IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-KA-01558-COA

DARRIAN RAGLAND **APPELLANT**

vs.

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

Darrian Ragland, Appellant;

Allen Shackelford, Esq., trial attorney;

E. Richardson LaBruce, Samuel D. Winnig, and Phillip W. Broadhead, Esqs., Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law;

Laurence Y. Mellen, Esq., District Attorney, **Walter E. Bleck, Esq.**, Assistant District Attorney, **Michael S. Carr, Esq.**, Assistant District Attorney, Office of the District Attorney;

Jim Hood, Esq. Attorney General, State of Mississippi;

Honorable Albert B. Smith, III, presiding Circuit Court Judge; and

Clarksdale Police Department, investigating/arresting agency.

Respectfully submitted,

PHILLIP W. BROADHEAD, MSB[redacted]
Clinical Professor, Criminal Appeals Clinic

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STATEMENT OF ISSUES

ISSUE ONE:

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN (A) FAILING TO MOVE THE COURT TO SUPPRESS THE APPELLANT'S PRIOR CONVICTIONS; (B) FAILING TO MOVE THE COURT TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS; (C) FAILING TO OBJECT TO THE COMPOSITION OF THE JURY; (D) FAILING TO GIVE AN OPENING STATEMENT; (E) WITHDRAWING VALID OBJECTIONS AT TRIAL; (F) FAILING TO RENEW HIS OBJECTION TO THE STATE'S REFERENCE TO THE COMPLAINANT AS "THE VICTIM" AT TRIAL; (G) BEING REPEATEDLY REPRIMANDED BY THE TRIAL JUDGE IN FRONT OF THE JURY; (H) FAILING TO OBJECT TO THE ADMISSION OF OFFICER WIDE'S TESTIMONY WITHOUT FIRST CONDUCTING A *BOX* HEARING; (I) INTRODUCING HIGHLY PREJUDICIAL INFORMATION DURING THE CROSS-EXAMINATION OF OFFICER WIDE; (J) FAILING TO PROPERLY PREPARE AND QUESTION HIS CLIENT DURING DIRECT EXAMINATION, WHILE NOT PRESENTING ANY ALIBI EVIDENCE EVEN THOUGH A CONTINUANCE WAS SOUGHT BY THE DEFENSE AND GRANTED BY THE TRIAL COURT TO FIND SUCH ALIBI EVIDENCE; (K) FAILING TO OBJECT TO THE STATE'S PREJUDICIAL AND INFLAMMATORY CLOSING STATEMENT; (L) FATALLY CONTRADICTING HIS CLIENT'S TESTIMONY DURING CLOSING ARGUMENT; AND, IN THE ALTERNATIVE, WHETHER TRIAL COUNSEL'S ERRORS CUMULATIVELY RENDERED INEFFECTIVE ASSISTANCE TO THE APPELLANT BEFORE, DURING, AND AFTER TRIAL.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE APPELLANT'S MOTION TO SET ASIDE THE JURY'S VERDICT (J.N.O.V.) BECAUSE THE EVIDENCE PRESENTED AT TRIAL WAS LEGALLY INSUFFICIENT, OR, IN THE ALTERNATIVE, REFUSING TO GRANT THE APPELLANT'S MOTION FOR A NEW TRIAL, AS THE VERDICT OF THE JURY WAS NOT SUPPORTED BY THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

Confusion. A cloud of confusion covers the testimony presented by the State in Darrian Ragland's case. First, the testimony of Norman Starks (hereinafter, "Sgt. Starks"). Sgt. Starks was the Sergeant of Investigations with the Clarksdale Police Department and investigated the present case. His testimony was riddled with speculations and conclusions based solely on hearsay. Second, the testimony of Kimberly Yarborough (hereinafter, "Mrs. Yarbrough"), the accuser in the present case, whose testimony, when not prompted by the State, was implausible and often contradictory. Third, the testimony of Officer Joseph Wide (hereinafter, "Officer Wide"), a johnny-come-lately witness discovered to defense counsel on the morning of trial. Finally, defense's closing argument presented speculation and conflicting arguments based on evidence that did not come up as proof in the trial.

On November 30, 2004, a grand jury indicted Darrian Ragland (hereinafter, "Mr. Ragland") on the charges of burglary of a dwelling and petit larceny. (CP. 2-3, RE. 8-9). Mr. Ragland's trial began almost five years later, on July 14, 2009. (CP. 1, RE. 7). After empaneling a jury, the State gave its opening statement. Defense counsel declined to make one. (T. I. 50). In its case-in-chief, the State first called Sgt. Norman Starks, who at the time of trial was employed by the District Attorney in Bolivar County (T. I. 50), and had previously been the investigator of the present case as the Sergeant of Investigations with the Clarksdale Police Department. (T. I. 50-51).

Early Saturday morning, March 27, 2004, Sgt. Starks investigated alleged burglary at 434 Barnes Street in Clarksdale, Mississippi. According to his testimony, once there, he spoke with the Complainant, Mrs. Yarbrough, who explained in detail what had happened that night. (T. I. 51). Immediately after talking to her, Sgt. Starks drove Mrs. Yarbrough to the Clarksdale police station to get an even more detailed statement as to the previous night's alleged burglary. Sgt. Starks testified that upon talking with Mrs. Yarbrough at the police station, he "allowed her to sign an Affidavit because she

actually knew the person." (T. I. 51-52). This comment elicited a hearsay objection from defense counsel, however, with the caveat that with a precautionary instruction from the court, the objection would be withdrawn. (T. I. 52). Without explicitly ruling on the objection, the trial court allowed the State to simply re-ask the question. (T. I. 53).

During Sgt. Starks' initial investigation of Mrs. Yarbrough's home, he dusted for fingerprints but failed to locate any. (T. I. 51, 54). He further stated that while he was at Mrs. Yarbrough's home he noticed "a table that was on the outside where the window was where the suspect got in - - climbed on top of to get into the window." (T. I. 54). Immediately following this statement, the State asked Sgt. Starks if he was able to determine how entry was made into Mrs. Yarbrough's house, raising an objection from defense counsel that having not been qualified as an expert he was unable to testify as to conclusions. (T. I. 54). The trial court overruled the objection. Sgt. Starks testified that he determined where entry was made from what he saw and from Mrs. Yarbrough's statements; prompting defense counsel to ask the trial court whether he had a continuing objection to Sgt. Starks' use of hearsay testimony. (T. I. 55). Regardless of the court's ruling on the objection, Sgt. Starks continued to testify as to the alleged point of entry. (T. I. 55-56). The State asked, "Is [this] the window through which the break-in was made. . .," which appears to be subject to the continuing objection; the trial court was silent as to the objectionable nature of this question and the response. (T. I. 58). Sgt. Starks later testified, "This is the window in which the suspect went into," which, despite the continuing objection, elicited another objection from defense counsel that was again overruled by the court. (T. I. 58). Defense counsel then entered another continuing objection to whether Sgt. Starks could testify as to "whether there was - - entry was gained, whether gained and whether - - unless he saw it. . ." and that objection was again overruled. (T. I. 59-60).

Sgt. Starks referred to Mrs. Yarbrough as "the victim" throughout his testimony, which the trial

court had previously concluded was unacceptable following defense counsel's objection during voir dire. (T. I. 8-9, 64). Sgt. Starks also testified that Mrs. Yarbrough had a bruise on her arm, which he concluded was from a struggle. (T. I. 65). Once again, defense counsel objected to Sgt. Starks's testimony, which the trial court sustained. Immediately thereafter, the State asked Sgt. Starks what Mrs. Yarbrough had said, eliciting hearsay, and defense counsel's objection was again sustained by the court. (T. I. 65-66).

On cross-examination, Sgt. Starks testified that "[Mrs. Yarbrough] indicated . . . that [the] table was set there in front of that window by the person that came into the window," a conclusion based solely on the hearsay of Mrs. Yarbrough's speculative conclusion. (T. I. 70). Defense counsel did not object, but simply asked the witness to answer his question. (T. I. 70). Further, Sgt. Starks testified that he never asked Mrs. Yarbrough whether the table outside of the window was her, whether the front door had been locked, whether the window screens could have been cut some time before that night, or whether anyone else had a key to her home. (T. I. 70-73). When asked why he did not conduct any further investigation, Sgt. Starks responded, "I believe the Complainant. I believe what she was saying was truthful and correct." (T. I. 73).

The State's next witness was Mrs. Yarbrough. (T. I. 76). Mrs. Yarbrough testified that on the night of March 27, 2004, she dropped her two oldest children off at a slumber party and returned home with her three-year old daughter and her five-year old son. (T. I. 77). With her husband, a truck driver, on the road, and her older children away from the house, Mrs. Yarbrough, wearing nothing but a tee shirt, invited her two young children to sleep in the bedroom with her: the little girl at the foot of her bed and the young boy on the floor beside her. (T. I. 106). The house, aside from the back bedroom, was pitch black dark, and the television in her bedroom was off. (T. I. 102). At some point later in the night, Mrs. Yarbrough was awakened by someone crawling into bed with her, whom she assumed was her five-

year-old son, and paid no attention. (T. I. 77). Then, after she claimed that she unexpectedly felt someone's hands running through her hair and penis rubbing up against the left side of her behind, she peered out of the corner of her eye to see who was in the bed with her. (T. I. 77, 89). There behind her lie "someone with braids in their hair, a white tee shirt, some black jeans" and a pair of "black shoes with some white on the sides with some red shoe strings." (T. I. 77-78).

Believing that she must have been dreaming, Mrs. Yarbrough continued to lie in the bed. (T. I. 78). It was not until she smelled the odor of alcohol on his breath did she roll over and ask the person beside her what he was doing in her bed. Mrs. Yarbrough then said that the man said "Bitch, you heard me. You fixing to give me some." (T. I. 78). After these words, Mrs. Yarbrough said that she then jumped out of her bed and ran straight to her vanity and cut on the light. According to Mrs. Yarbrough, as soon as the light hit his face, she immediately recognized the person in her bed as the Appellant, Darrian Ragland, who she claimed was the older brother of one of her childhood friends. (T. I. 82). Mrs. Yarbrough further testified that despite the fact that she had not seen the Appellant in over ten years, when he was a teenager, she had no doubt as to the identity of the man in her room. (T. I. 81, 91). She was so certain that she recognized the intruder, she did not even look at any pictures or a lineup: "I didn't have to look at nothing. I knew exactly who it was. I told them who it was and what he had on. And I told them where I last known for him to live at." (T. I. 104)

Mrs. Yarbrough continued to testify that as the man she believed to be Darrian Ragland got out of the bed and began pulling up his pants, Mrs. Yarbrough yelled at him, "'What the hell you doing . . . Just get out of my house. Get out of my house right now.'" (T. I. 78). Then, she went to the dresser beside her vanity, pulled out her unloaded Bersa .380, pointed it at the man, and repeated, "Get out of my house." (T. I. 79). Instead of leaving, however, the man faked one step towards the door and then lunged at the gun in Mrs. Yarbrough's hands, forcing her to backpedal and trip over her five-year-old

son who had been asleep on the floor. (T. I. 79).

