IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2010-IA-228-SCT

DAVID E. CONWILL — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT DAVID E. CONWILL ON INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

DAVID E. CONWILL. APPELLANT

VS.

STATE OF MISSISSIPPI, APPELLEE

In order that the Justices of the Supreme Court may evaluate possible disqualifications or recusal, the undersigned Counsel of Record certifies that the following listed persons/entities have an interest in the outcome of this case:

David E. Conwill, M.D., Appellant

Doug Wade, Attorney of Appellant

Patrick Rand, Attorney of Appellant

Mississippi State Department of Health

Attorney General, State of Mississippi

Hon. Michael Guest, District Attorney, Madison County, Mississippi and Associate District Attorneys of Madison County, Mississippi

Hon. William Agin, Trial Court Judge

THIS, the 25th of August, 2010.

DOUG WADE

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES

Comes now David E. Conwill ("Conwill"), Appellant herein, pursuant to M.R.A.P. 5(a) and appeals to this Court to reverse rulings of 19 November 2009 and 4 February 2010 by the Circuit Court of Madison County, Mississippi which denied his motions to dismiss a Perjury Indictment as an Habitual Offender. Copies of the denied motions were submitted as exhibits to Conwill's Petition for Interlocutory Appeal in this case, along with copies of the orders denying his motions and a copy of the current indictment. Conwill submits to this Court that the lower court erred in that this indictment should have been dismissed with prejudice based on the following issues of law:

(1) *Res Judicata* and violation of long-held principles of finality inherent in a guilty plea as established by Newly Discovered Evidence;

(2) Violation of the Third Prong of the Double Jeopardy Clause of both the United States and Mississippi Constitutions banning multiple punishments for the same alleged offense;

(3) Double Jeopardy based on *Blockburger* criteria;

(4) Double Jeopardy based on Collateral Estoppel as proved by Newly Discovered Evidence;

(5) Lack of Two Contradictory Sworn Statements and Other Insufficient Level of Proof; and

(6) Violation of Due Process Rights Under the 6th and 14th Amendments.

Conwill submits that the State of Mississippi's prosecution of him for perjury as an habitual offender cannot proceed because it is absolutely barred when the applicable law is applied to the undisputed facts herein.

STATEMENT OF THE CASE

On the 11th of September, 2007, Appellant ("Conwill") was stopped in Ridgeland, Mississippi by Narcotics Deputy Trey Curtis of the Madison County Sheriff's Department. After a search of Conwill's car, he was charged with possession of a small amount of crack cocaine. Conwill stated at the time of the said stop, and later testified at a Habeas Corpus Hearing on the 20th of September, 2007, that he believes the person in the car with him, Kimberly McDaniel, who was released at the scene uncharged, hid her cocaine under his seat during the time the officer was occupied with him. The Circuit Court (Judge Chapman) ruled against Conwill at this Habeas Corpus hearing, revoked his bail on a prior DUI charge, denied him bail on the new charges, and ordered him incarcerated pending action of the grand jury. Conwill was subsequently indicted on all charges (Exhibit A) and remained incarcerated until a plea agreement was negotiated by his attorney and the District Attorney in February, 2008. On October 30, 2007, Defendant made an **unsworn** statement by telephone, recorded from the Madison County Detention Center, that appeared to contradict his testimonial account of events and knowledge of the material issue of the presence of the drugs found in his car. This **unsworn** statement is the basis for the current indictments in this matter. After his attorney's negotiation with the District Attorney's office, and prompted by the District Attorney's citing of the recorded telephone call, Conwill agreed to enter a plea relating to the possession of the cocaine as stated in the indictment as well as a plea to his indictment for the prior DUI. Conwill agreed to his pleas expecting finality of the charges. Pursuant to this plea agreement, Conwill executed via counsel the standard petition to enter a guilty plea to possession of cocaine (Cause Number 2007-0533) and felony DUI (Cause Number 2007-0534) on the 20th of February, 2007. At his plea hearing, when questioned by Judge Richardson, Conwill stated that he preferred to plead "no contest in

