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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONAL CITATIONS

TREATISES

STATUTES

RULES

STATEMENT OF ISSUES

I. WHETHER THE COURT SHOULD ENTERTAIN INTERLOCUTORY APPEALS AFTER INDICTMENT, BUT BEFORE TRIAL

II. WHETHER TRIAL IS BARRED BY *RES JUDICATA,* DOUBLE JEOPARDY, OR COLLATERAL ESTOPPEL

III. WHETHER TRIAL IS BARRED BY INSUFFICIENCY OF EVIDENCE

IV. WHETHER TRIAL IS BARRED BY A VIOLATION OF DUE PROCESS

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to M.R.A.P. 34(b), the State pleads for oral argument in the instant case, and believes oral argument would be helpful to the Court for the following reasons:

1. Conwill has failed to abide by M.R.A.P. 3 and 4. Consequently, the State does not believe the substantive issues of this appeal are properly before the Court.

2. Conwill has failed to abide by M.R.A.P. 10 with regard to designation of the record. Because the Court does not have the benefit of a complete record, the State believes oral argument would help the Court better understand the context of what is included in the record on appeal.

3. The State believes the substantive issues before the Court warrant exhaustive analysis. The Court might better understand the facts, record, procedural posture and context of the case if the Court were able to question all counsel of record.

4. With regard to several procedural and substantive issues on appeal, the instant case may be viewed as a case of first impression of constitutional issues.

STATEMENT OF THE CASE

Before the Supreme Court is an interlocutory appeal from the Circuit Court of Madison County, granted on February 11, 2010. **C.P. 202.** Conwill's lawyer said, "In the habeas hearing, the question was asked ... 'Were these drugs yours?' 'No. I had no knowledge.' " **R. 26.** Prior to Conwill's guilty pleas for cocaine possession and felony DUI (**C.P. 138**), the State learned that Conwill, on or about October 30, 2007, made an admission to his girlfriend indicating his knowledge of cocaine found on September 11, 2007. **R. 15, 19.** This admission directly contradicted his prior testimony to Judge Chapman in a *habeas corpus* hearing. **Ex. "A," 15-16.** A true and correct copy of the transcript of the *habeas* hearing where Conwill offered false testimony is attached as Exhibit "A[1]."

In a letter from District Attorney Michael Guest, dated February 13, 2008, the State outlined new evidence for the September 11, 2007 cocaine arrest. **C.P. 148, 173-74; R. 11, 83-86, 89, 92.** At the time, Conwill had been indicted again[2] for perjury. **C.P. 1.** However, prosecutors were prohibited from disclosing that fact, as Conwill had not yet been served with the second indictment. **C.P. 1.** Guest explained the letter in a subsequent affidavit, indicating that the "same offer" related only to the pending felony DUI

1

A certified copy of the *habeaus* transcript of the relevant proceedings before Circuit Judge William E. Chapman, III, has been delivered to the Circuit Court of Madison County in the format required by the Supreme Court for appeal. The State, by separate motion, pleads that the Court allow the State to supplement the official record with this transcript pursuant to the M.R.A.P. 10(e), or, in the alternative, pursuant to M.R.A.P. 2(c).

2

Conwill was first indicted for perjury in Madison Circuit Court cause no. 2008-0359, which was true billed by the Grand Jury on May 7, 2008. A true and correct copy of that indictment is attached as Exhibit "B." The State, by separate motion, pleads that the Court allow the State to supplement the official record with this indictment and the related motion and order to dismiss the indictment, pursuant to the M.R.A.P. 10(e), or, in the alternative, pursuant to M.R.A.P. 2(c).

and cocaine possession charge. **C.P. 170-174.**

During a subsequent guilty plea on February 20, 2008, Conwill pled guilty to felony DUI and cocaine possession. **C.P. 130-37.** Conwill argues that his cocaine conviction, where he admitted possession, ended his problematic denials of possession in the *habeas* hearing. Conwill laments that despite evidence demonstrating his perjury, the State is barred from trial. The cocaine possession guilty plea was a separate, distinct crime, apart from the indicted perjury charge. **C.P. 5.** Conwill's motions to dismiss the second perjury indictment were correctly denied. The overriding question is whether the State should be allowed a jury trial.

STATEMENT OF FACTS

On September 11, 2007, while free on bond for felony DUI, Conwill and Kimberly McDaniel were stopped by a deputy. **R. 21; Ex. "A," 5-7.** Following a search, he was charged with possession of cocaine, punishable by a maximum of 8 years in prison. Miss. Code Ann. § 41-29-139(c)(1)(B); **R. 77; C.P. 38.** Consequently, the State sought an Article III, § 29 bond revocation, as Conwill was charged with a crime punishable by more than 5 years in prison while free on bond. **Ex. "A," 41.** Conwill filed a writ, arguing for bond, as the minimum sentence for cocaine possession was less than 5 years. **Ex. "A," 39-40.**

Judge Chapman presided over the *habeas* hearing. **R. 50-51; Ex. "A."** Responding to his attorney, Conwill testified: "And to my knowledge, and to my wilful behavior, there was none in my car." **Ex. "A," 15.** "Bottom line, that pipe was there, and he found this rock of crack cocaine there. Neither of them were in my car to my willingness nor knowledge. That was her pipe, and I'm assuming those were her drugs." **Ex. "A," 16.** These statements are the basis of the perjury indictment. **Ex. "B;" C.P. 5.** Judge Chapman ruled against Conwill. **Ex. "A," 42.**

