Mrs. Yarbrough, clad only in a tee shirt (R. 92), described how she next went to her chest of drawers and pulled out an unloaded hand gun at which time the intruder grabbed her. Yarbrough tripped over her son who had been sleeping on the floor. While Yarbrough was lying on the floor, her assailant was straddling her trying to yank off her clothing and take the gun.

Q. [BY PROSECUTOR BLECK:] Now, Kimberly, I don't really want to go through this with you too much again. But we've charged that he intended to rape you. How do you know he intended to rape you?

A. After I initially felt him rubbing his hands through my hair and rubbing on my leg, I felt him - - I felt his penis, him rubbing his penis up and down on my behind.

Q. Where on your behind?

A. It would have been - - I was laying on my right side. It was on the left side of my behind.

Q. And what did he say to you he was going to do to you or you were going to do for him?

A. He was like, "Bitch, shut up. You fixing to give me some pussy. You fixing to give me some."

Q. And what did you think he meant when he said that?

A. That I was going to have sex with him.

Q. Did you want to have sex with him?

A. No, sir.

Q. You said you knew him for a long time. Had he been your boyfriend in the past?

A. Never have he been my boyfriend. Never. (R. 89-90)

During cross-examination, Mrs. Yarbrough elaborated further:

> A. When I was pinned on the floor, all I had on was a gray Enyce tee shirt. I had "Enyce' across the top. He was pulling the tee shirt up. Then he had got the tee shirt fiddling with my breasts that he was pulling his pants up and he was still doing - - trying to get his penis out and had my hand with the other one trying to - - cause I had both of my hands on the gun. And he was holding my hand like this and he was trying to pull his penis out, still trying to rape me as I was on the floor. And my kids was hollering; screaming: "Get off of my momma."
>
> Q. But in the mean time, he had pulled his pants up, is that right?
>
> A. When he got off the bed, he was going to pull them up. He didn't button them up. He just pulled them up.
>
> Q. I see.
>
> A. He got on some plaid boxer shorts, too. (R. 93)

The intruder finally left the house "huffing and puffing." (R. 80) He took with him Mrs. Yarbrough's ".380 chrome and black Bursa" pistol valued at $375.00. (R. 87)

Three (3) witnesses testified for the State of Mississippi during its case-in-chief, including the victim, **Mrs. Kimberly Yarbrough**, who positively identified Darrian Ragland as the man who broke into her house, terrorized her by slipping into her bed where he caressed her hair, leg, and buttocks with his fingertips as well as with other portions of his anatomy, and demanded, in no uncertain terms, sexual intercourse. (R. 78-79, 89)

Mrs. Yarbrough testified she recognized her assailant and furnished his name to the police. (R. 104)

Norman Starks, Sergeant of Investigations with the Clarksdale Police Department at the time of the incident under scrutiny, testified he was dispatched to 434 Barnes Street in Clarksdale where he interviewed the complainant, Kimberly Yarbrough, and processed and photographed the crime scene. (R. 51-54) Yarbrough signed an affidavit apparently charging Ragland with the offense. (R. 52-53) Point of entry was a window from which the window screens had been cut. (R. 60-61)

Joseph Wide, a Clarksdale police officer, testified that prior to March 27, 2004, he knew Darrian Ragland. (R. 109)

Approximately an hour and a half to two hours prior to Yarbrough's 911 call on March 27th, Officer Wide observed Ragland "approximately two or three houses down from - - maybe three or four houses" down from Yarbrough's home on Barnes Street. (R. 110) The State then rested on its case-in-chief. (R. 115)

At the close of the State's evidence, the defendant moved for a directed verdict on the ground " . . . the State has failed to prove each and every element of the crime with which my client was charged." (R.118) This motion was denied. (R. 118)

After being advised of his right to testify or not, the defendant, against the advice of his lawyer, elected to testify. (R. 115-17) He asserted a general denial coupled with an alibi in defense of the charges, claiming he was not in Mississippi on March 27, 2004; rather, he was in Lima, Ohio, on that date. According to Ragland, he had lived in Ohio for six (6) years.

At the close of all the evidence, peremptory instruction was denied. (R. 123; C.P. at 35)

Following closing arguments, the jury retired to deliberate at 1:33 p.m. (R. 145) Nearly two hours later, at 3:13 p.m., it returned with dual verdicts of "guilty," both as to the burglary charged in

Count I and the larceny charged in Count II. (R. 147)

A poll of the jurors, individually by number, reflected the verdict returned was unanimous. (R. 147-48)

Following a sentencing hearing conducted on August 13, 2009, during which Ragland told Judge Smith he "recogniz[ed] the error of [his] ways" and "I've been tryin' to better myself as a person," Judge Smith, commenting upon the severity of the offense in the wake of the victim's enlightening impact statement (R. 154-57), sentenced Ragland to serve twenty-five (25) years in the custody of the MDOC for burglary and to six (6) months consecutive for the petit larceny. (R. 158)

On July 17, 2009, Ragland filed his motion for judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial. He alleged, *inter alia*, the verdict of the jury was against the overwhelming weight of the evidence. (C.P. at 11-12)

The motion was overruled by court order filed on August 31, 2009. (C.P. at 17)

Notice of appeal was filed by Mr. Shackelford on September 23, 2009. (C.P. at 18)

Allan D. Shackelford, a practicing attorney in Clarksdale, provided reasonably effective assistance to Ragland during the trial of this cause.