my best interest" to the possession charge, but Judge Richardson refused to agree to this and Conwill ultimately pled "guilty" to the possession of cocaine. As reflected in Judge Richardson's Judgment of Conviction and Sentence Instanter on the 21st of February, 2007, Conwill's pleas were accepted as guilty pleas by the Court. Conwill was adjudicated guilty of the charges and sentences were imposed. Conwill has since complied with all aspects of his sentences, including completion of the imposed year of house arrest, and he has paid in full all of his assessed Madison County fines and fees for these convictions. After final adjudication of his original charges, the District Attorney's Office obtained a Perjury Indictment (Madison County Cause Number 2009-0203-C -- Exhibit B). The Perjury Indictment charges Conwill with testifying falsely during his Habeas Corpus hearing after his arrest on the possession charge. Along with the Perjury Indictment, a concurrent Non-violent Habitual Offender Indictment was obtained. The District Attorney's office has obtained the current indictments based on elements in the chain of events of the charge to which Conwill entered a guilty plea and has already been punished, as to the knowing possession of drugs, his habeas corpus hearing testimony in his own defense, and the apparent contradictory statement made in a recorded **unsworn** telephone conversation with a female acquaintance, Paige Cockrell, made while Conwill was incarcerated but before his guilty pleas were negotiated with the District Attorney.

Conwill filed motions with the Circuit Court of Madison County to dismiss these indictments with prejudice based on grounds of *Res Judicata,* double jeopardy based on both *Blockburger* criteria and collateral estoppel, violation of the third prong of the Double Jeopardy Clause, violation of due process rights under the 6th and 14th amendments, and grounds of the lack of two contradictory sworn statements as the basis of the State's "proof."

Subsequent to the motion hearings on this case conducted November 19, 2009, in response to a granted motion to compel additional discovery, the District Attorney's office over

their objections, released to Conwill's Attorneys a relevant letter outlining the State's plea offer to Conwill's former attorney over the signature of Madison County District Attorney Michael Guest, dated February 13, 2008, (Exhibit C) as attached, which contains:

> **"I spoke with the Madison County Sheriff's Department after you left and I was informed that they had a recorded phone conversation where your client admitted to possessing the controlled substance in question. Your client was speaking with his girlfriend about the case and he admitted to knowing about the narcotics. I was also informed that your client had tested positive for cocaine. <u>Based upon this new information</u> I will make you the same offer, but your client will have to plea on both charges and I will agree to run them concurrently". (underline added)**

Conwill then filed a motion to dismiss on grounds that this newly discovered evidence confirmed his prior arguments for dismissal based on collateral estoppel and *Res Judicata.* The lower court denied all of Conwill's motions to dismiss. Conwill now appeals to this Court to overrule the lower Court's denial of his motions and dismiss with prejudice the Indictments in this case and bar further prosecution of these allegations.

SUMMARY OF THE ARGUMENT

The ***Mississippi Code Ann.*** § 99-39-21 (1972, as amended) states in section (3) that "**The doctrine of *res judicata* shall apply to all issues, both factual and legal, decided at trial and on direct appeal.**" Among the long-held tenants of *res judicata* is the concept that all charges or issues that were or could have been raised in an action are bared from being relitigated in any subsequent action. This is also the basis for the principles of expected finality inherent in a negotiated guilty plea. Insofar as the State's sole basis for bringing the current indictment appears to be based on an **unsworn** telephone call made by the appellant ("Conwill") while he was incarcerated under Section 29 of the ***Mississippi Constitution of 1890*** after a judicial determination that his testimony during a habeas corpus hearing lacked credibility, and that the content of this unsworn telephone call was the major factor for inducing Conwill's guilty pleas, as confirmed by a letter from the District Attorney to Conwill's attorney, it would appear that any charge of perjury based on this chain of events could have been made at that point and thus is now barred by *res judicata* because it stands to reason that if it were not for the content of that unsworn call, no charge of perjury would now have been brought against Conwill. The level of proof historically considered necessary to prove perjury (equivalent to that required to prove treason) is simply lacking. The State cannot legally relitigate the issue used to induce Conwill's prior guilty plea, which many examples of Federal and Mississippi case law have held "**represents a break in the chain of events which has preceded it in the criminal process**" [***Tollett v. Henderson,*** 411 U.S. 258 (1973) and its progeny].