It was at this point, with her back on the floor and the man straddling her, her two children awoke and began screaming, "Get off my momma." (T. I. 79, 93). The man, however, continued to try to wrestle the gun out of both of Mrs. Yarbrough's hands, while simultaneously trying to pull her tee shirt off of her, fiddle with her breasts, pull his pants down, and pull his penis back out. (T. I. 79, 93, 106). Eventually, the man wrestled the gun away and "finally just jumped up and he was huffing and puffing like he didn't know which way to go" and then ran out of the bedroom. (T. I. 80). Mrs. Yarbrough, peeking out from behind her bedroom door, watched the man wander from room to room looking for a way out of the house. She then called for her children to run into the bathroom and lock the door. She then ran to the dresser, retrieved her husband's gun, put the clip in it, picked up the phone, and dialed 911. (T. I. 80). As soon as she cocked the gun, she heard her front door alarm beep. (T. I. 80). Then, based on the alarm's thirty-second delay, she said searched the house to make sure he was gone, looked out into the front yard to see what direction he may have run as per the 911 operator's instructions, told the operator that she could not see him, and then entered her security code. (T. I. 95).

Some time later, a police officer, arrived at Mrs. Yarbrough's home. According to Mrs. Yarbrough, as she was going to meet the police officer at her front door she noticed that her "big old computer desk" had been pushed away from the wall in her living room. (T. I. 83). Behind the desk, she noticed that her curtains were "pulled back a little bit" and upon examination, noticed that the window had been propped open by a stick. (T. I. 83). She later testified that the cooler and the table were both hers and were left outside on the front porch from a barbeque the weekend before.

In addition to the cooler and the table, Mrs. Yarbrough noticed that the window's screen had been cut and there were pry marks on the bottom of the window frame, both of which she stated had not been there the day before. (T. I. 85-86). Further, Mrs. Yarbrough stated that later that morning, while she was

cleaning up her house, she discovered that a lamp, which was usually on top of the television in her room, was unplugged and thrown behind her rocking chair with its cord coiled around its base. (T. I. 101). She later stated that she had not initially seen the lamp because the television was turned off and there was very little light in her bedroom before she cut on her vanity. Mrs. Yarbrough testified that she had not heard anything prior to the man climbing into bed with her. (T. I. 102).

The trial transcript indicates that defense counsel only spoke with Officer Joseph Wide, (hereinafter "Wide") the morning before the trial, approximately four years after the indictment. (T. I. 107). For this reason, defense counsel initially moved, *in limine,* to prevent Officer Wide from testifying; however, this motion was apparently altered or withdrawn, as defense counsel concluded that "he can say he saw him" referring to Officer Wide seeing Mr. Ragland nearby and a few hours prior to the incident. (T. I. 107). Officer Wide indicated that he had known Mr. Ragland from the neighborhood for a few years prior to the incident, but then said he had not seen him in a long time. (T. I. 110). Officer Wide mentioned that it was Officer Brewer's case, who was still employed in Clarksdale, but Officer Brewer was never called to testify at trial. (T. I. 113-14). In the defense's case-in-chief, defense counsel called Mr. Ragland to the stand and conducted a very limited direct examination, which did not elicit any additional alibi information surrounding Mr. Ragland's whereabouts for the month of March 2004, despite the trial court's granting of a defense motion for continuance on the specific grounds to find alibi evidence. The State did not choose to cross-examine Mr. Ragland. Defense counsel then rested. (T. I. 119-20) (CP. 5-7, RE.22-24). After resting, the defense moved for a peremptory instruction for the court to direct the jury to return a verdict of not guilty, and that was denied by the court. (T. I. 123). In defense counsel's closing argument, he implied that there was in fact a man in the house, whether or not it was Mr. Ragland, but that the man may have been there for consensual sex. (T. I. 138).

On July 14, 2009, a jury comprised of one male and eleven females (T. I. 42-43), convicted

Darrian Ragland of burglary of a dwelling and petit larceny, and defense counsel timely filed a motion for judgment notwithstanding the verdict or in the alternative a new trial, which was denied by the trial court. (CP. 11-12, RE. 16-17). On August 17, 2009, Mr. Ragland was sentenced to the maximum extent of the law: twenty-five years as to the burglary charge, and six months as to the petit larceny charge. Feeling aggrieved by the verdict of the jury and the sentence handed down by the trial court, the Appellant timely filed a Notice of Appeal. (CP. 18, RE. 19).

SUMMARY OF THE ARGUMENT

A dark combination of an incompetent representation, apathetic investigation and prosecution, and juror confusion has resulted in the imprisonment of Darrian Ragland for over twenty-five years. At trial, a man was convicted of burglary with intent to rape with absolutely no physical or circumstantial evidence tying him to the home at 434 Barnes Street in Clarksdale, Mississippi. The State rested its entire case on two separate and highly suspect eyewitness identifications: One by the childhood schoolmate of the Appellant's sister who had admittedly not seen him in over ten years, and the other by a police officer, whose supposed identification was disclosed by the prosecutor on the morning of trial. This utter lack of physical evidence placing Mr. Ragland inside of the home in question, however, was further exacerbated by the defense counsel's incompetent representation and the State's delay of over four-and-a-half years in bringing Mr. Ragland to trial. This delay only served to excuse the conflicting, confusing, and implausible testimony of the State's witnesses, to exclude the exculpatory testimony of the first responding officer that night, and to hinder the defendant's ability to properly develop and establish his alibi evidence.

Mr. Ragland first contends that the defense counsel's deficient performance allowed him to be convicted at trial, despite the overwhelming lack of conclusive, consistent, and persuasive evidence offered by the State. Defense counsel committed thirteen errors over the course of his representation,

which the Appellant submits would satisfy the two-prong ineffective assistance of counsel test set forth in ***Strickland v. Washington***. For example, counsel not only failed to object to the testimony of Officer Wide, a prosecutorial witness discovered the morning of trial, but also, on cross-examination, introduced into evidence that the reason Officer Wide was in the area on the night of the alleged incident was because he had been dispatched there on a call that allegedly involved Mr. Ragland, evidence which is both unduly suggestive and highly prejudicial. Furthermore, defense counsel failed to make an opening statement; failed to make a ***Batson*** challenge to the State's continued striking of male jurors in an attempted rape case; failed to make a pre-trial motion to dismiss the indictment on speedy trial grounds; failed to make a motion to exclude Mr. Ragland's previous convictions, nor requested that the trial court perform a ***Peterson*** balancing test, which if successful, would have presented Mr. Ragland with an opportunity to testify without the fear of being impeached; and, alleged in his closing statement that this case was a consensual relationship between a married woman and her ex-lover gone wrong, essentially torpedoing the Appellant's trial testimony that he had been residing continuously outside of Mississippi for the past six years.

The circumstances surrounding the original accusations, the arrest, and the trial of Darrian Ragland are overflowing with procedural errors, acts and omissions by trial counsel that prejudiced the defense's case, and fundamental defects in the proceedings that seriously call into question the guilty verdict in this case, which resulted in a prison sentence of over a quarter century. Therefore, the Appellant respectfully moves this honorable Court to reverse the verdict of the jury and the sentence of the trial court and remand this case to the lower court with proper instructions for a new trial, or, in the alternative, to find the State's case legally insufficient, thereby and render this matter, ordering the immediate discharge of the Appellant from the custody of the Mississippi Department of Corrections.

ARGUMENT

ISSUE ONE:

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN (A) FAILING TO MOVE THE COURT TO SUPPRESS THE APPELLANT'S PRIOR CONVICTIONS; (B) FAILING TO MOVE THE COURT TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS; (C) FAILING TO OBJECT TO THE COMPOSITION OF THE JURY; (D) FAILING TO GIVE AN OPENING STATEMENT; (E) WITHDRAWING VALID OBJECTIONS AT TRIAL; (F) FAILING TO RENEW HIS OBJECTION TO THE STATE'S REFERENCE TO THE COMPLAINANT AS "THE VICTIM" AT TRIAL; (G) BEING REPEATEDLY REPRIMANDED BY THE TRIAL JUDGE IN FRONT OF THE JURY; (H) FAILING TO OBJECT TO THE ADMISSION OF OFFICER WIDE'S TESTIMONY WITHOUT FIRST CONDUCTING A *BOX* HEARING; (I) INTRODUCING HIGHLY PREJUDICIAL INFORMATION DURING THE CROSS-EXAMINATION OF OFFICER WIDE; (J) FAILING TO PROPERLY PREPARE AND QUESTION HIS CLIENT DURING DIRECT EXAMINATION, WHILE NOT PRESENTING ANY ALIBI EVIDENCE EVEN THOUGH A CONTINUANCE WAS SOUGHT BY THE DEFENSE AND GRANTED BY THE TRIAL COURT TO FIND SUCH ALIBI EVIDENCE; (K) FAILING TO OBJECT TO THE STATE'S PREJUDICIAL AND INFLAMMATORY CLOSING STATEMENT; (L) FATALLY CONTRADICTING HIS CLIENT'S TESTIMONY DURING CLOSING ARGUMENT; AND, IN THE ALTERNATIVE, WHETHER TRIAL COUNSEL'S ERRORS CUMULATIVELY RENDERED INEFFECTIVE ASSISTANCE TO THE APPELLANT BEFORE, DURING, AND AFTER TRIAL.

The confusion that was apparent in this case was greater in the Appellant's own defense counsel than even in the muddled, contradictory evidence and testimony presented by the State. Then, when the case was over and all of the testimony was complete, Darrian Ragland's fate was sealed not by the police, the accuser, or the prosecution. It was sealed by his own lawyer when he argued a line of defense to the jury in closing that had not even been pursued at trial. This action in summation, coupled with multiple errors and omissions, served only to give the Appellant a sham trial where no pre-trial motions were filed, no meaningful challenge to the State's case was mounted, nor a comprehensible defense presented to the jury. In the end, the Appellant's defense consisted of an attorney who did not perform in even a minimally competent manner, resulting in a predictable finish - guilty as charged.

"Any defendant convicted of a crime may raise the issue of ineffective assistance of counsel on direct appeal, even though the matter ha[d] not first been presented to the trial court." ***Read v. State***, 430 So. 2d 832, 841 (Miss. 1983). To determine whether counsel was ineffective so as to violate the accused's constitutional rights, the Court uses "the standard set forth by the United States Supreme Court in ***Strickland v. Washington***, 466 U.S. 668, 688 (1984), and adopted by Mississippi in ***Stringer v. State***, 454 So. 2d 468 (Miss. 1984)." ***Payton v. State***, 708 So. 2d 559, 560 (Miss. 1998). According to ***Strickland***, a reviewing court must determine "(1) whether counsel's performance was deficient, and, if so, (2) whether the deficient performance was prejudicial to the defendant in the sense that our confidence in the correctness of the outcome is undermined." ***Neal v. State***, 525 So. 2d 1279, 1281 (Miss. 1987).

The deficiency determination in the level of performance required of defense counsel is not unguided. Under the first prong of ***Strickland***, "[c]ounsel's representation is deficient if the errors are so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." ***Payton***, 708 So. 2d at 560. "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Strickland***, 466 U.S. at 689. (emphasis added) The court is not to analyze counsel's actions in hindsight, but rather to judge his or her decisions in a "highly deferential" manner. ***Motley v. Collins***, 18 F.3d 1223, 1226 (5th Cir. 1994) (quoting ***Strickland***, 466 U.S. at 689). In short, defense counsel's performance is presumed to be competent. ***Foster v. State***, 687 So. 2d 1124, 1129-30 (Miss. 1996). Upon establishing that counsel was deficient, the appellant must then also satisfy the second prong of the ***Strickland*** test: prejudice. Counsel's deficient performance is prejudicial "if counsel's errors are so serious as to deprive the defendant of a fair trial." ***Payton***, 708 So. 2d at 560. Thus, "the defendant must

show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 560-61. (emphasis added) "The defendant has the burden to satisfy both prongs of the test." ***Id.*** at 561.