Law students LaBruce and Winnig, acting as special counsel, have been substituted on appeal. Their vigorous and vociferous representation of Ragland has been equally effective.

SUMMARY OF THE ARGUMENT

Appellant claims his lawyer was ineffective in the constitutional sense for a host of reasons and argues the State's evidence was insufficient to support a conviction despite the eyewitness identification made by the victim inside her well lighted bedroom. (R. 78-79, 82, 92, 95-96)

Ragland's brief is filled with hyperbolic rhetoric, exaggerated claims and interesting "spins" on the posture of the testimony as well as the performance of trial counsel. We salute students

LaBruce and Winnig for their vigorous representation of Ragland and commend them for a job well done.

Ineffective Assistance of Counsel.

Ragland argues that counsel was ineffective in the constitutional sense for a multitude of reasons we decline to individually address.

Ragland has failed on direct appeal to make out a claim *prima facie* of ineffective assistance of trial counsel. The record fails to affirmatively reflect ineffectiveness of constitutional dimensions.

Appellee believes the present record is factually inadequate for a determination by the appellate court that Ragland was denied the effective assistance of trial counsel for the numerous reasons he now claims. A majority of Ragland's allegations are based upon facts not fully apparent from the record. Further fact-finding would be both prudent and necessary.

In any event, any lapses or omissions by counsel were not of sufficient gravity to render counsel's performance ineffective in the constitutional sense.

It is unusual for a reviewing court to consider a claim of ineffective assistance of trial counsel when the claim is made on direct appeal.

"This Court will rule on the merits on the rare occasions where (1) the record affirmatively shows 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." **Drummond v. State,** *supra*, No. 2008-KP-00313-COA decided October 27, 2009, (¶ 15) slip opinion at 8 [Not Yet Reported].

In this posture, a reviewing court can decline to rule on the merits of Ragland's ineffective assistance of counsel claim without prejudice to Ragland to raise the issue *de novo* in a motion for post-conviction relief. *See* **McLaurin v. State,** *supra*, No. 2008-KA-00814-COA decided November

17, 2009 (¶¶ 14-17) slip opinion at 5-6 [Not Yet Reported]; **Drummond v. State,** *supra*, No. 2008-KP-00313-COA decided October 27, 2009, (¶¶14 and 15) slip opinion at 7-8 [Not Yet Reported]; **Wynn v. State,** *supra,* 964 So.2d 1196 (Ct.App.Miss. September 4, 2007); **Jones v. State,** *supra,* 961 So.2d 730 (Ct.App.Miss. February 20, 2007).

Sufficiency and Weight of the Evidence.

Mrs. Yarbrough, who had grown up with Ragland and knew him as a teenager (R. 97), identified Ragland as her tormentor from his top to his middle to his bottom, *viz.*, all the way from his braided hair, his white tee shirt and black pants, black shoes with red shoe strings, to his "plaid boxer shorts." (R. 77-78, 93)

Her description of Ragland and his attire was so detailed as to make her identification of him virtually self-verifying.

The question of intent is not even close. Ragland directly expressed his intent to Mrs. Yarbrough.

ARGUMENT

ISSUE ONE.

TRY AS HE MIGHT, THE DEFENDANT HAS FAILED ON DIRECT APPEAL TO MAKE OUT A CLAIM *PRIMA FACIE* OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

THE RECORD FAILS TO AFFIRMATIVELY REFLECT INEFFECTIVENESS OF CONSTITUTIONAL DIMENSIONS.

Appellate counsel, with the refractive aid of hindsight and back-focal lenses, assails the effectiveness of trial counsel, Mr. Allan Shackleford, who is alleged to have committed twelve (12) sins of both commission and omission sufficient to render his representation at trial ineffective in the constitutional sense.

Substitute counsel berates trial counsel and criticizes his action and inaction in a manner more fit for Attila the notorious Hun. The bark of Ragland's appellate lawyers is far worse than the bite they attribute to Ragland's trial lawyer. Our review of the record leads to the inescapable conclusion that counsel's representation, while not perfect or even errorless, was not so defective as to give rise to a bona fide claim of ineffectiveness in the constitutional sense. This is especially true given the strength of the prosecution's case.

The record, in our opinion, is factually inadequate for a determination by a reviewing court that trial counsel was ineffective for the reasons he now claims. Without addressing each individual lapse of counsel alleged by Ragland, we respectfully defer to the cases which have declined to address the issue without prejudice to the appellant's right to raise the matter *de novo* in a post-conviction environment.