The third prong of the Double Jeopardy Clause of the **5th Amendment** and Article 3, Section 22 of the ***Mississippi Constitution of 1890*** guards against multiple punishments for the same offense as per ***North Carolina v. Pearce***, 395 U.S. 711, 717 (1969) and other case law. Mississippi case law has clearly held that the judicial officer in a habeas corpus proceeding is a

trier of facts charged with determining the credibility of any witnesses who testify therein and further, that denial of bail and incarceration constitutes punishment. Judge Chapman's finding that Conwill's testimony at his habeas corpus hearing lacked credibility and his subsequent denial of bail to Conwill resulting in Conwill's incarceration for over 5 months constitutes clear punishment for that judicial determination. Thus, any further trial and punishment based on a determination of Conwill's credibility at that self-same habeas corpus hearing would constitute an unconstitutional violation of the third prong of the double jeopardy clause.

The prosecution's proposed perjury case against Conwill violates the standards established by many, many Mississippi case law examples adopting criteria based on ***Blockburger v. United States***, 284 U.S. 299 (1932) for determining whether 2 offenses charged as a violation of 2 distinct statutory provisions emerging from the same transaction or chain of conduct constitute 2 offenses or only one for double jeopardy purposes under the **5th Amendment**. The critical factor as stated in Mississippi case law is whether each charged offense **as indicted** contains a unique element or fact which must be proved which the other offense does not (***Meeks v. State***, 604 So.2d 748 – Miss. 1992). Trial and the State's proposed proof of the indictment at bar would not pass muster under these criteria because the original charge required proof of the ultimate material fact about which a perjury charge could now only be sustained by proving that same ultimate material fact.

Further, allowing this indictment to go to trial would constitute double jeopardy because of collateral estoppel criteria established by ***Ashe v. Swenson***, 397 U.S. 436 (1970) because establishing proof of the ultimate material fact about which the perjury is alleged would require re-litigation of the very element used to induce Conwill's guilty plea on the original charge. The use of this element in the earlier litigation is established by the newly-discovered content of the District Attorney's letter to Conwill's former attorney – a letter which the prosecution sought to withhold from Conwill when they argued against his motion for additional discovery. That letter:

over the signature of Madison County District Attorney Michael Guest, dated February 13, 2008, (Exhibit C) as attached, contained the following statements:

> **"I spoke with the Madison County Sheriff's Department after you left and I was informed that they had a recorded phone conversation where your client admitted to possessing the controlled substance in question. Your client was speaking with his girlfriend about the case and he admitted to knowing about the narcotics. I was also informed that your client had tested positive for cocaine. Based upon this new information I will make you the same offer, but your client will have to plea on both charges and I will agree to run them concurrently". (underline added)**

Re-litigation of this point therefore would appear to be barred under principles of collateral estoppel as held by ***Ashe v. Swenson*** and its progeny.

McFee v. State, 510 So.2d 790 (Miss. 1987) unequivocally held, in a majority opinion crafted by Justice Lenore Prather, that Mississippi requires that contradictory statements introduced as "proof" of alleged perjury **must** both be **sworn** statements. The State's use of the content of an **unsworn** contradictory phone call statement in which Conwill was merely seeking to elicit sympathy from a female acquaintance thus does not satisfy the necessary criteria held by the Mississippi Supreme Court to sustain a perjury conviction. Conwill's conduct therein does **not** establish the necessary level of proof of perjury long held by the Mississippi Supreme Court and other jurisdictions.