In the present case, the Appellant respectfully contends that defense counsel committed at least a dozen errors in the course of his representation in this case. These errors, however, were not limited to errors of omission alone. Counsel also seemingly committed active error by carelessly introducing highly prejudicial evidence on cross-examination that had been otherwise excluded and by arguing in his closing statement a theory of defense that was completely contradictory to the defendant's sworn testimony at trial. "In short, defense counsel not only failed to defend his client effectively, but also aided, albeit unwittingly, the prosecution. We cannot by any stretch of the imagination construe this action as legitimate strategy for any competent criminal defense attorney." ***Waldrop v. State***, 506 So. 2d 273, 275-76 (Miss. 1987). For the following reasons, the Appellant contends that he received ineffective assistance of counsel as a matter of law and further urges that his conviction must be reversed and remanded for a new trial.

A. Defense Counsel's Pre-Trial Conduct:

> To . . . not prepare is the greatest of crimes; to be prepared beforehand for any contingency is the greatest of virtues.
>
> - Sun Tzu, *The Art of War* 83 (Samuel B. Griffith trans., Oxford University Press 1963).

There is no question that the defendant in a criminal case is entitled to at the every least a basic defense. ***Triplett v. State***, 666 So. 2d 1356 (Miss. 1995). The Mississippi Supreme Court has held that at the very least, "counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case." ***Ferguson v. State***, 507 So. 2d 94, 95-96 (Miss. 1987) (emphasis in original) (internal quotation marks omitted). The Fifth Circuit Court of Appeals has insisted "that effective counsel conduct a reasonable amount of pretrial investigation." ***Martin v.***

Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983). In the instant case, defense counsel failed to conduct an adequate pretrial investigation into the facts of the case, which resulted in a trial consisting of no opening statement, surprise evidence, no effective response to the undiscovered evidence, no defense witnesses, and the introduction of a totally contradictory theory of defense seemingly created during the defense's closing argument. Moreover, defense counsel's failure to file a single pretrial motion, other than one asking for a continuance to discover alibi evidence that apparently resulted in nothing, severely prejudiced the Appellant throughout his trial and in his sentencing to the maximum possible penalty.

1. *Failure to File a Motion to Exclude Defendant's Prior Convictions*:

Defense counsel failed to file a motion to attempt to exclude Mr. Ragland's previous convictions, nor requested the trial judge perform a ***Peterson*** balancing test, which if successful, would have presented Mr. Ragland with the opportunity to testify without the fear of being impeached. As a result of the failure to make this motion, defense counsel then urged the Appellant not to testify on his own behalf during the defense case. (T. I. 117). Furthermore, defense counsel's pre-trial inaction and subsequent actions resulted in an extremely limited, weak direct examination of the Appellant - the defense's lone witness. (T. I. 119-20). The utter lack of persuasiveness in this testimony can best be recognized by the State's decision to not even cross-examine Mr. Ragland. For this reason, defense counsel's performance was clearly deficient in failing to file a pre-trial motion to exclude the defendant's prior convictions. As with many of the instances of deficient performances set out below, there can be absolutely no strategic or tactical reason advanced in this failure to file such a suppression motion considered by most criminal defense attorneys to be routine when the client has a prior conviction and intends to testify in his own defense. As the only witness called by defense counsel, Mr. Ragland's theory of the case hinged entirely on his testimony; however, out of fear of revealing his prior convictions resulting in periodic stints in the Ohio state penitentiary, his testimony was severely limited

and his defense prejudiced without any tactical or strategic reason whatsoever.

2. Failure to Move the Court to Dismiss the Indictment on Speedy Trial Grounds, Despite the Nearly 4 ½ year Delay Between Indictment and Trial.

Mr. Ragland was also denied the effective assistance of counsel by his attorney's failure to even advise him that he had a potentially winnable motion to dismiss for a speedy trial violation and for failing to actually file such a motion to dismiss, as there was also no reasonable trial strategy to justify this failure to file a totally dispositive motion. *See* ***Hymes v. State***, 703 So. 2d 258, 260-61 (¶¶11-14) (Miss. 1997) (holding that counsel's failure to raise a speedy trial violation is grounds for a claim on ineffective assistance of counsel). "The decision as to whether to file [a speedy trial] motion falls under the ambit of acceptable trial strategy. In the absence of evidence that there was no possible trial strategy behind this decision, we find that this does not rise to the level of ineffective assistance of counsel." ***Burton v. State***, 970 So. 2d 229 (¶33) (Miss. Ct. App. 2007) (emphasis added). However, a defense attorney's failure to simply advise a defendant of his speedy trial rights can constitute ineffective assistance of counsel. *See* ***McVeay v. State***, 754 So. 2d 486, 489 (¶11) (Miss. Ct. App. 1999). While the record is unclear as to whether defense counsel actually advised Mr. Ragland of his speedy trial rights, it does not require a large leap in logic to infer that he did not even discuss this possibility with his client.

During the sentencing hearing, the trial judge asked Mr. Ragland what was the longest amount of time he had spent in jail in the last six years. (T. II. 153). He replied, "This is the longest. 11 months. 11 months." (T. II. 153). Mr. Ragland's sentencing in this case occurred on August 13, 2009. (T. II. 151). He was arrested on October 9, 2008, over ten months earlier. (CP. 1, RE. 7). Thus, it can also be reasonably inferred from the record that Mr. Ragland was incarcerated the entire time awaiting trial following his arrest in this case. Moreover, nearly four years had expired between Mr. Ragland's indictment on November 30, 2004, and his arrest on October 9, 2008. As a delay exceeding eight

months is presumptively prejudicial in Mississippi, and since a speedy trial violation results in the dismissal of the indictment, the record and common sense are devoid of an explanation for why the defense would not have tested these constitutional waters on behalf of Mr. Ragland, unless the Appellant was unaware that such a procedure existed. ***Sharp v. State***, 786 So. 2d 372 (¶15) (Miss. 2001).

To succeed on a claim on ineffective assistance of counsel, however, the Appellant must show not only that counsel's performance was deficient, but also that counsel's substandard performance prejudiced the defense. ***Strickland***, 466 U.S. at 687. An individual's right to a speedy trial is guaranteed by the ***Sixth and Fourteenth Amendments to the United States Constitution***, as well as ***Article 3, Section 26 of the Mississippi Constitution***. An alleged violation of the constitutional right to a speedy trial is examined under the four-part test established by ***Barker v. Wingo***, 407 U.S. 514, 531 (1972). The factors, which must be balanced in light of all surrounding circumstances, are: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) any prejudice to the defendant resulting from the delay. ***Id.*** at 533; ***Sharp, supra***, 786 So. 2d at (¶15). "The weight given each necessarily turns on the facts and circumstances of each case, the quality of evidence available on each factor, and, in the absence of evidence, identification of the party with the risk of nonpersuasion." ***Skaggs v. State***, 676 So. 2d 897, 900 (Miss. 1996).

The right to a speedy trial attaches at the time a person becomes an accused for constitutional purposes. ***Perry v. State***, 637 So. 2d 871, 874 (Miss. 1994) (holding that the time begins for speedy trial purposes at the "time of a formal indictment or information or else the actual restraints imposed by arrest and holding to a criminal charge")In the instant case, Mr. Ragland became an accused citizen for constitutional purposes on November 30, 2004, the day he was indicted. (CP. 1-3, RE. 7-9). He was brought to trial on July 14, 2009, over four and one-half years later, clearly exceeding Mississippi's eight-month threshold. (CP. 1, RE. 7). As Mr. Ragland was capable of showing that he was

presumptively prejudiced by this extraordinary delay, the trial court would have been required to inquire into the other ***Barker*** factors to determine whether his constitutional right had been denied.

Mr. Ragland also suffered actual prejudice as the over four and one-half year delay between indictment and trial likely impaired his ability to adequately prepare and present his alibi defense. "The possibility of impairment of the defense is the most serious consideration in determining whether the defendant has suffered prejudices as a result of delay." ***Hughey v. State***, 512 So. 2d 4, 11 (Miss. 1987) (emphasis added). Although the record is again devoid of specific instances in which Mr. Ragland's defense might have been impaired, affirmative proof of particularized prejudice to the defense is not required by the controlling case law. *See* ***Doggett***, 505 U.S. at 655. Specific instances of prejudice to the accused's defense are not required because "impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can rarely be shown." ***Id.*** (internal quotation marks omitted). As Mississippi has recognized, "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." ***Skaggs***, 676 So. 2d at 901 (*quoting* ***Doggett***, 505 U.S. at 655-56).

Simply because the record does not indicate that a particular alibi witness of Mr. Ragland passed away during this extended delay or that critical evidence disappeared, his speedy trial claim was not destroyed. "Every person is entitled to a fair and impartial trial . . . . Thus, where fundamental and constitutional rights are ignored, due process does not exist, and a fair trial in contemplation of the law cannot be had." ***Brooks v. State***, 46 So. 2d 94, 97 (Miss. 1950) (*en banc*) (internal citations omitted). The impairment of an accused's defense is "the most serious" form of prejudice protected against by the Speedy Trial Clause, "because the inability of a defendant to adequately prepare his case skews the fairness of the entire system." ***Doggett***, 505 U.S. at 654. As noted by the Mississippi Supreme Court, when an accused claims that his defense was prejudiced by the State's delay in bring him to trial, "a

weak showing on prejudice 'avails the prosecution little.'" ***Ferguson***, 576 So. 2d at 1255 (quoting ***Beavers v. State***, 498 So. 2d 788, 792 (Miss. 1986)). Thus, the all of the factors in the ***Barker*** analysis weigh in favor of Mr. Ragland. Mr. Ragland need only demonstrate that but for defense counsel's deficient performance, there was a reasonable probability that his speedy trial challenge would have been successful. He is not required to establish with absolute certainty that his right to a speedy trial was denied. In this case, however, all four factors weigh in Mr. Ragland's favor. Therefore, Mr. Ragland was provided ineffective assistance of counsel and the Appellant respectfully contends that the conviction and resulting sentence should be reversed.

B. Defense Counsel's Conduct During Trial:

During the course of trial, Mr. Ragland's defense counsel committed thirteen separate errors, outlined in detail below. The purpose of effective assistance under the Sixth Amendment is "to ensure a fair trial," thus, "[t]he benchmark for judging any claim of ineffectiveness 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 fair result." ***Strickland***, 466 U.S. at 689. Based on these omissions, errors and unprofessional conduct of defense counsel, which by no stretch of the imagination could ever constitute legitimate trial strategy as defined by ***Strickland***, Mr. Ragland was rendered ineffective assistance of counsel, and thus, the Appellant respectfully contends that his conviction should be reversed. In the instant case, the record is replete with instances of deficient performance by trial counsel, falling well below an accepted standard of professional conduct, which effectively denied Mr. Ragland a fair trial and clearly indicates that Mr. Ragland's defense was, in reality, no defense at all. This inadequate execution of the role of defense counsel began in jury selection.