The ground rules for resolving this complaint were first set forth in **Read v. State,** 430 So.2d 832, 841 (MIss. 1983), where this Court stated:

> (1) **Any defendant convicted of a crime may raise the issue of ineffective assistance of counsel on direct appeal, even though the matter has not first been presented to the trial court. The Court should review the entire record on appeal.** If, for example, from a review of the record, as in *Brooks v. State*, 209 MIss. 150, 46 So.2d 94 (1950) or *Stewart v. State*, 229 So.2d 53 (MIss. 1969), this Court can say that the defendant has been denied the effective assistance of counsel, the court should also adjudge and reverse and remand for a new trial. *See also, State v. Douglas*, 97 Idaho 878, 555 P.2d 1145, 1148 (1976).
>
> (2) Assuming that the Court is unable to conclude from the record on appeal that defendant's trial counsel was constitutionally ineffective, the Court should then proceed to decide the other issues in the case. Should the case be reversed on other grounds, the ineffectiveness issue, of course, would become moot. **On the other hand, if the Court should otherwise affirm, it should do so without prejudice to the defendant's right to raise the ineffective assistance of counsel issue via appropriate post-conviction proceedings.** If the

> Court otherwise affirms, **it may nevertheless reach the merits of the ineffectiveness issue where (a) as in paragraph (1) above, the record affirmatively shows ineffectiveness of constitutional dimensions,** or (b) the parties stipulate that the record is adequate and the court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed.
>
> (3) If, after affirmance as in paragraph (2) above, the defendant wishes to do so, he may then file an appropriate post-conviction proceeding raising the ineffective assistance of counsel issue. *See Berry v. State*, 345 So.2d 613 (MIss. 1977); *Callahan v. State, supra*. Assuming that his application states a claim, *prima facie*, he will then be entitled to an evidentiary hearing on the merits of that issue in the Circuit Court of the county wherein he was originally convicted./5 Once the issue has been formally adjudicated by the Circuit Court, of course, the defendant will have the right to appeal to this Court as in other cases. [emphasis supplied; text of note 5 omitted]

The following language found in the recent cases of **McLaurin v. State,** *supra*, No. 2008-KA-00814-COA decided November 17, 2009, (¶¶ 14-17) slip opinion at 5-6 [Not Yet Reported] and **Drummond v. State,** *supra*, No. 2008-KP-00313-COA decided October 27, 2009, (¶¶14 and 15) slip opinion at 7-8 [Not Yet Reported], control the posture of Ragland's complaint:

> Drummond contends that defense counsel's failure to object when the State was attempting to elicit hearsay testimony from the victim amounted to ineffective assistance of counsel. Drummond also argues that defense counsel was ineffective because counsel never attempted to impeach Moffett with his prior testimony. This Court does not generally consider an ineffective-assistance-of-counsel claim on direct appeal.
>
> The Mississippi Supreme Court has stated that:
>
> > It is unusual for this [c]ourt to consider a claim of ineffective assistance of counsel when the claim is made on direct appeal. This is because we are limited to the trial court record in our review of the claim[,] and there is usually insufficient evidence within the record to evaluate the claim. The Mississippi Supreme Court has stated that, where the record cannot support an ineffective assistance of counsel claim on direct appeal, the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief. This Court will rule on the merits

> on the rare occasions where (1) the record affirmatively shows 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."

Wilcher v. State, 863 So.2d 776, 825 (¶171) (Miss. 2003) (internal citations and quotations omitted). The record does not affirmatively indicate Drummond suffered denial of effective assistance of counsel of constitutional dimensions, and the parties have not stipulated that the record was adequate to allow the appellate court to make a finding without considering the finding of facts by the trial judge. Thus, we decline to address this issue without prejudice to Drummond's right to seek post-conviction relief, if he so chooses.

Drummond v. State, *supra,* No. 2008-KP-00313-COA decided October 27, 2009, (¶ 15) slip opinion at 8 [Not Yet Reported].

In the **McLaurin** case this court stated the following:

> McLaurin raises twenty-three allegations of ineffective assistance of counsel. Without exhaustively listing each of McLaurin's assertions, we summarize his allegations using his own words: "defense counsel did little to avail himself of the evidence in the custody of the State, . . . much less conduct an independent investigation."
>
> Mississippi Rule of Appellate Procedure 22(b) states:
>
> > Issues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.
>
> "Where the record is insufficient to support a claim of ineffective assistance, 'the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief.' " *Wynn v. State,* 964 So.2d 1196, 1200 (¶9) (Miss.Ct.App.2007) (citing *Aguilar v. State,* 847 So.2d 871, 878 (¶17) (Miss.Ct.App. 2002)).
>
> Several of McLaurin's allegations are based upon facts that are not fully apparent from the record: defense counsel failed to file a direct appeal or a motion for post-conviction relief after accepting a retainer and asserting the defense he was going to file the appeals; defense counsel did not review an incriminating photograph of McLaurin used at trial and did not file a motion to exclude the photograph; defense

> counsel failed to sufficiently investigate potential witnesses and relevant medical records; and defense counsel did not submit any jury instructions. The record contains no medical records, nor does it contain any statements by potential witnesses. Thus, we cannot address these issues on direct appeal. Because we cannot address several of McLaurin's ineffective assistance of counsel allegations on direct appeal, we find that McLaurin's ineffective assistance claim would be more appropriately brought in a petition for post-conviction relief, if he chooses to do so. Accordingly, we deny relief on this issue without prejudice."

McLaurin v. State, *supra*, No. 2008-KA-00814-COA decided November 17, 2009 (¶¶ 14-17) slip opinion at 5-6 [Not Yet Reported].