On October 30, 2007, the Madison County Sheriff's Department obtained an audio recording of a conversation between Conwill and another girlfriend, Paige Cockrell. In that recording, Conwill made an admission that he in fact knew about the cocaine in his vehicle which was the basis of his arrest. This admission contradicted his *habeas* testimony to Judge Chapman on September 20, 2007. **Ex. "A," 15-16; R. 11, 19.** On November 8, 2007, Conwill was indicted for possession of cocaine. **Conwill Ex. "A."** On February 13, 2008, Guest sent a letter to Conwill's lawyer, outlining new evidence for the cocaine arrest. **C.P. at 148, 173-74; R. 11, 83-86, 89, 92; Conwill Ex. "C."**

Guest extended a plea offer requiring two felony convictions: cocaine possession and felony DUI. **C.P. 148, 173-74.** On February 20, 2008, after pleading guilty to Judge Samac Richardson for cocaine possession (2007-0533) and felony DUI (2007-0534), a judgement was entered. **R. 36-37, 52-53; C.P. 130-37, 138-44.** Conwill was sentenced to 5 years in prison on each charge, to run concurrently, with the last 4 years suspended, 1 year house arrest, and 4 years of supervised probation. **C.P. 138-144.**

On July 1, 2008, a grand jury returned an indictment against Conwill for perjury in cause no. 2008-0359. **Ex. "B."** Discovery was provided to Conwill's new lawyer, including the September 20, 2007 *habeas* transcript. Conwill sought to quash the indictment on December 2, 2008. **Ex. "B."**

On January 28, 2009, a subsequent perjury indictment was true billed. **C.P. 5.** The indictment and capias in 2009-0203C were issued on March 9, 2009. **C.P. 1, 5.** On March 23, 2009, the State filed a motion to dismiss the perjury indictment in 2008-0359R, which was granted. **Ex. "B."** At no surprise to Conwill, the revised perjury indictment in 2009-0203C was served on April 1, 2009. **C.P. 1, 5.**

The stayed indictment alleges, that Conwill:

" . . . did willfully, and corruptly swear, testify, or affirm falsely to a material matter under oath, affirmation, or declaration legally administered in a *habeas corpus* proceeding pending in the Circuit Court of Madison County, Mississippi, before the Honorable William E. Chapman, III, Circuit Court Judge of the Twentieth Circuit Court District, in that the said DAVID CONWILL did falsely state, under oath, that he did not have knowledge that cocaine was present in his vehicle at the time of the arrest on September 11, 2007, when the defendant well knew such statement was false and that DAVID CONWILL, in truth and fact, was aware of the presence and character of said cocaine, and that said cocaine was subject to DAVID CONWILL's intentional and conscious dominion and control, said knowingly false testimony being in violation of Miss. Code Ann. §97-9-59 (1972, as amended). **C.P. 5.**

Conwill filed motions seeking pre-trial dismissal, arguing a perjury prosecution was barred by *res judicata*, double jeopardy, collateral estoppel, insufficient evidence, and due process. Given Judge Chapman's status as a "may call" fact witness regarding materiality, the Court assigned the case to Judge William S. Agin, as Special Circuit Judge. **C.P. 51.**

On November 19, 2009, Judge Agin heard extensive argument on Conwill's motions. **R. 1-95.** Judge Agin denied Conwill's motions. **R. 62-81.** On February 1, 2010, Conwill filed an additional motion to dismiss based on "newly" discovered evidence, alleging that the February 13, 2008, letter from Guest to Conwill's lawyer encompassed a global plea offer to all pending indictments, including the second perjury indictment which had not yet been served on Conwill. **C.P. 1; 5; 125-129.** Judge Agin denied Conwill's

motions to dismiss and granted his motion to compel discovery. **C.P. at 155-56.** The State provided Conwill a supplemental discovery response which described the evidence the State intended on introducing at trial, and a response to Conwill's motion in *limine* for exclusion of Conwill's perjury admission. **C.P. 164-169.**

On February 3, 2010, the State succinctly addressed Conwill's misplaced Motion to Dismiss, offering the Guest affidavit in rebuttal. **C.P. 170-174.** Guest explained that his letter did not offer dismissal of the second perjury indictment. **C.P. 173-174.** The second perjury indictment was not served on Conwill until April 1, 2008. **C.P. 1; 8.** The trial court overruled the motions and advised counsel to prepare for trial on February 16, 2010. **R. 83-95; C.P. 175-179.**

The Supreme Court, considering Conwill's petition for interlocutory appeal, stayed the trial and granted Conwill's appeal. **C.P. 194.** Conwill contends he is immune from a perjury prosecution. The State pleads for a jury trial.

SUMMARY OF THE ARGUMENT

In a recent opinion on the original jurisdiction of trial courts, which try cases, and appellate courts, which review appeals, Presiding Justice Graves, writing for a majority, said:

> "The Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions *that have been tried* and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court." *Gillett v. State*, 2010 WL 2609432, at 44 (Miss.2010)(quoting *Williams v. State,* 684 So.2d 1179, 1203 (Miss.1996)). [Emphasis Added].

A more concise statement of why a jury should decide Conwill's guilt is difficult to fathom. Consistent with the spirit of *Gillett*, *Farris v. State*, 764 So.2d 411 (Miss.2000), *Beckwith v. State*, 615 So.2d 1134 (Miss.1992), and *De La Beckwith v. State*, 707

So.2d 547, 569-571 (Miss.1997), the State pleads that the Court refrain from entertaining Conwill's pre-trial motions to dismiss in this felony prosecution, or any other felony prosecution, where a duly empaneled Grand Jury has returned an indictment, and the State, having prevailed in pre-trial motions, intends to offer evidence at trial that an accused has committed a crime.