1. *Failure to Raise Objections to the Composition of the Jury:*

In the landmark case of ***Batson v. Kentucky***, the U.S. Supreme Court ruled that the prosecution

in a criminal case can not use race as a basis for peremptory challenges to strike potential jurors. ***Batson v. Kentucky***, 476 U.S. 79 (1986). Within the following years, the Supreme Court also applied this standard to other groups such as Hispanics and Latinos. *See* ***Allen v. Hardy***, 478 U.S. 255 (1986) and ***Hernandez v. New York***, 500 U.S. 352 (1991). In 1994, the Supreme Court extended the ***Batson*** ruling to encompass gender exclusion in the exercise of peremptory strikes. *See* ***J.E.B. v. Alabama, ex rel T.B.***, 511 U.S. 127 (1994). The Mississippi Supreme Court followed this ruling in ***McGee v. State***, holding that "[a]llowing the State to exclude the potential juror based on his gender was indeed a deviation from sound precedent." 953 So. 2d 211, 215 (Miss. 2007).

In Mr. Ragland's trial, the State struck three males and only one female with its peremptory strikes. With its first two strikes, the State struck Andrew Calvin and Edward Carson Meredith. (T. I. 43). Ms. Brown, the only female struck by the State's peremptory strikes, was a person who actually had known Mrs. Yarbrough from having worked with her in the past. (T. I. 11). The State's final strike was yet another male, Roy Downing. (T. I. 44).

In ***Triplett v. State***, the Mississippi Supreme Court said that defense counsel's failure to raise a ***Batson*** challenge during jury selection was one of many errors that cumulatively led to the holding of ineffectiveness under the ***Strickland*** standard. ***Triplett***, 666 So. 2d at 1361. While the ***Triplett*** ruling has been distinguished, and applied only narrowly to cases "alleging multiple instances of ineffective, deficient conduct by an attorney," that is exactly what the Appellant asserts is exemplified by the facts of the present case. ***Turner v. State***, 953 So. 2d 1063, 1079 (Miss. 2007). In ***McGee v. State***, *supra*, the Mississippi Supreme Court held that even though a ***Batson*** challenge was not raised at trial, the issue could be raised under the plain error doctrine due to the on-the-record admission of gender discrimination. 953 So. 2d at 214. While the discrimination in ***McGee*** was actually admitted to by the prosecutor (***Id.***), the State in Mr. Ragland's case was a bit more subtle, and the Appellant urges the Court

to consider the fact that due to the composition of the jury and the number of male jury members struck by the prosecution, that plain error could easily be shown from the trial record. Furthermore, the Court in ***McGee*** held that only one instance of purposeful discrimination is enough to prove a discriminatory purpose, that the showing of a consistent pattern is not necessary. ***Id.*** at 215. In Mr. Ragland's case, if the three male peremptory strikes are not three instances of purposeful discrimination themselves, the strikes at least show a consistent pattern of discrimination based on gender.

As Justice Dickinson wrote in his special concurrence in ***McGee***, "regardless of whether a defendant can demonstrate prejudice, we will not excuse discrimination when it infects our judicial system."***Id.*** at 219 (Dickinson, J., concurring). In a trial where a male defendant is accused of burglarizing a woman's home with the intent to commit rape, and the jury is comprised solely of women, inherent prejudice to the accused should have been obvious to defense counsel, and a pattern of exclusion by the prosecutor could have clearly been shown. The Appellant therefore asserts that this failure on the part of trial counsel was not only deficient performance, but the composition of a jury dominated by women in the case at bar was inherently prejudicial.

2. *Trial Counsel Never Gave an Opening Statement:*

On July 14, 2009, the State proceeded in its case against Darrian Ragland. During its opening statement, the State laid out its case against the defendant in incriminating, excruciating detail. (T. I. 47-50). The State described the layout of the house, indicated what it expected the testimony to be and to show, and portrayed its theory of the case - that Darrian Ragland broke into Kimberly Yarbrough's home with the intent to rape her in the presence of her two small children - to tug at the emotions of the jury. When asked by the court whether he would like to respond, defense counsel stated, "If it please the Court, I'll reserve mine until I put on my case in chief," leaving the State's opening unchallenged, uncontested, and uncontradicted. (T. I. 50). Further, after the State rested, defense counsel neglected to

give an opening statement, thereby depriving the opportunity to detail to the jury his theory of the case.

While generally, "[t]he decision to make an opening statement is a strategic one," it can nonetheless be indicative of defense counsel's ultimate lack of any sort of defense strategy. ***Cabello v. State***, 524 So. 2d 313, 318 (Miss. 1988). "Just as courts presume that counsel's decisions are strategic, courts are also reluctant to infer from silence a lack of strategy." ***Walker v. State***, 823 So. 2d 557, 564 (Miss. Ct. App. 2002). But when defense counsel's total lack of strategy is exceedingly evident throughout the record, a reviewing court is not precluded from reasonably inferring that the failure to give an opening statement was simply a byproduct of counsel's failure to adequately prepare for trial. *See* ***Moody v. State***, 644 So. 2d 451, 454 (Miss. 1994) (finding that defense counsel's failure to make an opening statement was evidence of counsel's deficient performance).

In this case, where defense counsel had absolutely no witnesses to call on his case-in-chief and was encouraging the defendant not to testify on his own behalf, there can be no reasonable strategy for not attempting to inject his theory of defense immediately after the State's opening statement. For this reason alone, counsel's conduct was clearly deficient. Further, the defendant was prejudiced as it left the State's theory of the case unchecked and unchallenged, allowing the prosecution to then proceed without any serious adversarial testing or caution to the jury by defense counsel through an opening statement. Thus, Mr. Ragland was denied effective assistance of counsel and the Appellant urges this Court that his conviction must be reversed and a new trial granted.

3. *Defense Counsel Withdrew Valid Objections*:

On direct examination, Sgt. Starks testified that upon concluding his investigation and talking with Mrs. Yarbrough at the police station he "allowed her to sign an Affidavit because she actually knew the person." (T. I. 52). At the introduction of this hearsay testimony, defense counsel objected but stipulated that with a precautionary instruction, the objection would be withdrawn. (T. I. 52). However,

following a bench conference, defense counsel withdrew the objection without receiving the precautionary instruction or a ruling on the objection. (T. I. 52-53). Rather, defense counsel allowed the State to merely re-ask the same question and obtain essentially the same answer from Sgt. Starks, despite the fact that the question was clearly objectionable hearsay. (T. I. 52-53).

No limiting or precautionary instruction was given to the jury, and because no instruction was given to the jury, they were allowed to use the first statement from the witness stand from Sgt. Starks that the complainant told him that she actually knew the defendant. There can be no strategic or tactical explanation for these actions, since withdrawing a valid objection and allowing the admission of damaging identification testimony clearly constitutes deficient performance that directly resulted in highly prejudicial testimony being admitted into evidence.

4. *Defense Counsel Failed to Renew His Objection to the State's Reference to the Complainant as "the Victim" at Trial*:

In voir dire, the term "the victim" was used to refer to Mrs. Yarbrough, before any evidence was entered indicating that a crime had occurred or that Mrs. Yarbrough was a victim of a crime, and although defense counsel objected, defense counsel waited until the damage was done. (T. I. 8-9).

> **THE COURT**: Why don't you introduce yourself and then who the victim is.
> **MR. BLECK**: Ladies and gentlemen, my name is Walter Bleck. I'm an Assistant District Attorney here in the Eleventh Circuit Court District. Our victim today is a lady by the name of Kimberly Yarbrough. You may know her. She used to work up at the Double Quick. She currently works at the hospital.
> **MR. SHACKELFORD**: May we approach the bench just a moment, your Honor?
> **(BENCH CONFERENCE BETWEEN THE COURT AND COUNSEL OUTSIDE THE HEARING OF THE JURY AS FOLLOWS, TO-WIT:)**
> **MR. SHACKELFORD**: This is on the record.
> For my record, I would like to, request that the jury be instructed that it is the alleged victim and not -- ask for a peremptory instruction that it is -- she was a victim.
> **MR. BLECK**: Judge, I think there is no question she's a victim. There maybe the question that Mr. Shackelford wants to raise as for the perpetrator. But I don't think there is any question she's a victim.
> **MR. SHACKELFORD**: I will be attacking her -- in every case whether the crime *occured*. That's a part of the crime. [*sic*]
> **THE COURT**: Noted for the record.

MR. SHACKELFORD: Thank you.
(T. I. 8-9).

Defense counsel obviously and belatedly recognized that using the term "victim" to refer to an accuser could have an unduly prejudicial effect on the jury by improperly shifting the burden of proof to the defendant; thus, he objected and asked for a peremptory instruction from the trial judge. However, defense counsel knew what the case was, or at least he should have known what the case was prior to trial, but failed to ask for this ruling before the jury could hear the word. After defense counsel voiced his objection, he left it with the trial judge merely noting it for the record, and did not continue to push for the court to issue a peremptory statement, nor did he ask for a continuing objection to the use of the term. In fact, leaving the objection merely "noted for the record" failed to adequately and procedurally preserve this issue as an error for review on appeal. *See generally,* ***MRE 103(a).*** Later, during trial, the term "victim" was again used to refer to Mrs. Yarbrough. This time, the term was used by the State's first witness, Sgt. Starks, before any testimony was presented that any crime had even occurred, or that Mr. Ragland might have committed any crime connected in any way to Mrs. Yarbrough. (T. I. 64-65). Even after having recognized this as an error that could severely and unjustly prejudice the Appellant in the eyes of the jury during trial, defense counsel failed to renew the objection in a timely manner to Sgt. Starks' testimony, which again also failed to preserve the error for appeal, further exhibiting deficient performance that resulted in prejudice to the Appellant even after this trial was over.

5. *Counsel was Repeatedly Reprimanded by the Trial Court in Front of the Jury on Multiple Occasions for Being Overly Aggressive with the Complaining Witness in this Case.*

In this case, defense counsel's unprofessional conduct before the jury directly led to multiple occasions of fully justified admonishment from the trial judge that had the unintended effect of indicating a bias on the part of the trial court against defense counsel, which subsequently infected the jury with anger against Mr. Ragland. During his cross-examination of Mrs. Yarbrough, the complainant,

defense counsel was repeatedly admonished by the trial court in front of the jury for interrupting, needlessly insulting, and unnecessarily badgering the witness:

> Q My question is, did you ever hear the screens being cut? Please answer me.
> **MR. BLECK**: Judge - -
> Q Just answer my question.
> **MR. BLECK**: - - let her answer her question.
> **THE COURT**: *Stop*! Let the witnesses finish her answer. Then start your question. She was finishing her answer. Let her finish her answer. Then go to the next question.
> **MR. SHACKELFORD**: May I return to that question when I get an answer for that after he [sic] completes her statement?
> . . . .
> **THE COURT**: The question was asked. She gets to answer and she gets to explain.

(T. I. 100) (emphasis added).

Not but three questions later did defense counsel's unprofessional, insulting, and degrading conduct in questioning Mrs. Yarbrough continue, prompting another indignant objection from the State, which was forcefully sustained by the trial judge before the eyes of the jury:

> Q Are you through?
> A Yes, sir.
> **MR. BLECK**: Judge, I'm going to ask that he stop making these demeaning comments and remarks: "Are you through?" She's got a right and he needs to not demean and be argumentative and abusive.
> **THE COURT**: I agree. I agree. Sustained.