Because (1) the record fails to show ineffectiveness of constitutional dimensions and (2) both parties have not stipulated the record is adequate to allow the appellate court to make the necessary findings of fact, this Court need not rule on the merits of Ragland's individual ineffective assistance of counsel claims. **Wynn v. State,** *supra,* 964 So.2d 1196 (Ct.App.Miss. September 4, 2007); **Jones v. State,** *supra,* 961 So.2d 730 (Ct.App.Miss. February 20, 2007).

At best, any scrutiny of trial counsel's omission must await a new horizon in a post-conviction environment where trial counsel will have an opportunity to explain the reasons for his actions and/or inactions. It is a rare case indeed where an appellate court will find constitutional ineffectiveness in trial counsel without granting to counsel a meaningful opportunity to be heard.

Our position, in a nutshell, is that Ragland has failed to demonstrate on direct appeal that any aspect of his lawyer's performance was deficient in the constitutional sense and that the deficient performance, if any, prejudiced the defense. Started differently, the record, in its present posture, fails to affirmatively reflect ineffectiveness of constitutional dimensions.

ISSUE TWO.

ANY RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT RAGLAND BROKE AND ENTERED THE VICTIM'S DWELLING HOUSE WITH THE FELONIOUS INTENT TO RAPE MRS. YARBROUGH.

RAGLAND HAS FAILED TO DEMONSTRATE THE TRIAL JUDGE ABUSED HIS BROAD JUDICIAL DISCRETION IN OVERRULING RAGLAND'S MOTION FOR A NEW TRIAL GROUNDED, IN PART, ON A CLAIM THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

NO UNCONSCIONABLE INJUSTICE EXISTS HERE.

Ragland, whose defense at trial was a general denial coupled with an alibi, assails both the sufficiency and the weight of the evidence. He argues, *inter alia*, that " 'facts and inferences' in the State's case are overflowing with blatant inconsistencies, logical fallacies, and an unconvincing set of events and only serve to conclusively establish that no 'rational' juror could have believed the State's key witnesses gave credible evidence that the Appellant broke into Mrs. Yarbrough's home in the manner to which was testified with an intent to rape Mrs. Yarbrough." (Brief of Appellant at 44)

At various places throughout his appellate brief, Ragland describes the posture of the evidence as "tenuous," "contradictory," "unreasonable," "Inconsistent," "unreliable," "flimsy," and he declares the jury's verdict "repulsive to reason, inference, and conclusion." (Brief of Appellant at 42, 46, 48)

Similarly, he describes the testimony of Mrs. Yarbrough and Officer Wide as "underwhelming." (Brief of Appellant at 32)

Our initial response to these descriptions, as well as to Ragland's other observations, is provided by Justice Robertson in **Reynolds v. State,** 521 So.2d 914, 917 (Miss. 1988):

"Horse feathers!" 521 So.2d at 917.

Corroboration of Mrs. Yarbrough's testimony by Wide was at least "whelming" and was certainly enough. **Heidelberg v. State,** 584 So.2d 393, 394 (Miss. 1991).

Our basic response to Ragland's exaggerated "spin" on the testimony is summarized in only three words: Classic jury issue.

Ragland suggests there was insufficient evidence from which a reasonable, fair-minded juror could find, either directly or by reasonable inference, that if Ragland was the person who entered the dwelling house, he did so with the required intent to rape. (Brief of Appellant at 44)

He also opines, for the same reason, he is entitled to a new trial because the first trial resulted in an unconscionable injustice.

We disagree.

Identification.

"The testimony of one eyewitness is sufficient to sustain a criminal conviction." **Barnett v. State,** 757 So.2d 323, 331 (¶27) (Ct.App.Miss. 2000) citing **Williams v. State,** 512 So.2d 666, 670 (Miss. 1987).

Mrs. Yarbrough identified Ragland in court as her nighttime visitor and assailant. (R. 91) She was able to view Ragland nearly eyeball to eyeball in a well-lighted bedroom. Although she had not seen him for ten (10) years she recognized Ragland because she had grown up with him when he was a teenager (R. 81, 97) and was certain of her identification. (R. 91) "I don't have any doubt that's him, that's Darrian." (R. 91)

It is well settled that a victim's uncorroborated identification of a defendant as his/her assailant is both substantial and credible evidence upon which the fact finder can base its verdict. **Brown v. State,** 798 So.2d 629 (Ct.App.Miss. 2001); **Dukes v. State,** 751 So.2d 1129 (Ct.App.Miss.

1999), reh denied. *Cf.* **Peyton v. State,** 796 So.2d 243 (Ct.App.Miss. 2001), reh denied, cert denied. *See also* **Passons v. State,** 239 Miss. 629, 124 So.2d 847, 848 (1960), where we find the following language:

> The character and adequacy of evidence of identification of an accused in a criminal case is primarily a question for the jury, provided evidence could reasonably be held sufficient to comply with the requirement of proof beyond a reasonable doubt. The jury need not be controlled by the number of witnesses testifying to the identification of an accused. **Identification based on the testimony of a single witness, if complying with the standard in criminal cases, can support a conviction, even though denied by the accused. The jury can appraise the truthfulness of an asserted alibi. In short, positive identification by one witness of the defendant as the perpetrator of the crime may be sufficient as in the instant case.** 23 C.J.S. Criminal Law § 920, p.192. [emphasis ours]

In **Passons,** *supra*, the evidence sustained a conviction of armed robbery as against the defense of alibi.