To avoid trial, Conwill asserts numerous theories. Conwill's double jeopardy argument is without merit. The independent crimes of perjury and possession of cocaine are separate and distinct offenses under *Blockburger v. United States*, 284 U.S. 299 (1932). The pre-trial defense of *res judicata* lacks merit, as Conwill's guilty plea to cocaine possession is not the basis of the second perjury indictment; consequently, the four necessary identities are not present. *Holland v. Mayfield*, 826 So.2d 665, 670 (Miss. 1999). Prosecution for cocaine possession does not merge with, or preclude, a separate perjury prosecution. *Id.*

Conwill's alleged insufficiency of evidence does not bar trial. "...this Court has never stated the indictment must specifically set out the proof necessary for a conviction." *Byrom v. State*, 863 So.2d 836, 867 (Miss.2003). For good reason, no reported decision exists where, prior to trial, this Court has adjudicated the sufficiency or admissibility of evidence against a criminal defendant. Lastly, Conwill infers that the State violated his due process rights with intentional delay or trickery. This argument lacks merit due to Conwill's failure to demonstrate any intentional delay or trickery in furtherance of tactical advantage. *De La Beckwith v. State*, 707 So.2d 547, 569-571 (Miss.1997).

ARGUMENT

I. WHETHER THE COURT SHOULD ENTERTAIN INTERLOCUTORY APPEALS AFTER INDICTMENT, BUT BEFORE TRIAL

Considering M.R.A.P. 5 and related comments, along with the Court's inherent authority, the State respectfully pleads that this particular appeal be procedurally addressed with an *en banc* reconsideration of precedent set forth in *Beckwith v. State*, 615 So.2d 1134 (Miss. 1992). The lower court should be allowed to afford Conwill his constitutional right of having a duly sworn and empaneled jury determine guilt in a bifurcated trial. *Article 6, Section 156, Mississippi Constitution of 1890; Gillett v. State*, 2010 WL 2609432, at 44 (Miss.2010); *State v. Culp*, 823 So.2d 510, 513 (Miss. 2002); *Farris v. State*, 764 So.2d 411, 426 (Miss.2000); *Seely v. State*, 451 So.2d 213, 214-215 (Miss.1984); *Hurt v. State*, 420 So.2d 560 (Miss.1982); U.C.C.C.R. 6.04. Conwill's plea for this Court's intervention, as opposed to judicial review, is not ripe. *Flanagan v. U.S.*, 465 U.S. 259, 104 S.Ct. 105 (1984); *Abney v. U.S.*, 431 U.S. 651, 97 S.Ct. 2034 (1977); *DiBella v. U.S.*, 369 U.S. 121, 124, 82 S.Ct. 654, 656 (1962); *U.S. v. McDonald*, 435 U.S. 850, 98 S.Ct. 1547 (1978). "Adherence to this rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" *Abney,* 431 U.S. at 656-657, 97 S.Ct. at 2038-2039 (1977). It is a fundamental principle that a prosecutor be afforded discretion over what charge to bring in any criminal trial. *Farris v. State*, 764 So.2d 411, 422 (Miss.2000)(quoting *Watts v. State,* 717 So.2d 314, 320 (Miss.1998); *United States v. Batchelder,* 442 U.S. 114, 99 S.Ct. 2198 (1979).

Otherwise, circuit courts will loose an ability to efficiently maintain criminal dockets. As routine arbiters of when indictments may be adjudicated by jury trials, appellate courts will be flooded with post indictment, pre-trial challenges. The practical effect is comparable to an extension of Miss.R.Civ.P. 12(b)(6) and 56 beyond civil claims into criminal prosecutions. Allowing criminal defendants this procedural remedy would erode the province of the grand jury in returning true bills of indictment upon probable cause, along with the circuit courts' role as a trial court of original jurisdiction. *Article 6, Section 156, Mississippi Constitution of 1890.*

In *Beckwith v. State*, 615 So.2d at 1136 (Miss. 1992), this Court stated:

> There should be no necessity to emphasize the obvious: This case is not before us from a final conviction. It is before us on an interlocutory appeal in which Beckwith claims a Constitutional right not to even be put to trial, seeking this Court to intervene in circuit court criminal trial proceedings instituted by the State of Mississippi, stop them, and order his discharge.
>
> This Court does not equate the right not to be wrongfully convicted as somehow giving a defendant a right not to be put to trial at all. We adhere to the wisdom stated by the United States Supreme Court in *Cobbledick v. United States*, 309 U.S. 323 at 325, 60 S.Ct. 540 at 541, 84 L.Ed. 783 at 785 (1940):
>
> > An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. *Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.* The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution *must await his conviction* before its reconsideration by an appellate tribunal. (Emphasis [in original])

This Court has granted Conwill's petition for interlocutory appeal and has ordered a stay of trial. **C.P. 202.** While this argument was considered by a three Justice panel, the State respectfully prays for an *en banc* reconsideration.