(T. I. 101) (emphasis added).

"The trial judge always must be circumspect and unbiased, at all times displaying neutrality and fairness in the trial, and consideration for the constitutional rights of the accused." ***Fermo v. State***, 370 So. 2d 930, 933 (Miss. 1979). Defense counsel's unprofessional conduct on cross-examination forced the trial judge to abandon his responsibility of an air of neutrality in front of the jury, which resulted in disapproval in the jury of such abusive conduct, which was naturally imputed to Mr. Ragland, resulting in the deprivation of a fair trial before an impartial jury for the Appellant. Although it is always expected that defense counsel zealously pursue cross-examination of key prosecution witnesses, completely unprofessional and "demeaning" conduct leading to a emphatic admonishment by the trial

court cannot be held to be legitimate trial strategy, especially when that conduct prejudices the defendant in the eyes of the jury. In this case, defense counsel's inept attempt to discredit the testimony of the State's complaining witness, who had just recently testified that she had been attacked in her own home by the defendant, prompted justified outrage from the trial judge and infected the jury with bias. For this reason, defense counsel was ineffective, his deficient performance resulted in *per se* prejudice against Mr. Ragland, and the Appellant respectfully urges this honorable Court that his conviction should be reversed as he was denied a fundamentally fair trial before an unbiased jury.

6. *Defense Counsel Erred in Discovering, Investigating, and Handling the Belated Testimony of Officer Wide at Trial:*

The record shows that defense counsel interviewed one of the State's witnesses, Mr. Joseph Wide, only the morning before the trial - "When I interviewed Mr. Wide this morning, he indicated to me that he had seen the defendant . . ." (T. I. 107) (emphasis added). The trial date in this case was set for July 14, 2009. (CP. 1, RE. 7). Defense counsel was appointed to the case on December 2, 2008, and the State gave discovery to him on December 12, 2008. (CP. 1, RE. 7). Defense counsel had over six months to find Clarksdale City Police Officer Joseph Wide and interview him prior to the morning of the trial. Defense counsel either (1) did not bother to interview this witness until the last possible moment the day of trial, or (2) this witness was suspiciously not part of the discovery provided to the defense by the State.

(a) *If the Identity of Joseph Wide was excluded from the State's Discovery, Counsel Erred in Failing to Request a "Box Hearing" Prior to Joseph Wide's Testimony.*

In ***Randolph v. State***, this honorable Court detailed how the Supreme Court of Mississippi has enumerated the following specific procedures to be employed when a discovery violation is asserted by the defense to the trial court:

1. Upon defense objection, the trial court should give the defendant a reasonable opportunity to become familiar with the undisclosed evidence by interviewing the

witness, inspecting the physical evidence, etc.

2. If, after this opportunity for familiarization, the defendant believes he may be prejudiced by lack of opportunity to prepare to meet the evidence, he must request a continuance. Failure to do so constitutes a waiver of the issue.
3. If the defendant does request a continuance, the State may choose to proceed with trial and forego using the undisclosed evidence. If the State is not willing to proceed without the evidence, the trial court must grant the requested continuance.

Randolph v. State, 852 So. 2d 547, 562-63 (Miss. 2002).

This discovery violation procedure has become commonly known as a "***Box*** Hearing" in Mississippi. *See* ***Robinson v. State***, 747 So. 2d 847 (Miss. Ct. App. 1998); ***Box v. State***, 437 So. 2d 19, (Miss. 1983). The defense counsel in Mr. Ragland's case was clearly unfamiliar with Officer Wide's testimony, failed to strictly adhere to the requirements of ***Box***, faltered in asking for a motion *in limine* to exclude or limit his testimony, and then allowed the surprise evidence to be heard by the jury without following these procedures.

A ***Box*** hearing would have necessarily been granted by the trial court upon a showing of surprise and non-disclosure, and such a hearing would have ultimately resulted in either a denial of relief, a continuance to prepare for the surprise testimony, or the complete elimination of the witness' testimony. Defense counsel's failure to request this hearing only allowed the jury to hear this last-minute testimony putting Darrian Ragland in the neighborhood that night, but also waived this issue for appeal and demonstrated one of the many instances of ineffective representation causing a unfairly prejudicial effect on Mr. Ragland's trial.

(b) *If the Identity of Joseph Wide was produced in the State's Discovery, Defense Counsel Erred in Failing to Interview Joseph Wide Prior to the Morning of Trial*

Outside the presence of the jury, defense counsel describes in slight detail a conversation he had with the State's witness the morning before trial: "He had indicated to me that he had seen the defendant because he was called to another house where a lady had asked that he be removed from that house." (T.

I. 111). If Officer Wide's information was included in the State's discovery, there is no evidence on the record to show that defense counsel made any effort to locate this unidentified "lady," contact her, arrange an interview, and subpoena her to possibly contradict Officer Wide's testimony. Defense counsel also referenced Officer Wide's report (T. I. 111), but when Officer Wide could not produce it, defense counsel did not make any attempt to move for a continuance or a limiting instruction based on the fact that Wide could not produce any evidence of coming in contact with Mr. Ragland. Therefore, in either event, defense counsel's failure to act in either of these two contingencies is only another failure to render the effective assistance of counsel to Mr. Ragland.

7. Defense Counsel Also Erroneously Introduced Highly Prejudicial Information During the Cross-Examination of Officer Wide:

By informing the jury on cross-examination that Officer Wide observed Mr. Ragland as a result of being dispatched to that neighborhood on a call involving Mr. Ragland, defense counsel essentially caused to be admitted otherwise inadmissible and highly prejudicial evidence that actually supported the accuracy and the credibility of Officer Wide's testimony. The ***Strickland*** standard does not require deference to counsel's conduct when there is no conceivable strategy that could explain it. ***Lyons v. McCotter***, 770 F.2d 529, 534-35 (5th Cir. 1985). There is absolutely no conceivable strategy for defense counsel to introduce highly prejudicial evidence that was specifically excluded by the trial court on defense counsel's motion. While defense counsel's cross-examination of Officer Wide in and of itself may not have destroyed Mr. Ragland's alibi defense, it certainly contributed significantly to the jury's guilty verdict.

Following the testimony of Mrs. Yarbrough, defense counsel and the State had a bench conference where defense counsel made a motion *in limine* to prevent Officer Wide from testifying that he was dispatched to remove Darrian Ragland from another woman's house that lived nearby. (T. I. 107-08). In response, the State simply said, "all I want to do is establish that he saw him and that he was

within a hundred yards of this house shortly before it occurred." (T. I. 108). The prosecutor, apparently caught off guard by defense counsel's last-minute motion *in limine*, stated to the trial court that he would instruct Officer Wide to "not say that [he was called to the area by the "lady" to eject Mr. Ragland from her home]." ***Id.*** On direct examination, the State did not mention or allude to the fact that Officer Wide saw Mr. Ragland in the area as a result of his being dispatched there that night. On cross-examination, however, defense counsel asked Officer Wide, "[m]ay I see a copy of your report, please?" (T. I. 111). After Officer Wide responded that he did not have the report with him, defense counsel continued to question him regarding the police report, which contained the objectionable information.

Instead, it was the State who then objected, saying "Judge, I agreed to [defense counsel's] motion not to have him talk about what he was doing when he saw him specifically because I thought we were going to keep it limited." (T. I. 111-12). To satisfy the State, defense counsel then, for some mysterious reason, told the trial court that he would ask Officer Wide if he was actually dispatched, the very evidence which the State had agreed to forego as a result of the defense's motion to limit this testimony . (T. I. 112). Defense counsel's next question to Officer Wide was, inexplicably, "[a]s I understand it, you claim that you were on a call that involved Darrian, is that right?" (T. I. 112) (emphasis added). Asking this inexplicably foolish question and introducing the very evidence that the State had agreed not to introduce, which alleged that the defendant had committed another separate, unrelated crime in that area, cannot by any stretch of the imagination be considered legitimate trial strategy under all of the principles of law and authorities cited hereinabove.

Furthermore, counsel's error in this particular instance resulted in a more severe prejudice to the defendant than some of the other errors listed herein, as it made Officer Wide's testimony that he actually saw Mr. Ragland in the neighborhood that very night (according to the prosecutor, "[a]bout a hundred yards down the road [from Mrs. Yarbourgh's house]" (T. I. 108)) more credible in the eyes of

the jury. The mere fact that Officer Wide could then testify that he saw Mr. Ragland in the area as a result of being officially dispatched on a call specifically involving the Appellant's involvement in an unrelated criminal complaint that night made his testimony essentially uncontradictable and unimpeachable. On the other hand, had he simply testified that he saw Mr. Ragland in that area hours earlier, a reasonable juror could doubt his accuracy on the basis that he did not know Mr. Ragland personally and may have been mistaken in his identification. In a "he said, she said" mistaken identity case, defense counsel's introduction of highly prejudicial inculpatory evidence that solidified the second witness's identification of the defendant must be considered ineffective assistance of counsel. Furthermore and perhaps most damaging of all, defense counsel's blunder completely undermined the only line of defense offered during the testimony: alibi. For this reason, the Appellant respectfully contends that these actions on the part of defense counsel cannot be called any thing but inept, clumsy, and downright ignorant and Mr. Ragland's conviction should be reversed on this ground alone as it represents all of what the ***Strickland*** standard prohibits.

8. *Counsel Failed to Mount an Effective Defense on His Client's Behalf*:

"There is no question that the defendant is entitled to a basic defense." ***Payton v. State***, 708 So. 2d 559, 562 (¶9) (Miss. 1998). In ***Triplett v. State***, the Mississippi Supreme Court elaborated on what a basic defense may entail:

> Basic defense in this case required complete investigation to ascertain every material fact about this case, favorable and unfavorable. It required familiarity with the scene, and the setting. It required through his own resources and process of the court learning the names of, and interviewing every possible eyewitness, and getting statements from each. It required prior to trial learning all information held by the state available to the defense through pre-trial discovery motions.

Triplett v. State, 666 So. 2d 1356, 1361 (Miss. 1995) (emphasis added).

In this case, there is no doubt that defense counsel failed to provide Mr. Ragland with even a basic defense, as it is uncontradicted from the record that defense counsel obviously conducted no pre-

trial investigation resulting in no alibi witnesses and failed to adequately prepare Mr. Ragland's testimony at trial. For these reasons, Mr. Ragland's conviction and subsequent twenty-five year sentence should be reversed.

Defense counsel's inadequate pre-trial investigation inevitably culminated in his unqualifiedly deficient performance during every phase of this trial. "At a minimum, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case." ***Payton***, 708 So. 2d at 562 (citing ***Ferguson v. State***, 507 So. 2d 94, 96 (1987) (emphasis in original). At trial, defense counsel called no witnesses other than the Appellant to support Mr. Ragland's assertion of an alibi defense. While generally counsel's choice as to whether to call a witness or not is strategic in nature and given a presumption of reasonableness, this decision must be made based on counsel's proper investigation of all aspects of the case. *See* ***Johns v. State***, 926 So. 2d 188, 196 (Miss. 2006).