Same here.

Also relevant is the following language found in **Walker v. State,** 799 So.2d 151, 153, (¶ 5) (Ct.App.Miss. 2001), articulated in the wake of Walker's argument raising the questions of both weight and sufficiency:

> These two issues are combined as they both have the same standard of review and are governed by the same facts. Calvin Walker first argues that the in-court identification by Murphy was insufficient to enable the jury to find Calvin Walker guilty beyond a reasonable doubt. **"The inconsistencies of the in-court identification go only to the credibility and weight of the evidence, which is a factual determination to be made by the jury."** *Kimbrough v. State*, 379 So.2d 934, 936 (Miss. 1980). Murphy testified that Calvin Walker was one of the two men who robbed her and Catlano. **Calvin Walker's attorney questioned Murphy at length on cross-examination concerning her identification of Calvin Walker as the second robber. Who the jury decides to believe is a decision to be made by the jury, not for this Court.** *Billiot v. State*, 454 So.2d

445, 463 (Miss. 1984). In this instance the jury decided that Murphy's in-court identification of Calvin Walker was credible. [emphasis ours]

It was the function of the jury to decide whether or not the identification made by the victim was credible and reliable. Mrs. Yarbrough, we note, testified there was no doubt about her identification of Ragland. We quote:

> Q. [BY PROSECUTOR BLECK:] We've talked about the fact that you knew Darrian Ragland for a long time. But you also said you hadn't seen him for a long time?
>
> A. Yes, sir.
>
> Q. When you saw him, did you have any doubt who that was in your house.
>
> A. No, sir. I had no doubt.
>
> Q. Any doubt who that was pulling his pants up from around his ankles in your bedroom?
>
> A. No doubt whatsoever.
>
> Q. Any doubt who told you, you are going to give him some, you're going to give him some?
>
> A. No doubt.
>
> Q. Do you see that person in the courtroom today?
>
> A. Yes, sir.
>
> Q. Where is he?
>
> A. Sitting right over there beside the door.
>
> Q. That fellow with the tie on and the - -
>
> MR. SHACKELFORD: We'll stipulate that she has identified the defendant.
>
> Q. Any doubts in your mind that's him?

MR. SHACKELFORD: I'm talking about identified him in court - - in this court.

A. I don't have any doubt that's him, that's Darrian. (R. 90-91)

Ragland complains about the lack of fingerprints, additional footprints and other physical evidence linking Ragland to the crime. (Brief of Appellant at 31-32, 44, 47) Such is not an impediment to conviction. "The absence of physical evidence does not negate a conviction where there is testimonial evidence." **Graham v. State,** 812 So.2d 1150 (Ct.App.Miss. 2002), cert denied 828 So.2d 200 (2002).

In **Blocker v. State,** 809 So.2d 640, 645 (¶18) (Miss. 2002), an appeal from a conviction of murder less than capital where Blocker's conviction was based largely upon the testimony of a self-confessed accomplice who later recanted, this Court opined:

> Blocker **argues that because there was no physical evidence of her involvement in the crimes, only** the testimony of Curman G. Madden, which besides being uncorroborated was impeached by his earlier confession and by eyewitness testimony, linked her to the events of August 12, 1997. * * * *
>
> While it is true that Madden confessed to the crimes and later recanted when he placed the blame on Blocker, **it is up to the jury to weigh any inconsistencies or contradictions in his testimony. Jones v. State,** 381 So.2d 983, 989 (Miss.1980). The jury is also charged with the responsibility of balancing conflicting evidence. **Winters v. State,** 449 So.2d 766, 771 (Miss. 1984). In this situation, several facts were put before the jury that, if believed, would implicate Blocker in the fatal shooting. * * *

Again. Same here.

The conviction in the case at bar, of course, does not rest upon the testimony of an accomplice but largely upon the identification testimony of the victim, Kimberly Yarbrough, who observed the defendant lying next to her in her bed and saw him moments later standing inside a well lighted

bedroom.

Intent.

While Ragland may argue until the cows come home insufficient evidence of intent, we argue the jury, as was its *exclusive* prerogative, decided that issue adversely to the defendant's position.

In **Newburn v. State**, 205 So.2d 260, 265 (Miss. 1967), this Court stated:

> "Intent is a state of mind existing at the time a person commits an offense. If intent required definite and substantive proof, it would be almost impossible to convict, absent facts disclosing a culmination of the intent. The mind of an alleged offender, however, may be read from his acts, conduct, and inferences fairly deducible from all the circumstances."

In **Shanklin v. State**, 290 So.2d 625, 627 (Miss. 1974), this Court further opined:

> Intent to do an act or commit a crime is also a question of fact to be gleaned by the jury from the facts shown in each case. The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent. [citations omitted]

See also **Chambliss v. State,** 919 So.2d 30, 35 (Miss. 2005) citing **Shanklin v. State,** *supra;* **Knox v. State,** 805 So.2d 527 (Miss. 2002) [Intent to do an act or commit a crime is a question of fact to be gleaned by the jury from the facts shown in each case.]