II. WHETHER TRIAL IS BARRED BY *RES JUDICATA*, DOUBLE JEOPARDY OR COLLATERAL ESTOPPEL

[A] *Res Judicata.*

Conwill argues the trial judge erred in denying his motion to dismiss with prejudice based upon the doctrine of *res judicata*.. **C.P. 23-27; 155-56; 178-79.**

Res judicata does not apply because the four necessary identities are not present. *Holland v. Mayfield*, 826 So.2d 664, 670 (Miss. 1999). In *State v. Ellis*, 770 So.2d 1041, 1043 (Ct.App.Miss.2000), quoting *Holland v. Mayfield*, 826 So.2d 664, 670 (Miss.1999), the Mississippi Supreme Court once again addressed the issue of *res judicata* and restated:

> The rule of law known as *res judicata* holds that when a court of competent jurisdiction enters a final judgment on the merits of an action, the parties or their privies are precluded from re-litigation of claims that were decided or could have been raised in that action. *Walton v. Bourgeois,* 512 So.2d 698, 700 (Miss. 1987). There are four identities that must be present before a subsequent action may be dismissed on the grounds of *res judicata*:
>
> (1) identity of the subject matter of the original action when compared with the action now sought to be precluded; (2) identity of underlying facts and circumstances upon which a claim is asserted and relief sought in the two actions; (3) identity of the parties to the two actions, and identity met where a party to the one action was in privity with a party to the other; and (4) identity of the quality or character of a person against whom the claim is made. *Dunaway v. W.H. Hopper & Associates*, Inc. 422 So.2d 749, 751 (Miss. 1982). A party is precluded from raising a claim in a subsequent action if the four identities of *res judicata* are present. This is so regardless of whether all grounds for possible recovery were litigated or asserted in the prior action, so long as those ground were available to a party and should have been asserted. *Dunaway* at 751 . . . *Id.* (quoting *Aetna Cas. & Sur. Co. v.*

Berry, 669 So.2d 56, 67 (Miss. 1996)). * * * * * *

While this case law primarily has been decided in the context of civil practice, and the Mississippi Rules of Civil Procedure have not been extended to criminal practice and procedure, an analysis fails to warrant Conwill's argument. First, as demonstrated by the record and in other parts of this brief, the 'claim' or indictment for perjury was brought twice, in the normal course of business, and like any other case the Madison County District Attorney's office would bring. Careful analysis of the timing of events clearly shows that the State was not intentionally 'sand bagging' for strategic purposes, but rather followed the requirements of grand jury secrecy and the Court's calendar in a good faith attempt to prosecute Conwill as quickly and efficiently as possible.

When Conwill's false statements about his knowledge and possession of the cocaine failed to result in a favorable outcome in the Article III, Section 29 proceeding, Conwill elected to go forward with a concurrent guilty plea for felony driving under the influence and cocaine possession. **R. 36-37, 52-53; C.P. at 130-37, 138-44.** This guilty plea occurred on February 20, 2008.

Around a month and a half later, on May 7, 2008, the first perjury indictment was presented to a Madison County Grand Jury. **Ex. "B."** On July 1, 2008, a Madison County Grand Jury returned that indictment against Conwill in cause no. 2008-0359. **Ex. "B."** Discovery was provided to Conwill's new lawyer, including the September 20, 2007 *habeas corpus* transcript. **Ex. "B."** Conwill filed a motion to quash the indictment on December 2, 2008, alleging that the indictment was substantively insufficient. **Ex. "B."** In response, the State voluntarily filed a motion to dismiss the first indictment, and

an order was entered accordingly on March 23, 2009. **Ex. "B."** Conwill wrongly assumed victory, content that dismissal of the first indictment ended his travails.

On January 28, 2009, a subsequent indictment for perjury was presented to a Madison County Grand Jury and true billed. **C.P. 5.** The State prosecuted Conwill's perjury case within the parameters of docket settings, grand jury schedules and time constraints, all of which are dictated by the Madison County Circuit Court. Because the first indictment was criticized as insufficient, and consistent with *Farris v. State*, 764 So.2d 411, 421 (Miss.2000), the undersigned counsel researched perjury law and re-drafted a second indictment which follows the statute and requirements of notice in all respects. Miss. Code Ann. §97-9-59; **Ex. "B;" C.P. 5.**

The subject matter of the 'original action' or indictment (cocaine possession in cause no. 2007-0533), is distinctly and elementally different compared to the first perjury indictment (cause no. 2008-0359), as well as the second perjury indictment (cause no. 2009-0203). **C.P. 5; Ex. "B."** Further, the underlying facts and circumstances in the two different crimes, together with the proof needed at trial, and the relief sought are fundamentally different. To the extent civil case law on *res judicata* applies, which the State does not concede, we respectfully submit that the doctrinal elements of the defense do not exist, and, consequently, this assignment of error is without merit.

[B] Double Jeopardy - Multiple Punishments - *Blockburger* Criteria.

Conwill also claims the trial court erred in denying his motion to dismiss with prejudice based on the grounds of double jeopardy argued within the context of multiple punishment for the same offense. **C.P. 61-66; 155-56; 178-79.** This argument is

without merit because the elements of perjury are entirely different from the elements of cocaine possession.

The perjury involved here targets false swearing about possession of cocaine and not the issue of possession *per se*. Consequently, the argument flunks the test in *Blockburger v. United States*, 284 U.S. 299 (1932). Each requires proof of a fact which the other does not. Adjudicating the merits of cocaine possession did not adjudicate Conwill's perjury, which had already occurred. Prosecution for cocaine possession never merged with Conwill's perjury indictments.

[C] Double Jeopardy - Collateral Estoppel.

Conwill argues the trial court erred in not granting his motion to dismiss based on grounds of collateral estoppel. **C.P. 31-37; 155-56; 178-79.** Collateral estoppel is not a valid defense to bar a trial. In the perjury case in chief, the State has no intention of relying in any way upon Conwill's admissions during his guilty plea as direct evidence.