Defense counsel had filed a pretrial motion for a continuance in order to find and bring alibi witnesses to Clarksdale. (CP. 5-6, RE. 22-23). However, nothing in the record indicates defense counsel actually made any attempt to locate alibi witnesses, contact alibi witnesses, nor does the record reflect that defense counsel issued any subpoenas or intended to call any witnesses in Mr. Ragland's defense, despite the fact that the Appellant's theory of defense was that he was not in Clarksdale on the night Mrs. Yarbourgh claims her house was burglarized by Darrian Ragland.

It is clear from the totality of the record that counsel was derelict in his minimum duty to interview potential witnesses and make an independent investigation of the facts and circumstances of the case. *See* ***State v. Tokman***, 564 So. 2d 1339, 1342 (Miss. 1990). A reasonable inference behind defense counsel's failure to investigate may have been caused by insufficient funds to hire an investigator as evidenced in his January 13, 2009, motion for a continuance - "his whereabouts must be investigated by his court-appointed lawyer who has no expense account to travel to the various locations

where defendant had been during the period of time surrounding the alleged event." (CP. 5-6; RE. 22-23).

In ***Payton***, *supra*, the Mississippi Supreme Court found counsel's inadequate pre-trial investigation to be legally deficient where counsel relied solely on evidence collected by his private investigator. ***Payton***, 708 So. 2d at 562. In this case, however, it is clear from the record that defense counsel failed to conduct a scintilla of investigation beyond simple discovery received from the prosecution. Defense counsel was undoubtedly aware that Mr. Ragland's goal for his theory of defense was that he was in Lima, Ohio, on the night in question; however, there was no evidence of an independent investigation by counsel to even attempt to accomplish Mr. Ragland's intention to present an alibi defense. *See generally*, ***Mississippi Rule of Professional Conduct (MRPC) 1.2*** (and the Official Comment). Thus, the decision not to use the alibi witnesses was not simply based on a limited, but marginally proper investigation; it was based on no investigation by defense counsel whatsoever.

It is also undisputed from the record that defense counsel never interviewed Officer Wide before trial. Furthermore, it appears that counsel never interviewed Officer Napolean Brewer, one of the first responding police officers at the scene of the alleged incident, as he failed to immediately ask the trial court for a continuance upon discovering that Officer Brewer, a properly subpoenaed witness, was in San Diego, California, on the day of trial. (T. I. 13).

Moreover, the record makes it disturbingly obvious that defense counsel never discussed with Mr. Ragland, before trial, whether he would testify in his own defense, never prepared Mr. Ragland in case he decided to testify at trial, nor ever discuss with Mr. Ragland his overall defense strategy and the means by which this strategy would be accomplished. The sole evidence presented on defense counsel's case-in-chief was the nineteen question direct examination of Mr. Ragland, which was so inept that the prosecutor saw no reason to cross-examine Mr. Ragland, even though the State had ***MRE 609*** prior

conviction impeachment evidence of which they could have made use. (T. I. 119-21). In fact, it appears that defense counsel was so unprepared to question Mr. Ragland that he urged him not to testify, despite having no other evidence or witnesses to present in support of his alibi defense. While "[t]here are no doubt times when it would be folly for the defendant to take the stand, and counsel who failed to advise of such would be derelict if not ineffective," the case at hand is certainly not one of them. ***Jaco v. State***, 574 So. 2d 625, 636 (Miss. 1990). For these reasons, the Appellant respectfully avows that defense counsel was unquestionably deficient in his professional obligations to present an effective defense in his representation of Mr. Ragland.

Upon establishing the first prong of the ***Strickland*** standard, the appellant must then prove the second prong, prejudice, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694 (emphasis added). To show reasonable probability, the mover must merely show "a probability sufficient to undermine confidence in the outcome." ***Davis v. State***, 743 So. 2d 326, 334 (Miss. 1999). If defense counsel had simply been prepared for trial, if he had undergone any pre-trial investigation, or if he had prepared Mr. Ragland to testify, there is certainly "a reasonable probability" that the outcome of these proceedings would have been different.

The testimony at trial established that absolutely no physical evidence tied Mr. Ragland to Mrs. Yarbrough's home on the night in question. The only evidence that the prosecution was able to present was the belated testimony of Officer Wide and the eyewitness identification of Mrs. Yarbrough, who admitted that she did not directly know or had not even seen Mr. Ragland in over ten years. (T. I. 76-115). Under no circumstances, can this limited prosecution evidence be considered overwhelmingly persuasive. The jury did not rely solely on the State's evidence to convict Mr. Ragland, but rather, used defense counsel's inability to present a remotely adequate alibi defense to convict Mr. Ragland.

Coupling this failure with defense counsel's multiple other failures and the active deficiencies in bolstering the State's case, it cannot be said with any certainty that had other defense counsel challenged the presence of two small children who allegedly slept through most of this attack described by the complaining witness in this case, the outcome would have been no different. Had defense counsel properly investigated the case, he could have presented reliable testimony which could have contradicted the underwhelming testimony of Mrs. Yarbrough and Officer Wide. But since none of this was done, the confidence of the verdict rendered in this case is completely undermined and the prejudice that was created in the total failure of the adversarial system in this case begs for this Court to not only find error, but to order a new and fundamentally fair trial for the Appellant with the effective assistance of counsel.

Although the record is bare of the existence or non-existence of any available alibi witnesses - a result of defense counsel's neglect in conducting a pre-trial investigation - there is no doubt that Mr. Ragland was entitled to have his alibi defense fairly presented to the jury. *See* ***Johns***, *supra*, 926 So. 2d at 199 (stating, "[t]he problem is not with what the witnesses said or did not say. The problem is that [defense counsel] never talked to them. Johns was entitled to an alibi defense."). As also noted by the Court in ***Johns***, "[t]he testimony of the alibi witnesses, coupled with the fact that there was absolutely no physical evidence to convict Johns, could very well have changed the outcome of the trial." ***Id.*** at 200. For these reasons, the Appellant respectfully submits that the professional errors described hereinabove in the failure to investigate, develop, and present a even basic alibi defense constituted deficient performance resulting in prejudice and Mr. Ragland's conviction and sentence should be reversed.

9. *Defense Counsel Erred in Failing to Object to the State's Prejudicial and Inflammatory Closing Statement*:

Effective defense attorneys need to raise timely objections to errors made by the State in trials against their clients. In ***Williams v. State***, the Court held that "the failure of an objection is fatal" when

the defense counsel did not object to the prosecutor's improper closing argument. ***Williams v. State***, 512 So. 2d 666, 670 (Miss. 1987). In ***Walker v. State***, the Court held that if "no contemporaneous objection is made, the error, if any, is waived." ***Walker v. State***, 671 So. 2d 581, 597 (Miss. 1995). In ***Randolph v. State***, *supra*, the Court held that "the law is well settled on the point of the necessity of contemporaneous objections during closing arguments at trial. An objection was not made by Randolph during the prosecution's closing argument, and thus this issue is waived on appeal." ***Randolph v. State***, 852 So. 2d 547, 559 (Miss. 2002).

In Mr. Ragland's case, the prosecutor's closing argument should have been objected to on several points. First, the prosecutor describes being secure in one's home as "just the most basic of liberties." (T. I. 134). Second, the prosecutor describes Mrs. Yarbrough's children as "two screaming kids" and goes on to inflammatorily claim that when Mr. Ragland allegedly went to the house, "he went in there to rape her in her own house in front of Tyler, who was five years old, and her daughter, who was two years old." (T. I. 135). The prosecutor describes, in a purely speculative manner totally unsupported by the evidence and testimony, how Mr. Ragland cut a window screen, pried the window open, climbed thr ugh it and knocked items off of a ledge. (T. I. 135-36). The prosecutor then said, "but you will notice he did cut - he had the presence of mind and sense to cut that cable which he thought was a telephone before he went in." (T. I. 136). He further describes how Mr. Ragland supposedly "took that lamp and he - wrapped the cord up around it and he hid it behind so that she couldn't stand up and turn the light on." (T. I. 136). The prosecutor concluded his wildly speculative summation not based on the evidence presented, but in incendiary insinuation before the jury by stating, "but I don't think if those little kids hadn't been yelling, I don't think he would have left." ***Id.***

Although a prosecutor is allowed a wide latitude in closing argument, a competent, effective defense attorney would have reasonably objected to many, if not all, of these factually unsupported

statements as being overly speculative, unfairly prejudicial, and outside the scope of the testimony heard at trial. However, defense counsel here made no objections, the jury heard these highly inflammatory and calculated prejudicial statements without any protest, and, therefore, none of these potential errors were preserved for appeal. But the prosecutor's closing argument was not the one that drove the stake through Darrian Ragland's defense case - it was his own lawyer's summation that made the case for the state.

10. *Defense Counsel's Closing Argument Fatally Flawed the Appellant's Testimony at Trial:*

The Sixth Amendment right "to effective assistance of counsel extends to closing arguments." ***Yarborough v. Gentry***, 540 U.S. 1, 5 (2003). As it is the accused's last chance to persuade the jury of his innocence or the weakness of the prosecution's case, "no aspect of [partisan] advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." ***Herring v. New York***, 422 U.S. 853, 862 (1975).

In Mr. Ragland's case, however, he was denied this Sixth Amendment right as his defense counsel suddenly presented an entirely new theory of defense during summation that was not only unsubstantiated in any way by the evidence and testimony presented during trial, but also was in stark contradiction to Mr. Ragland's own testimony. In closing argument, defense counsel stated:

> Another thing that is telling here, a question I think you are going to have to answer, was he -- whoever that was in that house, was he in there to rape, force this lady to have rape or was he in there for consensual sex.
>
> I wonder -- and you need -- you might want to answer this question, too, when you are back there in that room. We really don't know when that little boy waked up. You know, there has been many a woman that screamed rape when she was caught. Many of them.
>
> Did she start resisting because the little boy woke up? He was lying right at the foot of the bed. Kind of - - plenty of light in there so that any - - whoever this was in that room saw the little baby, a little five year old. Oh, by the way, where was that five year old, the fellow that woke up when he was there? . . . .
>
> Yes, the question comes now whoever that was, whoever that was, was he invited in and the boy woke up? That's for you to decide.
>
> Thank you, Judge.

(T. I. 138-39, 142) (emphasis added).

Not once in his summation did defense counsel argue or remind the jury of Mr. Ragland's sworn testimony that he was in Lima, Ohio, on March 27, 2004. Rather, defense counsel concocted his own version of the events, apparently on the fly without his client's express permission to change the goal of the theory of defense in this case through a means that had absolutely no chance of success. *See generally*, ***MRPC 1.2*** (and Official Comment). This version - that the sexual relationship between Darrian Ragland and Mrs. Yarbrough was consensual and that she "cried rape" after being caught in the act by a child - was unsupported by the evidence and testimony adduced at trial. Not surprisingly, the State noticed defense counsel's newborn theory of defense, which only was put before the jury at the end of the case in argument, and in rebuttal the prosecutor presented it to the jury as further proof of Mr. Ragland's guilt: "Ladies and gentlemen, I don't know where [defense counsel] heard any testimony to suggest it was consensual. I heard nothing. All I heard was, 'I'm not there.'" (T. I. 144).