Here Ragland's intent could be read from his acts, conduct, and inferences fairly deducible from the surrounding circumstances. Indeed, Ragland directly expressed his intent to Mrs. Yarbrough.

It was a jury issue by virtue of jury instruction number S-1 which instructed the jury in plain and ordinary English it had to find that Ragland intended to rape in order to convict.(C.P. at 44)

Sufficiency of the Evidence.

"In reviewing the sufficiency of the evidence, as opposed to its weight, " . . . all evidence

supporting the guilty verdict is accepted as true, and the State must be given the benefit of all reasonable inferences that can be reasonably drawn from the evidence." **Jiles v. State,** 962 So.2d 604, 605 (¶ 5)(Ct.App.Miss. 2006). *See also* **McDowell v. State,** 813 So.2d 694, 697 (¶8) (Miss. 2002).

"[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Bush v. State,** *supra*, 895 So.2d 836, 843 (¶16) (Miss. 2005), quoting from **Jackson v. Virginia,** 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

"Should the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render." **Bush v. State,** *supra*, 895 So.2d at 843 citing, *inter alia*, **Edwards v. State,** 469 So.2d 68, 70 (Miss. 1985).

The indictment alleged Ragland "did . . . break and enter the dwelling house of Kimberly Yarbrough located at 434 Barnes Avenue, . . . by breaking in through a rear window with the intent to commit the crime of rape therein . . . " (C.P. at 2) No complaint has been made that the jury was improperly instructed on the issues of breaking, entry, and intent. (C.P. at 32)

The crime of burglary consists of two essential elements: (1) the burglarious breaking and entering of a house or building described in the statute, and (2) the felonious intent to commit some crime therein. **Newburn v. State,** *supra*, 205 So.2d 260 (Miss. 1967). *See also* **Beale v. State,** 2 So.3d 693 (Ct.App.Miss. 2008), reh denied, cert denied 999 So.2d 1280 (2009).

In the case at bar the intent crime is rape.

Clearly the evidence in this case demonstrates a lack of consent or permission to enter and supports a finding of a breaking, entry, and an intent to rape.

The evidence from which a reasonable and fair-minded juror could find a breaking consists of photographs and testimony concerning pry marks and window screens that had been cut. Entry was achieved through a rear window where the intruder used a table to elevate himself. (R. 54-55, 60-62, 102-03)

In judging the legal sufficiency, as opposed to the weight, of the evidence on a motion for a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to *disregard* evidence favorable to the defendant. **Anderson v. State,** 904 So.2d 973 (Miss. 2004), reh denied; **Lynch v. State,** 877 So.2d 1254 (Miss. 2004), reh denied, cert denied 125 S.Ct. 1299, 543 U.S. 1155, 161 L.Ed.2d 122 (2004); **Hubbard v. State,** 819 So.2d 1192 (Miss. 2001), reh denied; **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996); **Ellis v. State,** 667 So.2d 599, 612 (Miss. 1995); **Clemons v. State,** 460 So.2d 835 (Miss. 1984); **Forbes v. State,** 437 So.2d 59 (Miss. 1983); **Bullock v. State,** 391 So.2d 601 (Miss. 1980). *See also* **Jones v. State,** 904 So.2d 149, 153-54 (Miss. 2005) ["The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."]

The jury, of course, was under no duty or obligation to accept Ragland's alibi defense. (R. 119-21) **Lee v. State,** 457 So.2d 920 (Miss. 1984). Ragland's alibi simply raised an issue of fact to be resolved by the jurors. **Gray v. State,** 549 So.2d 1316 (Miss. 1989). **Hughes v. State**, 724 So.2d 893 (Miss. 1998); **Burrell v. State**, 613 So.2d 1186 (Miss. 1993); **Johnson v. State,** 359 So.2d 1371,

1373 (Miss. 1978) ["The jury was not under a duty to accept the alibi of appellant . . ."]; **Wingate v. State,** 794 So.2d 1039 (Ct.App.Miss. 2001), reh denied, cert denied.

By denying Ragland's motion for a directed verdict (R. 118), his request for peremptory instruction (C.P. at 35), and Ragland's motion for judgment notwithstanding the verdict (C.P. at 17), Judge Smith correctly held the question of Ragland's identity and intent was a jury issue.

In criticizing the integrity of the State's case, Ragland views the evidence in the light most favorable to him.