Writing for the majority in *Farris v. State*, 764 So.2d at 423, then Justice Mills opined, "Collateral estoppel provides that an issue of ultimate fact which was a valid and final judgment may not be re-litigated between the same parties in a subsequent suit. *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). This doctrine is a practical civil extension of the Double Jeopardy Clause in the Fifth Amendment to the United States Constitution, which states that "nor shall any person be subject for the same offence to be twice put into jeopardy of life or limb...." U.S. Const. amend. V. In *State ex rel. Moore v. Molpus,* 578 So.2d 624, 642 (Miss.1991), we held that:

> The public interest in stability and repose is so paramount that collateral estoppel protects competent judgments which are subsequently thought to be erroneous. "*Where the elements of estoppel have been satisfied,* the court's inquiry is not whether the court's order was erroneous, but only that it was the final judgment of the case".... Our law rebuffs subsequent attempts to impeach or attach the initial judgment even where, for example (a) Additional evidence has been discovered, *Cotton v. Walker,* 164 Miss. 208, 224, 225, 144 So. 45, 47 (1932); (b) The substance of law has [been] incorrectly decided and applied, *Fisher v. Browning,* 107 Miss. 729, 739 66 So. 132, 136 (1914); or (c) Where constitutional questions have been erroneously decided.

In *Farris*, the defendant cited *Herring v. Herring,* 571 So.2d 239 (Miss.1990), for the proposition that since his fees were approved by court order, and no attempt was made to invalidate a chancellor's orders, then evidence which would render those orders invalid was non-existent on appeal. *Farris v. State*, 764 So.2d at 425. "He points to *Hinds County Bd. of Supervisors v. Common Cause,* 551 So.2d 107 (Miss.1989), and M.R.C.P. 60(b), which outline the proper procedure for attacking the validity of a chancery court judgment. Farris's reliance on these authorities is misplaced." The Court continued:

> *Common Cause* and Rule 60(b) both address the proper avenue for attacking chancery court judgments in *civil* matters. Today we are faced not with a civil matter, but with a criminal conspiracy case which was perpetrated through the veil of chancery court authority. A guardian *ad litem* does not enjoy immunity from our criminal law just because a chancellor has made the appointment and subsequently orders attorney fees. Any actor, regardless of official authority, who commits a crime against the peace and dignity of the State of Mississippi, and who is subject to the jurisdiction of this sovereign State, shall be held responsible for his actions according to the law of this State and the supreme law of the United States. Miss. Const. Art. 6, § 156.
>
> *Herring* involved the recusal of three sitting Chancellors from a child custody case where a Special Chancellor was appointed by a recusal order to hear the case. 571 So.2d at 239. Subsequent to the recusal order, one of the previously recused Chancellors stepped back

> into the fray and entered an order overruling a motion for his recusal. *Id.* at 241-42. We reversed and remanded, holding that, "In the absence of some valid order setting aside ... [the original recusal order], the only person authorized to hear this case was [the Special Chancellor]." *Id.* at 243. We also held that the orders of the Special Chancellor were not subject to collateral attack. *Id.*

Farris v. State, 764 So.2d at 425.

For the same reasons, Conwill, should be precluded from collaterally attacking the orders of Judge Agin, a Specially Appointed Circuit Judge. *Id.* But for Conwill's perjury to Judge Chapman, a special appointment would have been unnecessary, and the law should not reward Conwill's false testimony with procedural advantage. Analogous to the *Farris* argument concerning the integration of Miss.R.Civ.P. 60(b) and chancery court jurisdiction as a procedural/ constitutional defenses in a criminal case, Conwill pleads that this Court recognize a mythical creature akin to Miss.R.Civ.P. 12(b)(6) or 56.

Conwill essentially argues that, 'Even if everything the evidence and witnesses against me is accepted as true, I am entitled to a pre-trial judgment of acquittal as a matter of law, or a pre-trial dismissal with prejudice, as the prosecutor has failed to true bill an indictment upon which relief may be granted. And if the Madison County Circuit Court says no, surely the Mississippi Supreme Court will recognize the benefit this brilliant, hybrid creature of civil procedure may bring to criminal law.' This is particularly disturbing because facts and evidence have not been adjudicated at a trial, and, "Appeal rights cannot depend on the facts of a particular case." *Carroll v. U.S.*, 354 U.S. 394, 405, 77 S.Ct. 1332, 1339 (1957).

Common law crimes, such as the rape of a mental incompetent, have been abrogated by statute, such as that for sexual battery under Miss. Code Ann. § 97-3-95.

In *McInnis v. State*, 52 So. 634, 636 (Miss. 1910), the Court recognized that, "In construing the statute, it should be borne in mind that embezzlement is a statutory crime. No such offense was known to the common law. 1 Bishop Crim. Law (8th Ed.) § 567; *Hemingway v. State*, 68 Miss. 371, 8 South. 317. In the latter case, referring to section 2787, Code 1880, the court held that it was the "creation of an offense, prior to the adoption of that Code, unknown to our jurisprudence." Under well-known rules of construction, a criminal statute is strictly construed in favor of the defendant, and so when in derogation of the common law, and against the making of two separate and distinct offenses of the same act-double punishment, which must be clearly within the language and intendment of the statute."

Because Conwill's procedural/jurisdictional creature of chaos sounds of rules, as opposed to the common law, it should be barred from the realm of criminal law and procedure, as those creatures don't apply, or even exist. *Farris v. State*, 764 So.2d 420-426; *Beckwith v. State*, 615 So.2d at 1136-1139. The procedural relief sought by Conwill is clearly an imagined creature of civil procedure, cross-bred as an acrobatic defense mechanism for usurping the authority of Article 6, Section 156 of the Mississippi Constitution, which places original jurisdiction of all criminal matters firmly with the Circuit Courts of Mississippi. *Gillett v. State*, 2010 WL 2609432, at 44 (Miss.2010); *Farris v. State*, 764 So.2d at 426. The elements of collateral estoppel have not been met, as the ultimate issue of fact in first and second perjury indictments was not whether Conwill admitted to possessing cocaine in his guilty plea. The State does not suggest that with every change of plea from "not guilty" to "guilty," the State somehow gains the ability to enhance punishment by a subsequent prosecution for perjury because the defendant failed to enter a guilty plea at the earliest possible time.