Other jurisdictions have held that although adjudicative facts as testified can form the basis of a perjury charge, **ultimate facts** cannot. This somewhat mirrors the argument embodied in collateral estoppel. Moreover, as far back as 1920, in ***Johnson v. State***, 845 So. 140, the Mississippi Supreme Court embraced the same basic principle by upholding the right of an individual to take the stand in his own defense of his version of the ultimate facts for which he is being charged without fear of a perjury charge/conviction. To do so, Conwill contends, would constitute a violation of due process rights under the **6th and 14th Amendments**.

ARGUMENT

(1) Res Judicata and related aspects of double jeopardy and violation of long held principles of finality inherent in an adjudicated guilty plea:

As far back as 1912, in ***McNeice v. State***, 101 Miss. 366, 58 So.3 (1912), [See also ***Mississippi Code Ann.*** § 99-9-59, Judicial Decision Footnote 3 (1972, as amended)], the Mississippi Supreme Court advanced the principles of finality inherent in a guilty plea which were much later expressed by the United States Supreme Court:

> **"a guilty plea represents a break in the chain of events which has preceded it in the criminal process ..."**[***Tollett v. Henderson***, 411 U.S. 258 (1973); ***Blackledge v. Perry***, 417 U.S. 21 (1974); ***Haring v. Prosise***, 462 U.S. 306 (1983); ***Ward v. State***, 914 So.2d 332 (Miss. 2005); ***Thornhill v. State***, 919 So.2d 238 (Miss. 2005)].

In ***McNeice v. State***, as quoted in the cited reference from the ***Mississippi Code Ann.*** supra, the court held that:

> **"Where on a prosecution for an unlawful sale of liquor, defendant pleaded guilty, testimony of the alleged purchaser that he did not purchase the liquor was not material and no predicate for perjury."**

Because the ultimate issues of fact in our case at bar have already been adjudicated by the Madison County Circuit Court with expected finality pursuant to Conwill's plea in Cause Number 2007-0533, in which that court found Conwill guilty of **knowingly** possessing cocaine, Conwill's prior testimony and alleged **unsworn** contradictory statements from a recorded telephone call he made while incarcerated do not relate to any non-adjudicated, non-concluded material matter currently pending before the court. In ***Sealfon v. United States***, 332 U.S. 575 (1948) a unanimous Court held:

> **"The doctrine of *res judicata* is applicable to criminal as well as civil proceedings, and operates to conclude those matters in issue which have been determined by a previous verdict, even though the offenses be different."**

And, ***Mississippi Code Ann.*** § 99-39-21 (1972, as amended) states in section (3) that

> **"The doctrine of *res judicata* shall apply to all issues, both factual and legal, decided at trial and on direct appeal."**

In *Allen v. McCurry*, 449 U.S. at 94 (1980), the United States Supreme Court held:

> **"The federal courts have traditionally adhered to the related doctrines of *res judicata* and collateral estoppel. Under *res judicata,* a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been [emphasis added] raised in that action."**

In the case at bar, the state had possession of the recorded **unsworn,** alleged, contradictory statement from Conwill's telephone call a full 3 ½ months before his plea was adjudicated and he was found guilty of the predicate possession offense. Subsequent to the motion hearings on this case conducted November 19, 2009, in response to a granted motion to compel additional discovery, the District Attorney's office over their objections, released to Conwill's Attorneys a relevant letter outlining the State's plea offer to Conwill's former attorney over the signature of Madison County District Attorney Michael Guest, dated February 13, 2008, (Exhibit C) as attached, which contains:

> **"I spoke with the Madison County Sheriff's Department after you left and I was informed that they had a recorded phone conversation where your client admitted to possessing the controlled substance in question. Your client was speaking with his girlfriend about the case and he admitted to knowing about the narcotics. I was also informed that your client had tested positive for cocaine. Based upon this new information I will make you the same offer, but your client will have to plea on both charges and I will agree to run them concurrently". (underline added)**

To re-introduce the recording now as the underlying basis for trying to prove an alleged offense which **could have been brought at the time the original plea was adjudicated** is an unequivocal violation of the doctrine of *res judicata* as held by the U.S. Supreme court in ***Allen v. McCurry***, Supra, and represents a form of **double jeopardy** as cited in the dictum put forward in ***Brown v. Ohio***, 432 U.S. 161 (1977), a seminal case involving double jeopardy issues, and later repeated almost verbatim in ***Harris v. Oklahoma***, 433 U.S. 682 (1977). Therein, Mr. Justice Brennan joined in the Court's opinion reversing convictions on double jeopardy grounds and, joined by Justice Marshall, cited ***Ashe v. Swenson***, 397 U.S. 436 (1970) [the landmark collateral estoppel/double jeopardy case] in stating that he would have reversed "on the ground not addressed by the Court, **that the State did not prosecute the petitioner in a single proceeding**." (emphasis added) He went on to state that

> **"I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."**

All of the above supports the simple, basic concept that *res judicata* is binding and conclusive for issues arising out of a criminal transaction and that the "break in the chain of events" represented by an adjudicated guilty plea "represents a merger of all the issues involved -- attempts to relitigate one or more of these alleged issues violates the fundamental tenants of *res judicata* and represent clear double jeopardy under this analysis and the case law and dicta cited.

(2) Violation of the Third Prong of the Double Jeopardy Clause:

The United States Supreme Court held in ***Benton v. Maryland***, 395 U.S. 784 (1969) that the Fifth Amendment's guarantee against double jeopardy is a fundamental right enforceable against the States through the Fourteenth Amendment. This clause guards against "multiple punishments for the same offense" as per ***North Carolina v. Pearce***, 395 U.S. 711, 717 (1969) and ***United States v. Halper***, 490 U.S. 435, 440 (1989). Pursuant to the 5th and 14th ***Amendments to the United States Constitution***, Article 3, Section 22 of the ***Mississippi Constitution of 1890***, and established Mississippi and national legal precedents, the indictments charging Conwill with perjury as an habitual offender is unconstitutional double jeopardy. The prosecution's proposed case would subject Conwill to trial, and if he were convicted, he would be subjected to additional punishment for the same offense. Judge Chapman's ruling at his habeas corpus hearing denying Conwill bail and incarcerating him for 5 ½ months is a ruling on Conwill's credibility. As noted by the Mississippi Supreme Court in ***Blackwell v. Sessums***, 284 So.2d 38 (Miss. 1973):

> **"We are also committed to the proposition that where the evidence is in conflict on this question of whether the proof is evident or presumption of guilt is great that the judge at the habeas corpus hearing is the trier of fact ..."**

Quoting from Ex Parte ***Bridewell***, 57 Miss. 39 (1879), the ***Blackwell*** Court went on to note that:

> **"... the judicial officer who hears the application [for bail] is the trier of the facts and acts upon the conviction that the testimony leaves upon his own mind ... he has seen the witnesses, and heard them testify under circumstances which made it his duty to attend to their bearing and determine their credibility."**

Thus, in ruling against Conwill in his habeas corpus hearing, Judge Chapman ruled upon Conwill's credibility and punished Conwill by denying bail, which resulted in Conwill's

incarceration for 5 ½ months. Conwill incurred expenses in retaining an attorney to represent him in the matter then pending before the Court. The fact that denial of bail represents punishment is incorporated, inter alia, in the holdings of the Mississippi Supreme Court in ***Lee v. Lawson***, 375 So.2d 1019 (Miss. 1979) and Ex Parte ***Dennis***, 334 So.2d 369 (Miss. 1976):