Judge Waller's opinion in **Bush v. State,** *supra*, 895 So.2d 836, 843 (¶¶16,17) (Miss. 2005), makes it perfectly clear that in resolving sufficiency of the evidence issues the evidence must be viewed and considered in the light most favorable to the State's theory of the case. We quote:

> In *Carr v. State,* 208 So.2d 886, 889 (Miss. 1968), we stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows "beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." **However, this inquiry does not require a court to**
>
> > **'Ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.**
>
> *Jackson v. Virginia,* 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (citations omitted) (emphasis in original.) Should the facts and inferences considered in a challenge to the sufficiency of the evidence "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty," the proper remedy is for the appellate court to reverse and render. *Edwards v. State,* 469

> So.2d 68, 70 (Miss. 1985) (citing *May v. State,* 460 So.2d 778, 781 (Miss. 1984)); *see also Dycus v. State,* 875 So.2d 140, 164 (Miss. 2004). However, if a review of the evidence reveals that it is of such quality and weight that, "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fairminded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence will be deemed to have been sufficient. *Edwards,* 469 So.2d at 70; *see also Gibby v. State,* 744 So.2d 244, 245 (Miss. 1999).
>
> * * * * * *
>
> In light of these facts, we find that any rational juror could have found beyond a reasonable doubt that all of the elements had been met by the State in proving capital murder with the underlying felony being armed robbery. This issue is without merit. **Bush v. State,** 895 at 843-44 (¶¶16, 17) [emphasis in bold print ours].

The **Bush** case is particularly notable for re-articulating the standards of review for both the sufficiency of the evidence and the weight of the evidence. In note 3 of the **Bush** opinion, the Court pointed out that the tests articulated in **Bush** differ " . . . from the tests articulated in some of our previous opinions." **Bush v. State,** *supra,* 895 So.2d at 844, note 3.

The Court in **Bush** observed that in **Turner v. State,** 726 So.2d 117, 125 (Miss. 1998), it had stated an incorrect standard of review for weight of the evidence complaints.

The test for legal sufficiency, on the other hand, was correctly stated in **Turner,** 726 So.2d at 124-25 as follows:

> Turner's contention is that the State failed to prove beyond a reasonable doubt that he was the driver of the pick-up when the accident occurred. The standard of review for Turner's legal sufficiency argument, wherein he argues the trial court erred in denying his motions for directed verdict and his motion for j.n.o.v., is:
>
> > Where a defendant has requested a peremptory instruction in a criminal case or after conviction moved for a judgment of acquittal notwithstanding the verdict, the trial judge must consider all of the evidence - not

> just the evidence which supports the State's case . . . . The evidence which supports the case of the State must be taken as true . . . The State must be given the benefit of all favorable inferences that may reasonabl[y] be drawn from the evidence . . . If the facts and inferences so considered point in favor of the defendant with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting the peremptory instruction or judgment n.o.v. is required. On the other hand, if there is substantial evidence opposed to the request or motion - that is, evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair minded men in the exercise of impartial judgment might reach different conclusions the request or motion should be denied.
>
> *Weeks v. State,* 493 So.2d 1280, 1282 (Miss. 1986)(citing *Gavin v. State,* 473 So.2d 952, 956 (Miss. 1985)) * * * * * *

A finding the evidence is insufficient results in a discharge of the defendant. **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

Can it be said in the case *sub judice* that no rational juror could have found beyond a reasonable doubt that all of the elements of burglary with an intent to rape had been met by the State?

We think not.

To the contrary, based upon the testimony of Mrs. Yarbrough and Officer Wide a reasonable and fair-minded juror could have found that Mrs. Yarbrough, quite unwillingly, was"sleeping with the enemy," and the enemy was Darrian Ragland.

Stated differently " . . . any rational juror could have found beyond a reasonable doubt that all of the elements had been met by the State in proving [the crime charged.]" **Bush v. State,** 895 So.2d at 844.

Weight of the Evidence.

Ragland also claims, for virtually the same reasons, the verdict of the jury was against the overwhelming weight of the evidence because, *inter alia*, "Mrs. Yarbrough, the State's sole eyewitness, presented a confusing and often times contradictory tale of what happened on March 23 [sic], 2004." (Brief of Appellant at 46)

This argument implicates the denial of Ragland's alternative motion for a new trial which asserted, *inter alia*, "[t]he verdict is against the overwhelming weight of the evidence." (C.P. at 11) "A greater quantum of evidence favoring the State is necessary for the State to withstand a motion for a new trial, as distinguished from a motion for j.n.o.v." **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

This Court reviews the trial court's denial of a post-trial motion, e.g., a motion for a new trial, under the abuse of discretion standard. **Flowers v. State**, 601 So.2d 828, 833 (Miss. 1992); **Robinson v. State**, 566 So.2d 1240, 1242 (Miss. 1990). No abuse of judicial discretion has been demonstrated here because the testimony of the three witnesses for the State, including Mrs. Yarbrough's detailed description of her tormentor, weighs heavily in support of the verdict. Put another way, the testimony and evidence, in toto, does not preponderate in favor of Ragland.

The evidence certainly does not preponderate in favor of Ragland's claim he was in the State of Ohio on the night of the burglary. Rather, it is lopsidedly in favor of the State's theory of the case. One eyewitness, Officer Wide, placed Ragland on Barnes Avenue in Clarksdale, and another eyewitness, Mrs. Yarbrough, placed Ragland in her bed. **Bush v. State,** 895 So.2d 836, 844-45 (¶¶18-19) (Miss. 2005). Accordingly, the trial judge did not abuse his judicial discretion in denying Ragland's motion for a new trial. (C.P. at 17)

The jury, as stated previously, was under no duty or obligation to accept Ragland's alibi defense. (R. 119-121) *See* **Lee v. State,** *supra,* 457 So.2d 920 (Miss. 1984).