The ultimate issue of fact is whether or not Conwill committed perjury in the Circuit Court of Madison County when, under oath in the *habeas corpus* hearing, he testified to Judge Chapman, that:

> "And to my knowledge, and to my wilful behavior, there was none in my car." **Ex. "A," 15.** "Bottom line, that pipe was there, and he found this rock of crack cocaine there. Neither of them were in my car to my willingness nor knowledge. That was her pipe, and I'm assuming those were her drugs." **Ex. "A," 16.**

The State maintains that Conwill's prior testimony, when considered together with the current indictment and evidence the State intends to offer at trial, is not an attempt to re-litigate an ultimate fact in the final judgment of the conviction for cocaine possession. The State acknowledges that Conwill can't be punished for that particular cocaine possession twice. However, the State does believe a trial should be allowed so a jury may consider whether or not Conwill is guilty of committing the felony crime of perjury.

III. WHETHER TRIAL IS BARRED BY INSUFFICIENCY OF EVIDENCE

Conwill, relying upon *McFee v. State,* 510 So.2d 790 (Miss. 1987), claims the trial court erred in denying his motion to dismiss based on the lack of two contradictory sworn statements. He claims that both contradictory statements must have been made under oath for the present perjury indictment to stand. In a very similar case to the one at bar, the Court of Appeals, affirming a conviction for perjury, noted, "In *McFee,* the Mississippi Supreme Court recognized "that the common law rule that one witness and other corroborating circumstances must be proved to sustain a perjury conviction refers only to proof of the falsity of the accused's statement. The necessity of corroboration does not extend to proof of the other elements of the crime." *Ford v. State*, 956 So.2d

301, 307 (Miss.App.2006)(citing *McFee,* 510 So.2d at 793).

On September 20, 2007, the sworn statements constituting the perjury charge were made by Conwill, to Judge Chapman, at a *habeas corpus* hearing. **R. 4; 50-51; Ex. "A," 15-16.** Responding to his attorney about possession of cocaine when he was arrested on September 11, 2007, Conwill testified, under oath: "And to my knowledge, and to my wilful behavior, there was none in my car." **Ex. "A," 15.** "Bottom line, that pipe was there, and he found this rock of crack cocaine there. Neither of them were in my car to my willingness nor knowledge. That was her pipe, and I'm assuming those were her drugs." **Ex. "A," 16.**

Admittedly, the tape recorded statement wherein Conwill admitted knowledge and possession of the cocaine during a telephone call was unsworn. No matter.

The Court held in *McFee v. State*, 510 So.2d 790, 792 (Miss.1987) that, "...[i]n order to convict for perjury, the prosecution is required to prove the falsity of the accused's statement by a minimum of two witnesses, or by one witness and corroborating circumstances." [Emphasis Added]. See also, *Hammett v. State*, 797 So.2d 258, 263 (Miss.App.2001)(recognizing that perjury may be proven by two witnesses or one witness and corroborating evidence). Consequently, based on the evidence the State intends on introducing at trial, including the witnesses set forth in the record, together with Conwill's recorded audio admission, the State has established issues of fact which this Court should allow a Madison County petit jury to consider. **C.P. 164-169.**

Moreover, we respectfully submit the trial judge lacked jurisdiction, *i.e.*, the power to pre-hear and pre-adjudicate, the sufficiency of the State's proof of Conwill's

perjury. In *State v. Matthews*, 218 So.2d 743, 744 (Miss.1969), the Court recognized the prohibition of pre-trial, evidentiary attacks against Grand Jury indictments based on insufficient evidence. "This procedure is of course based upon the general rule that the law does not permit the court to go behind an indictment to inquire into the evidence considered by the Grand Jury to determine whether it was in whole or in part competent and legal." *Id.*

Citing *State v. Grady*, 281 So.2d 678, 680-681 (Miss.1973), in *State v. Burrill*, 312 So.2d 1,4 (Miss.1975), the Court held:

> ...this Court, in order to preserve orderly procedure, raised on its own motion the question of whether a defendant may test the sufficiency of the evidence before the grand jury. If this procedure can be used, it would result in a pretrial hearing in practically every case to determine whether the state has sufficient evidence to support the indictment. This could only result in confusion and delay in the trial of a criminal case. . .It is well settled in this state that neither a motion to quash nor any other pretrial pleading can be employed to test the sufficiency of the evidence to support the indictment. . . .[Emphasis Added].

Consequently, the State should not be barred from trial by an allegation of insufficient evidence for the second perjury indictment in the Circuit Court of Madison County, Mississippi.

IV. WHETHER TRIAL IS BARRED BY A DUE PROCESS VIOLATION

Regardless of how guilty the States believes Conwill is with regard to the pending perjury indictment, he is guaranteed a fair trial. "It is one of the crowning glories of our law that no matter how guilty one may be, no matter how atrocious his crime, nor how certain his doom, when brought to trial anywhere he shall, nevertheless, have the same fair and impartial trial accorded to the most innocent defendant. Those

safeguards, crystalized into the constitution and laws of the land as the result of the wisdom of centuries of experience, must be, by the courts, sacredly upheld, as well in case of the guiltiest as of the most innocent defendant answering at the bar of his country." *Tennison v. State*, 31 So. 421, 423 (Miss.1902).