> **" Justifiable premise for bail is that its denial punishes the accused prior to a guilty verdict while he was clothed with a presumption of innocence."**

Conwill in no way contests the jurisdiction of Judge Chapman to rule upon his credibility during the habeas corpus hearing, but merely points out that this was done and Conwill was punished as a result of Judge Chapman's adverse ruling on his credibility. Had Judge Chapman believed Conwill's testimony at the time, he could not have found probable cause for the charges involved therein and could not have punished Conwill with denial of bail and incarceration. Conwill contends that being subjected to a possible trial under the current perjury indictment represents further multiple punishments for alleged false statements under oath for which he, in fact, has already been punished.

(3) Double jeopardy under the *Blockburger* standard:

The United States Supreme Court held in ***Benton v. Maryland***, 395 U.S. 784 (1969) that the Fifth Amendment guarantees against double jeopardy is a fundamental right enforceable against the States through the Fourteenth Amendment. Among the three separate protections this assures is "protection from a second prosecution for the same offense after conviction" as per ***United States v. Dixon et al.***, 509 U.S. 688 (1993). Pursuant to the 5th and 14th ***Amendments to the United States Constitution***, Article 3, Section 22 of the ***Mississippi Constitution of 1890***, and established Mississippi and national legal precedents, the indictments in the above referenced

cause charging Conwill with perjury as an habitual offender represent unconstitutional double jeopardy. The prosecution's proposed case will not withstand application of the "same evidence" or "same elements" test defined by ***Blockburger v. United States***, 284 U.S. 299 (1932) which has been adopted by the Mississippi State Supreme Court as the most commonly applied standard for Double Jeopardy cases in this state [see ***Wilson v. State***, 775 So. 2d 735 (Miss. 2000), ***Meeks v. State***, 604 So. 2d 748 (Miss. 1992), and ***Hunt v. State***, 863 So.2d 990 (Miss. 2004)]. ***Blockburger*** holds that in cases of 2 offenses charged as a violation of 2 distinct statutory provisions emerging from the same transaction or chain of conduct, the test to be applied to determine whether there are 2 offenses or only one (for double jeopardy purposes) is "whether **each** provision requires proof of a fact which the other does not." As stated in ***Meeks v. State*** and ***Hunt v. State***, ***Blockburger***

> **"...charges that we compare statutory offenses, as indicted, and see whether *each* requires proof of a fact which the other does not." (emphasis added)**

In the case at bar, Conwill has already pled and been adjudged guilty of, and sentenced for, the **same** ultimate predicate offense **as indicted** ("**knowingly** possessed" cocaine) about which he is now accused of perjury. The indictment for possession of cocaine is appended (Exhibit A) and the Judgment Order from the pleaded conviction was appended to Conwill's Petition to this Court for Interlocutory Appeal. The indictment for which Conwill has already pled and been adjudged "guilty" and punished, contains **no new or additional fact** not **totally subsumed** in the charges in the current indictment, (Cause No. 2009-0203-C). Both charges, if tried, would require proof of the **same** knowledge and possession. The perjury indictment would require proof of the additional fact that Conwill testified falsely about this, but the knowing possession indictment and conviction in this case required proof of **no additional fact** not also encompassed

in the proof necessary to support a perjury conviction. Thus, double jeopardy clearly applies under ***Blockburger***, as the test stated in ***Blockburger*** is:

> **" The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not" .**

As the Mississippi Supreme Court held in ***Meeks v. State***, Supra:

> **"A person who has been tried and convicted for a crime which has various incidents included in it, ... cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."**

In addition, the ***Meeks*** Court states:

> **"*Blockburger* allows separate convictions and punishments only where *each* offense requires proof of a fact which the other does not." (emphasis added)**