"The jury is the **sole judge** of the weight and credibility of the evidence." **Byrd v. State**, 522 So.2d 756, 760 (Miss. 1988). It's verdict will not be disturbed on appeal unless the failure to do so would sanction an "unconscionable injustice." **Groseclose v. State,** 440 So.2d 297, 300 (Miss. 1983).

The word "unconscionable" points to something that is monstrously harsh and shocking to the conscience. The verdict returned in the case at bar does not exist in this posture. It is neither harsh nor shocking, and affirmation of Ragland's conviction(s) and sentence should be the order of the day.

In ruling on the defendant's motion for a new trial, the trial judge - and this Court on appeal as well - must look at the evidence in the light most favorable to the State's theory of the case, i.e., "in the light most favorable to the verdict." **Herring v. State,** 691 So.2d 948, 957 (Miss. 1997), citing **Mitchell v. State,** 572 So.2d 865, 867 (Miss. 1990). "We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State." **McClain v. State,** 625 So.2d 774, 781 (Miss. 1993). *See also* **Gibby v. State,** 744 So.2d 244, 245 (Miss. 1999 [On appellate review "[e]vidence is examined in a light most favorable to the state [and] [a]ll credible evidence found consistent with defendant's guilt must be accepted as true."] *See also* **Valmain v. State,** 5 So.3rd 1079, 1086 (¶30) (Miss.2009) quoting from **Todd v. State,** 806 So.2d 1086, 1090 (¶11) (Miss. 2001) ["(An appellate court] must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial.")]

In **Bush v. State,** *supra*, 895 So.2d 836, 844 (¶18) (2005), the Supreme Court penned the following language also articulating the true rule:

> When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State,* 691 so.2d 948, 957 (Miss. 1997). We have stated that on a motion for new trial,
>
> > The court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.
>
> *Amiker v. Drugs for Less, Inc,* 796 So.2d 942, 947 (Miss. 2000)/2 However, the evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *McQueen v. State*, 423 So.2d 800, 803 (Miss. 1982). Rather, as the "thirteenth juror" the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial./3
>
> Sitting as a limited "thirteenth juror" in this case, we cannot view the evidence in the light most favorable to the verdict and say that an unconscionable injustice resulted from this jury's rendering of a guilty verdict. * * * " [text of notes 2 and 3 omitted]

See also **Chambliss v. State,** *supra,* 919 So.2d 30, 33-34 (¶10) (Miss. 2005), quoting *Bush*, 895 So.2d at 844 (¶18).

In **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

This Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983)

The case at bar certainly does not exist in this posture.

CONCLUSION

The trial record does not show ineffectiveness of constitutional dimension, and appellee declines to stipulate the record is adequate to make a finding without consideration of findings of fact of the trial judge. Accordingly, any challenge to Mr. Shackleford's representation must await a new horizon.

A reasonable and fair-minded juror could have found beyond a reasonable doubt from the testimony and photographs that Ragland entered the house with the intent to rape. It was the sole and exclusive prerogative of the jury, not the trial judge, to consider and weigh the testimony which, if true, was wholly sufficient to support a finding that Ragland was guilty of the crimes charged.

"In any jury trial, the jury is the arbiter of the weight and credibility of a witness' testimony, [and] [t]his Court will not set aside a conviction without concluding that the evidence, taken in the most favorable light, could not have supported a reasonable juror's conclusion that the defendant was guilty beyond a reasonable doubt." **Rainer v. State**, 473 So.2d 172, 173 (Miss. 1985).

Although Ragland, with the able and effective assistance of both trial and appellate counsel,

has pursued his claims with great vigor, they are devoid of merit.

Appellee respectfully submits that no reversible error took place during the trial of this cause. Accordingly, the judgments of conviction of dwelling house burglary with the intent to commit rape (Count I) and petit larceny (Count II), together with the twenty-five (25) year and six (6) month consecutive sentences imposed in this cause, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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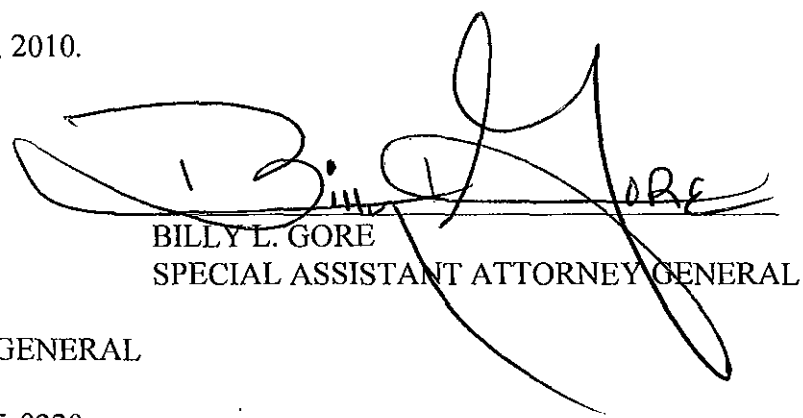
This the 10th day of June, 2010.



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