Here in this single act of unprofessional and deficient performance, Mr. Ragland can clearly meet both prongs of the ***Strickland*** analysis. First, it was entirely unreasonable for trial counsel, during closing argument, to present the jury with an inconsistent theory of defense that had not been even slightly developed during trial. Second, defense counsel's last-second introduction of this consensual relationship defense prejudiced Mr. Ragland as it (a) offered the prosecution an opportunity to use it as further proof of Mr. Ragland's guilt and, (b) tainted the defendant's credibility in the eyes of the jury, an issue of great importance as he was the lone defense witness. As stated by the Fifth Circuit, the defendant "is presumed to be the master of his own defense." ***Moore v. Johnson***, 194 F.3d 586, 605-06 (5th Cir. 1999). "Nonetheless, counsel has wide latitude in deciding how to best represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that time." ***Yarborough v. Gentry***, 540 U.S. 1, 5 (2003). Similarly, Mississippi has recognized that "[a]ttorneys are permitted wide latitude in their choice and

employment of defense strategy." ***Hiter v. State***, 660 So. 2d 961, 965 (Miss. 1995). Thus, in the absence of evidence that there was no reasonable trial strategy, counsel's decision whether to even make a closing statement will not support an ineffective assistance of counsel claim. *See also,* ***Bolton v. State***, 734 So. 2d 307, 309 (¶5) (Miss. Ct. App. 1999).

In this case, there was no articulable, reasonable strategic purpose for defense counsel's abandonment - at the very end of the trial - of Mr. Ragland's alibi defense in favor of a ridiculous "consensual relationship" defense during his closing argument. During the State's case-in-chief, defense counsel's only apparent "strategy" was to challenge the accuracy of Mrs. Yarbrough's identification, a reasonable decision considering that she had not seen Mr. Ragland in over ten years and there was absolutely no physical evidence tying Mr. Ragland to Mrs. Yarbrough's home. In fact, the only evidence that counsel may have even considered in arguing "consent" to the jury in this absurd way was one question during Mrs. Yarbrough's cross-examination:

Q. Could you tell who it was by his touch?
A. No, sir. I mean, he had never touched me before.
(T. I. 96).

Other than this single isolated instance of denial, defense counsel offered no support for his newborn theory of the case, and not only did the prosecution call it "nothing"in rebuttal, the jury did not clearly did not believe it.

While criminal law affords a defendant the opportunity to raise alternative, and even somewhat inconsistent, defense theories in closing, it nonetheless remains obvious that doing so is contrary to common sense. *See generally,* ***Matthews v. United States,*** 485 U.S. 58, 64 (1988) (holding that defendant could simultaneously deny accepting the money while arguing entrapment at trial); *but also see,* ***United States v. Ervin***, 436 F.2d 1331, 1334 (5th Cir. 1971) (concluding that trial court's failure to exclude inadmissible eyewitness identification evidence was harmless error as defendant's sole theory

of defense at trial, insanity, was logically inconsistent with his appellate defense of denial). Furthermore, the general proposition that it is not *per se* unreasonable to argue an inconsistent case theory is only applicable when "there exists evidence sufficient for a reasonable jury to find in [its] favor." ***Matthews, supra***, 485 U.S. at 63 (emphasis added). "After all, a criminal trial is not a game or a sport. '[T]he very nature of a trial [i]s a search for truth.'" ***Id.*** at 72 (1988) (White, J., dissenting) (*quoting* ***Nix v. Whiteside***, 475 U.S. 157, 166 (1986)).

In this case, defense counsel did not introduce one iota of evidence from which a reasonable jury could find consent, a fact not lost on the prosecuting attorney: "[Mr. Ragland] told you he just wasn't there. He didn't say there was any consent. He didn't say anything. All he said was it's not me. I wasn't there." (T. I. 143). Thus, it is clear that defense counsel "did not choose, strategically or otherwise, to pursue one line of defense over another. Instead, [he] simply abdicated his responsibility to advocate his client's cause." ***Washington v. Strickland***, 693 F.2d 1243, 1252 (5th Cir. 1982) (en banc), *rev'd on other grounds*, 466 U.S. 668 (1984) (emphasis in original). The entire thrust of Mr. Ragland's testimony and theory of defense during trial was that he was in Lima, Ohio, on March 27, 2004. Yet, in his closing argument, defense counsel suddenly sprang upon the jury and the defendant this "consensual relationship gone wrong" argument, a defense which was not only entirely unexplored at trial, but also fatally inconsistent with Mr. Ragland's alibi defense. Thus, counsel's last-second decision to wholly abandon the defendant's theory of the case, which was substantially supported by evidence on the record, and argue an unsubstantiated alternative theory that produced no conceivable benefit to the defense, was professionally unreasonable.

Moreover, by abruptly abandoning the defendant's theory of the case at the last possible moment, defense counsel essentially impeached Mr. Ragland's own sworn testimony through an impromptu decision apparently made during summation. A defendant has "the ultimate authority to determine

whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." ***Florida v. Nixon***, 543 U.S. 175, 187 (2004) (internal citations and quotation marks omitted). As is clear from the record, Mr. Ragland decided to testify on his own behalf that he was in Ohio on March 27, 2004, thereby making an issue for jury decision of the defense of alibi. (T. I. 116-120). By offering an entirely contradictory theory of defense during his closing, however, defense counsel ultimately vitiated Mr. Ragland's constitutional right to testify and eviscerated the chosen line of defense at the twelfth hour of the case.

"Every person is entitled to a fair and impartial trial, and the dispensing of justice is the object of courts. Thus, where fundamental and constitutional rights are ignored, due process does not exist, and a fair trial in contemplation of the law cannot be had." ***Brooks v. State***, 46 So. 2d 94, 97 (Miss. 1950) (en banc) (internal citations omitted). As the Mississippi Supreme Court has held:

> The denial of the right of an accused to testify is a violation of his constitutional right regardless of whether the denial stems from the refusal of the court to let a defendant testify as in ***Warren v. State***, 174 Miss. 63, 164 So. 234 (1935), or whether the denial stems from the failure of the accused's counsel to permit him to testify.

Culberson v. State, 412 So. 2d 1184, 1186 (Miss. 1982).

In this case, once his counsel presented a fatally inconsistent theory of defense during summation, Mr. Ragland's constitutional right to testify on his own behalf without encumbrance by his own counsel was violated and he was denied a fair trial. Further, the Mississippi Supreme Court has recognized that "a lawyer has a duty to represent his client not only with diligence but with loyalty. No more devastating breach of this duty can be imagined than for a lawyer to denounce his client before the trier of fact as untruthful." ***Ferguson v. State***, 507 So. 2d 94, 97 (Miss. 1987) (internal citations omitted) (emphasis added). In cases such as this, where the constitutional violations "are so flagrant[,] no punctilious calibration of prejudice is necessary." ***Id.*** While counsel in this case did not explicitly call the defendant a liar, he certainly implied such to the jury when he abandoned Mr. Ragland's alibi defense during his

closing statement. Counsel essentially told the jury, "I don't believe Mr. Ragland, so how about this line of defense." As the Mississippi Supreme Court has noticed, "[h]ow can a trial be fair when the defendant's own attorney is attacking him?" ***Id.*** In this case, there is no doubt that Mr. Ragland was denied a fair trial. For this reason alone, Mr. Ragland's conviction should be reversed.

Assuming that defense counsel's closing argument does not require immediate reversal under ***Ferguson***, under the ***Strickland*** standard, Mr. Ragland must also show that counsel's unreasonable, fatally deficient conduct in closing prejudiced his defense. The standard to determine prejudice is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." This simply means "a probability sufficient to undermine the confidence in the outcome." ***Foster v. State***, 687 So. 2d 1124, 1129-30 (Miss. 1996).

The verdict against Mr. Ragland rested primarily on the uncorroborated eyewitness identification of Mrs. Yarbrough, who had admittedly not even seen him in over ten years, and was only weakly supported by the testimony of Officer Wide. Thus, the entire State case boiled down to a battle of "he says, she says," which relates directly to witness credibility. As noted by the Fifth Circuit, "[s]uch a verdict is more likely to have been affected by errors than one with overwhelming record support." ***Nealy v. Cabana***, 764 F.2d 1173, 1179-80 (5th Cir. 1985) (internal quotation marks omitted). In the case at bar, defense counsel waited until closing argument, after hearing the testimony of the defendant, to reveal his strategy to the court. It is patently prejudicial for a defense attorney to allow his client to testify then present a defense contradictory to the defendant's testimony during closing.

C. The Cumulative Effect of the Errors and Omissions by Defense Counsel:

"In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." ***Strickland***, 466 U.S. at 696 (emphasis added).

During Mr. Ragland's trial, defense counsel committed many errors, starting even before the trial. Defense counsel failed to issue subpoenas for any alibi witnesses for the defendant, nor request any funding to gather witnesses in favor of the defense, even after submitting a motion for continuance to discover alibi witnesses. This motion was unfortunately the only motion filed by the defense prior to trial. There was no motion filed to exclude the defendant's prior convictions, and no motion filed to dismiss the indictment on speedy trial grounds, even though there was a four and one-half year delay between indictment and trial.

Defense counsel failed to raise any objections to the composition of the jury, even though the jury was comprised of eleven females and only one male, after the State used the majority of its peremptory strikes to rid the jury of other males. During voir dire, defense counsel objected to the use of the term "victim" to refer to the accuser, but only after the term was used in front of the jury. Defense counsel then failed to actually obtain a ruling on this objection to preserve it for appeal, and further failed to renew the objection when the term was again used by a State's witness. Mr. Ragland's attorney also withdrew valid objections, and was reprimanded by the court for being overly aggressive with the State's witnesses, a scolding that took place in full view of the jury. Defense counsel utterly failed in handling the testimony of Officer Wide by failing to request a ***Box*** hearing prior to his testimony, and then by introducing highly prejudicial information during cross-examination, the same information that the judge had already excluded. Defense counsel failed to even mount an effective defense on Mr. Ragland's behalf, including failing to give an opening statement, failing to object to prejudicial and inflammatory information in the State's closing statement, and ultimately defense counsel used his closing statement to fatally contradict Mr. Ragland's own testimony at trial, leaving the jury to doubt everything they could have possibly believed from the defense.

"It is clear there is no constitutional entitlement to errorless counsel." ***Williams v. State***, 722 So.

2d 447, 451 (Miss. 1998) (*citing* ***Cabello v. State***, 524 So. 2d 313, 315 (Miss. 1988)). However, a defendant in a criminal case surely is entitled to counsel that does not make over a dozen distinct errors before, during, and after trial.