Conwill claims he cannot adequately defend himself against the pending charge of perjury due to the finality of his guilty plea in which possession of the cocaine in question was voluntarily and intelligently admitted. He argues that the question of possession, which the State contends Conwill earlier lied about under oath, was adjudicated once and for all via his guilty plea, and that to proceed with a trial for perjury based upon false statements about possession would violate his Due Process rights and the judicial ideal of fundamental fairness.

Conwill's Due Process argument should be rejected for the same reason it was rejected for *Byron De La Beckwith* at 615 So.2d at 1143-44. This Court should " . . . never address by interlocutory appeal rights that can be vindicated on [direct] appeal."

We respectfully point out that nothing within the four (4) corners of the letter dated February 13, 2008, from the district attorney to Mr. Featherston, former defense counsel, ties the State's offer of a plea bargain to the charge of perjury true billed on May 7, 2008. **Ex. "B;" C.P. at 148, 173-74.** The concurrent plea offer for felony driving under the influence and cocaine possession charge was not an all inclusive plea bargain that ruled out a subsequent prosecution for perjury; rather, it was an offer directed only for those particular pending charges. **C.P. 148, 173-74.** The affidavit sworn by the district attorney on February 3, 2010, in response to Conwill's motion to dismiss based on new evidence makes this perfectly clear. **C.P. 170-74.**

Conwill, under the trustworthiness of the official oath, elected to testify during a *habeas corpus* hearing. **Ex. "A," 15-16.** When Conwill's false statements about his knowledge and possession of the cocaine failed to result in a favorable outcome in the Article III, Section 29 proceeding, Conwill elected to go forward with a concurrent guilty plea for felony DUI and cocaine possession. **R. 36-37, 52-53; C.P. 130-37, 138-44.** This guilty plea occurred on February 20, 2008.

Around a month and a half later, on May 7, 2008, the first perjury indictment was presented to a Madison County Grand Jury. **Ex. "B."** On July 1, 2008, a Madison County Grand Jury returned that indictment against Conwill in cause no. 2008-0359. **Ex. "B."** Discovery was provided to Conwill's new lawyer, including the September 20, 2007 *habeas corpus* transcript. **Ex. "B."** Conwill filed a motion to quash the indictment on December 2, 2008, alleging that the indictment was substantively insufficient. **Ex. "B."** In response, the State voluntarily filed a motion to dismiss the first indictment, and an order was entered accordingly on March 23, 2009. **Ex. "B."** Conwill wrongly assumed victory, content that dismissal of the first indictment ended his travails.

On January 28, 2009, a subsequent indictment for perjury was presented to a Madison County Grand Jury and true billed. **C.P. 5.** "[W]here a *nolle prosequi* is entered the particular case is at an end on the docket, ... this does not bar another prosecution for the same offense if commenced in the court where the case originated, as was done in the instant case." *De La Beckwith*, 707 So.2d at 569. The indictment and capias in 2009-0203C were issued on March 9, 2009. **C.P. 1.** Shortly thereafter, on March 23, 2009, the State filed a motion to dismiss the perjury indictment in 2008-0359R, which was granted. The revised indictment and capias for perjury in 2009-

0203C were executed and returned on April 1, 2009. **C.P. 1.**

Conwill argues that his rights of Due Process under the 6th and 14th Amendments were violated, inferring that the State improperly and intentionally delayed prosecuting the perjury case until after he pled guilty to felony driving under the influence and possession of cocaine. Conwill suggests that the State had a duty to disclose any future intention of seeking a perjury indictment on the date of the letter from Michael Guest to Conwill's lawyer, and that the State's failure in that regard violates his constitutional rights. Conwill's arguments are misplaced.

Conwill ignores the two year statute of limitations on the prosecution of perjury. Set forth in Miss. Code Ann. § 99-1-5. Conwill also ignores U.C.C.C.R. 7.04: "No grand juror, witness, attorney general, district attorney, county attorney, other prosecuting attorney, clerk, sheriff, or other officer of the court shall disclose to any unauthorized person that an indictment is being found or returned into court against a defendant or disclose any action or proceeding in relation to the indictment before the finding of an indictment ...." *Id.* "No attorney general, district attorney, county attorney, other prosecuting attorney, or other officer of the court shall announce to any unauthorized person what the grand jury will consider in its deliberations. If such information is disclosed, the disclosing person may be found in contempt of court punishable by fine or imprisonment." *Id.*; See also, Miss. Code Ann. § 97-9-53.

Simply put, had Guest or any other person involved in Conwill's perjury investigation disclosed the existence of the second indictment to any party, especially an adverse party, such would have been in direct violation of the law of grand jury secrecy. Miss. Code Ann. § 97-9-53; U.C.C.C.R. 7.04.

Further, even assuming the short periods of time between presentation of the first and second perjury indictments might constitute an intentional delay in furtherance of strategy, the law on the subject dictates the State should prevail.