In 2004, the Supreme Court of Mississippi again held that "there is no constitutional right to errorless counsel." ***Manning v. State***, 884 So. 2d 717, 730 (Miss. 2004) (internal citations omitted). The Court also held that a conviction may be reversed "based upon the cumulative effect of errors that do not independently require a reversal." ***Id.*** (emphasis added) While Appellant is arguing that each and every trial error independently requires a reversal, it is the position of the Appellant that even if all these errors were contended to be harmless, the cumulative effect of all of these errors resulted in a trial that was unfairly prejudicial to the Appellant, deprived Appellant of his constitutional right to a fair trial, and would have likely produced a different result had they not occurred. *See generally*, ***Brown v. State***, 995 So. 2d 698 (Miss. 2008). Therefore, the Appellant respectfully submits that these errors and omissions when viewed in the totality of the record made at trial constitute ineffective assistance of counsel *per se* and that the proceedings in this case were so undermined by defense counsel's actions and inactions that it seriously call into question not only the accuracy and veracity of the jury's verdict, but also undoubtedly implicates the fairness, integrity or public reputation of these judicial proceedings, thereby constituting clear error that is not "harmless" in nature, and this honorable Court should reverse the conviction and sentence rendered, thereby remanding this case to the lower court with proper instructions for a new trial.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S MOTION TO SET ASIDE THE JURY'S VERDICT (J.N.O.V.) FOR LEGAL INSUFFICIENCY IN THE PROSECUTION'S CASE OR, ALTERNATIVELY, TO GRANT THE APPELLANT A NEW TRIAL WHERE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Further illustrating the lower court's error, the evidence against the Appellant in this case fails with respect to both the State's burden under the requirement of legal sufficiency and the jury's verdict in light of the whole record. The manifest errors that occurred at trial reflect no investigation, legitimize the State's confused factual narrative, support the uncorroborated tale of Mrs. Yarbrough, ignore Appellant's alibi defense, and, ultimately, have caused a grave injustice to Mr. Ragland.

Although legal sufficiency and weight of the evidence are analytically distinct evaluations under the jurisprudence of this State, the two standards jointly reveal the aforementioned errors and, therefore, will be treated herein as a single issue argument.

A. Legal Sufficiency- The standard of appellate review for challenges to the legal sufficiency of the evidence is articulated in ***Bush v. State,*** 895 So. 2d 836 (¶ 17) (Miss. 2005) (citing ***Jackson v. Virginia***, 443 U.S. 307, 315 (1979)). In ***Bush***, the Court restated that "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." ***Id.*** The Court also emphasized that "[s]hould 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." ***Id.*** (emphasis added) (citing ***May v. State***, 460 So. 2d 778, 781 (Miss. 1984)).

No rational trier of fact could have found that the Appellant broke into Mrs. Yarbrough's home with the intent to commit a rape therein, because critical factual details given by Mrs. Yarbrough surrounding the night were patently inconsistent, and, therefore, this evidence is unbelievable to reasonable people. Since important inferences from the inconsistent and unreliable testimony of prosecution witnesses remained unresolved, reasonable persons could not have divorced themselves

from reasonable doubt about the State's theory of the case and the charge in the indictment that Darrian Ragland, or any other individual, broke into Mrs. Yarbrough's home with the intent to commit rape.

Critical facts concerning the events on the night of the alleged break-in that were asserted are plainly doubtful on their face. The State's first witness, Norman Starks, testified that multiple attempts to break-in were made through multiple points of entry to the house. (T. I. 63). Sgt. Starks also refers to Exhibit S-13, a picture of an end table used to gain access to the windows. (T. I. 65, 70). This exhibit showed one clear, distinct footprint. (Exh. S-13, RE. 27). No explanation was given how multiple entry attempts could have been made while leaving only one clear footprint. Unless the person who allegedly broke in was a one-legged man, common physics would dictate that two feet would have been necessary for the amount of cutting and prying of the window screens described by Sgt. Starks. (T. I. 58-63). Furthermore, no evidence was offered that this footprint was in anyway connected to Mr. Ragland, or was in any way connected to any alleged break-in. These assertions are irreconcilable, and no "rational" trier of fact could have suppressed their "reasonable doubt" about where the footprint came from, or what actually happened. ***Bush***, *supra*, at ¶17. Two reasonable questions arise: First, how could have multiple entry attempts have been made using the same table and left only one clear and distinct footprint, rather than two footprints or a series of multiple footprints? Second, how could reasonable jury members assume that this one single footprint belonged to Mr. Ragland when no evidence was presented that the footprint came from a shoe owned by Mr. Ragland, a shoe the same size that Mr. Ragland would wear, or that the shoe even was a male's shoe?

Secondly, the charge of attempted rape is initially unsupported by Mrs. Yarbrough's testimony and only is supported when the State reminds Mrs. Yarbrough of the charge against Mr. Ragland.

> Q Can you tell the jury what happened that -- that night?
> A . . . .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.
> . . . .

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 is 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 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. . . . 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.

. . . .

And I looked and that's when I went to jump up.

. . . .

Q. 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 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 pu**y. 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.

(T. I. 77-78, 89-90) (emphasis added).

Only after obviously prompting Mrs. Yarbrough into elaborating on her very general and vague pri r testimony by reminding her that the charge against the Appellant included an intent to commit rape could the State even begin to attempt to support that "tenuous" claim under the ***Bush*** standard of review.

These "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. And the lack of these "reasonable inferences" that plague the State's case are such that all of the prosecution's witnesses raise more questions than they answer rendering, its chief and sole eyewitness's testimony and the testimony of the police in this case utterly incredible, inconsistent to the point of total invalidity, and completely uncorroborated by the direct physical and testimonial evidence

in the case. Even in "viewing the evidence [the State's case] 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***, *supra*, at ¶17. Because the State did not meet its burden of proof in their case-in-chief on credible evidence "beyond a reasonable doubt" on an essential element of the crime of burglary with intent to commit rape, namely that there was an actual unwanted intrusion into Mrs. Yarbrough's home, that Mr. Ragland broke into the home in the manner described, and furthermore attempted to have non-consensual sex with Mrs. Yarbrough, the Appellant asks this honorable Court to reverse and render the judgment of the lower court denying counsel's motion for a directed verdict, peremptory instruction, and J.N.O.V., and order the Appellant be immediately discharged from the custody of the Mississippi Department of Corrections.

B. Weight of the Evidence- The familiar standard of review for the denial of a post-trial motion seeking a new trial is abuse of discretion. ***Dilworth v. State***, 909 So. 2d 731, 736 (Miss. 2005). A motion for a new trial challenges the weight of the evidence presented at trial. ***Dilworth***, 909 So.2d at 737. A reversal is warranted only if the lower court abuses its discretion in denying a motion for new trial. ***Id.*** When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, an appellate court will only disturb a jury's verdict when it is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an "unconscionable injustice." ***Bush v. State***, 895 So. 2d 836, 844 (Miss. 2005). In a hearing on a motion for a new trial, the trial court sits as a "thirteenth juror," but the motion 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. ***Id.*** The evidence should also be weighed in the light most favorable to the verdict. The ***Bush*** Court stated:

> 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. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

Id.

In the context of a defendant's motion for new trial, although the circumstances warranting disturbance of the jury's verdict are "exceedingly rare," such situations arise where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind. ***Thomas v. State***, 92 So. 225, 226 (1922). Though this standard of review is high, the appellate court does not hesitate to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict. ***Dilworth***, 909 So.2d at 737. The "tenuous" evidence presented by the State against the Appellant in the case at bar begs this honorable Court to invoke its status as the "thirteenth juror" and its power to reverse the verdict to allow a new jury to consider the prosecution's case in a new trial. As set out hereinabove, the State's paltry evidence, when considered against the Appellant's plausible explanation of his own whereabouts on March 23, 2004, weighs in favor of reversing the jury's verdict.

The State's case was deprived of its foundation early in the trial with the testimony of Sgt. Starks, who revealed to the jury that the entire investigation in this case consisted of talking to Mrs. Yarbrough, the Complainant, unsuccessfully checking the house for fingerprints, and taking thirteen pictures (T. I. 67). Thus, the entirety of Sgt. Starks' case against Mr. Ragland were the statements of Mrs. Yarbrough, an eyewitness who supposedly immediately identified the Appellant in a dark room despite not having seen him in over ten years. (T. I. 81). Furthermore, at trial, Mrs. Yarbrough, the State's sole eyewitness, presented a confusing and often times contradictory tale of what happened on March 23, 2004.

According to her testimony, at some point in the night, she and her two young children fell asleep in her bedroom with all the lights and the television off. (T. I. 102). She continued to claim that during the night some intoxicated man cut through multiple widow screens, attempted to pry open multiple windows, build a small ladder out of a cooler and bedside table, pull back the curtains of a window, move a large computer desk and other items away from the window, search the house, walk into her bedroom, unplug the lamp sitting on top of the dresser, wrap up its cord, toss it onto the floor, cut a telephone line, and then climb into bed with her, all without waking up any of three occupants in the bedroom, including a five-year old boy who was supposedly sleeping on the floor and a three-year old said to have been sleeping at the foot of the bed. (T. I. 77-78, 83-86, 101).

Moreover, according to Mrs. Yarbrough, her two small children did not even wake up after she questioned the man on why he was there, demanded he leave her house, got out of bed, walked across the room, cut on her light, and searched her dresser for her gun. (T. I. 78-79). Rather, it was not until the man lunged at her and she tripped over her son did her two children then awake. (T. I. 79). Not only was Mrs. Yarbrough's testimony patently unreasonable, implausible, and impossible, it also directly contradicted the only piece of physical evidence gathered by Sgt. Starks at her home. Mrs. Yarbrough testified that her alleged assailant grabbed both of her wrists with his hand as he attempted to knock away the gun she held (T. I. 93); however, to support the State's proposition that a struggle occurred, they introduced a photograph indicating a only single bruise on her inner forearm. (Exh. S-12, RE. 26).

Further, the only additional evidence that the State was able to produce against Mr. Ragland was the entirely unsubstantiated testimony of Officer Wide, discovered to defense counsel on the morning of trial, that supposedly placed Mr. Ragland about three or four houses down from Mrs. Yarbrough's home a couple of hours before the alleged incident. (T. I. 110). In contrast, Mr. Ragland unequivocally stated that he was not in Mrs. Yarbrough's home on the night in question. (T. I. 119-20). What is not

in evidence in this trial is the testimony of Napolean Brewer, the first responding officer on the night in question, and, perhaps more notably, the testimony of the woman who allegedly called the police in an incident supposedly involving Mr. Ragland earlier that night. This woman, who is undisputed from the record to be an actual person, appears to have never been sought by the police, much less identified for the benefit of defense counsel or the jury, and remains a mystery in this case. Absent any reliable physical, forensic, or occurrence evidence against the Appellant, the State's case must rely upon the inconsistent and implausible allegations of its sole eyewitness. *See also*, ***Dilworth***, *supra*, at 737. The flimsy evidence put on by the State in this case centered only around the testimony of Mrs. Yarbrough, whose claims remain uncorroborated and completely implausible. ***Id***.

In light of the balance of the evidence that was before the jury in this case, the verdict reached in this matter is plainly repulsive to reason, inference, and conclusion. Although the lower court allowed the verdict to stand in face of defense counsel's motion for new trial, it was clearly an abuse of discretion to refrain from exercising its prerogative as the "thirteenth juror" on the trial level. The verdict is so contrary to the overwhelming weight of the evidence that this honorable Court can alleviate unconscionable injustice which has occurred if the verdict is allowed to stand, and the Appellant respectfully urges the Court to reverse the jury's verdict, thereby remanding this case with proper instructions to the lower court for a new trial, or, in the alternative to reverse, render, thereby ordering the immediate release of the Appellant from the custody of the Mississippi Department of Corrections.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court with instructions to the lower court for a new

trial. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The claims of error in this case are brought by the Appellant under ***Article 3, Sections 14, 23, and 26 of the Mississippi Constitution*** and the ***Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution***. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have on this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of the Appellant to the following persons:

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This the 9th day of April, 2010.

Phillip W. Broadhead, MSB [redacted]
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