To quote *De La Beckwith*:

> Beckwith urges this Court to overturn *Hooker,* arguing that the "intentional delay" requirement has been misapplied by the federal courts. He asks the Court to balance the prejudice to the accused against the prosecution's reason for the delay, a test which was used by the Fifth Circuit Court of Appeals in *United States v. Townley,* 665 F.2d 579 (5th Cir.), *cert. denied,* 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982) and by the Fourth Circuit Court of Appeals in *Howell v. Barker,* 904 F.2d 889 (4th Cir.), *cert. denied,* 498 U.S. 1016, 111 S.Ct. 590, 112 L.Ed.2d 595 (1990). Beckwith admits that the Fifth Circuit returned to the "intentional delay" standard in *United States v. Hooten,* 933 F.2d 293 (5th Cir.1991), but argues that since *Hooten* did not expressly overrule *Townley,* it should be limited to the facts of that case. He claims that the "deliberate delay dicta" was "mistakenly cited as precedent."
>
> Beckwith ignores *U.S. v. Beszborn,* 21 F.3d 62 (5th Cir.1994), an even more recent case where the Fifth Circuit reiterated that in order to show a due process violation the defendant must show intentional delay for tactical advantage on the part of the prosecution. In addition to the lack of "intentional delay," the Court also found a lack of actual prejudice in overturning a district court's dismissal of the charge against Beszborn. The district court had found prejudice in the fact that five potential witnesses had died and documents had been moved and could not be found, claims similar to those made in the present case. The Fifth Circuit held that the district court had misapplied the standard for a due process claim and that presumptive prejudice was not sufficient. Beszborn had shown nothing that the deceased witnesses would say which would have affected the case, nor did he show anything that could be proved by any missing or misplaced documents. Beckwith is in the same position. Witnesses for both the state and the defense had died in the interim between the trials, but testimony from previous trials was available and was read to the jury. Beckwith did not put into the record any facts he could have proved by these deceased witnesses that did not go to the jury through their prior testimony. Nor does his claim of memory loss fare any better. As the Fifth Circuit said, "Vague assertions of lost witnesses, faded memories, or misplaced documents are insufficient to establish a due process violation from pre-indictment

delay," citing *United States v. Harrison,* 918 F.2d 469 (5th Cir.1990); *United States v. Ballard,* 779 F.2d 287 (5th Cir.), *cert. denied,* 475 U.S. 1109, 106 S.Ct. 1518, 89 L.Ed.2d 916 (1986). See also *United States v. Delario,* 912 F.2d 766 (5th Cir.1990) (showing of intentional delay for tactical purposes required for claim of violation of due process.)

We note that other Federal Courts of Appeal have applied the same standard of "intentional delay." See *Acha v. United States,* 910 F.2d 28 (1st Cir.1990); *United States v. Lash,* 937 F.2d 1077 (6th Cir.1991), *cert. denied,* 502 U.S. 949, 112 S.Ct. 397, 116 L.Ed.2d 347; *United States v. Ashford,* 924 F.2d 1416 (7th Cir.), *cert. denied,* 502 U.S. 828, 112 S.Ct. 98, 116 L.Ed.2d 69 (1991); *United States v. Anagnostou,* 974 F.2d 939 (7th Cir.1992), *cert. denied,* 507 U.S. 1050, 113 S.Ct. 1943, 123 L.Ed.2d 649 (1993); *United States v. LeQuire*, 943 F.2d 1554 (11th Cir.1991), *cert. denied,* 505 U.S. 1223, 112 S.Ct. 3037, 120 L.Ed.2d 906 (1992).

We further note the similarities between this case and *Stoner v. Graddick,* 751 F.2d 1535 (11th Cir.1985). The state of Alabama brought charges against J.B. Stoner for the bombing of a black church nineteen (19) years after the crime. No reason was given by the state for the revival of the 19-year-old case. The Eleventh Circuit rejected Stoner's due process claim, holding that he had not met his burden of proving intentional delay for tactical advantage. The Court said that where there was no bar to prosecution by an applicable statute of limitations, "the constitution places a heavy burden on the defendant to show that pre-indictment delay has offended due process." *Id.* at 1540. If the 19 years between Stoner's crime and conviction did not offend due process, neither did the 21 years between Beckwith's *nolle prosequi* and his conviction.

We decline to reverse the intentional delay standard established by this Court in *Hooker* and followed by the Fifth Circuit Court of Appeals in *Beszborn.* Due process is due process throughout both Mississippi and the Federal judicial systems. Beckwith has shown no due process violation which would justify overturning the jury's verdict in this case.

De La Beckwith v. State, 707 So.2d 547, 569-571 (Miss.1997)

Critically, the State has not had an opportunity to try Conwill's perjury case. Application of the facts in Conwill's case to those in the *De La Beckwith* case, along with the pertinent law, underscore Conwill's misplaced argument. The fact is that the Madison County District Attorney's Office acted as fast as the judicial system, resources

and docket case load allowed. Facts and public policy issues between prosecutions for murder, intertwined with racism and the violation of civil rights, may be distinguished from those prosecutions for perjury.

However, the integrity of our judicial system is fundamentally undermined when parties intentionally offer false testimony in a court of law. The idea, suggested by Conwill in *Johnson v. State*, 84 So. 140 (Miss.1920), that even a "... negro vagrant should not be condemned ... for taking the witness stand..." is offensive, lacking any relevance to the case at bar. If our Courts will excuse perjury for any given defendant, whether to delay incarceration, or to hasten release from custody, then our legal system and all related jurisprudence are for naught.

CONCLUSION

Considering the law and limited record in pretrial litigation, the State pleads for a jury trial in the Circuit Court of Madison County, Mississippi.

Respectfully submitted, this the 29th day of November, 2010.

Dow Yoder

Dow Yoder
Madison County Assistant District Attorney
Mississippi Bar No [redacted]

CERTIFICATE OF SERVICE

I, Dow Yoder, Assistant District Attorney for the State of Mississippi, do hereby certify that I have this date delivered a true and correct copy of the above **BRIEF FOR THE APPELLEE, pursuant to** to the following:

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