In the case at bar, the only material facts or elements which would have to be proved/re-litigated in order to establish whether or not Conwill told the truth about them, is whether the drugs and pipe were actually, knowingly, Conwill's or not, and the court has already convicted him of this based on his plea. In context of the perjury allegation, the 10th U.S. Circuit Court of Appeals recently summarized the ***Blockburger*** "same evidence" test as holding that:

> **"... offenses charged are identical in law and fact only if the facts alleged in one would sustain a conviction if offered in support of the other" *United States v. Vicky L. Crook*, 10th Cir. R. 32.1 (2007).**

In ***McNeice v. State***, 101 Miss. 366, 58 So.3 (1912):

> **"Where on a prosecution for an unlawful sale of liquor, defendant pleaded guilty, testimony of the alleged purchaser that he did not purchase the liquor was not material and no predicate for perjury."**

This clearly and unequivocally is the situation in our case at bar.

(4) Double Jeopardy Based on Grounds of Collateral Estoppel as Proved by Newly-Discovered Evidence:

The United States Supreme Court held in ***Benton v. Maryland***, 395 U.S. 784 (1969) that the Fifth Amendment guarantee against double jeopardy is a fundamental right enforceable against the States through the 14th Amendment. Among the three separate protections, this assures "protection from a second prosecution for the same offense after conviction" as per ***United States v. Dixon et al.***, 509 U.S. 688 (1993).

As upheld by the United States Supreme Court in ***Ashe v. Swenson***, 397 U.S. 436 (1970):

> **"The Fifth Amendment guarantee against double jeopardy, applicable here through the Fourteenth Amendment by virtue of *Benton v. Maryland, Supra* [395 U.S. 784] embodies collateral estoppel as a constitutional requirement."**

The United States Supreme Court in ***Ashe v. Swenson***, 397 U.S. 436 (1970) and its progeny, and the Mississippi State Supreme Court in ***State v. Clements Jr.***, 383 So.2d 818 (Miss. 1980) and ***Sanders v. State***, 429 So.2d 245 (Miss. 1983) held that once a court has decided an issue or fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. The holding in ***Ashe v. Swenson*** was that

> **"'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer*, 242 U.S. 85 (1916)."**

In ***United States v. Hernandez***, 572 F.2d 218 (1978), a collateral estoppel/double jeopardy case following a prior acquittal, but with many other parallels to our case at bar, the court held that

> **"The issue on this appeal is whether double jeopardy foreclosed the Government from prosecuting Hernandez for perjury (18 U.S.C. § 1623) based upon his alleged false testimony in his prior trial charging him with violating 18 U.S.C. § 1001, in which he was acquitted. Applying *Ashe v. Swenson* (1970) 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469, we hold that Hernandez' prosecution for perjury was barred by double jeopardy."**

Most successful double jeopardy challenges, based on the doctrine of collateral estoppel, have argued this doctrine following a prior acquittal, as was the case in ***Ashe v. Swenson*** and ***Hernandez***. Although successful double jeopardy challenges involving defensive collateral estoppel following a prior conviction are relatively uncommon, nowhere does ***Ashe v. Swenson*** specifically hold that the collateral estoppel doctrine can never apply equally to constitutional protections against violation of the second prong of the double jeopardy clause. Although no Mississippi case law was found which adequately addresses the collateral estoppel issues which may be unique to our case at bar, at least one decision from another jurisdiction appears enlightening. The Alabama Supreme Court held in ***Howard v. State*, 710 So. 2d 460 (Alabama 1997), after an adjudicated guilty plea for one offense, a subsequent prosecution for another indictment involving related conduct in the same criminal transaction was barred on double jeopardy grounds based on defensive collateral estoppel even though the 2 prosecutions would have been permissible under *Blockburger* criteria.**

The State possessed all the evidence cited in their discovery for our current case at bar for a period of almost 4 months before the time they entered into the plea agreement with Conwill, which he accepted with an expectation of finality. Subsequent to the motion hearings on this case conducted November 19, 2009, in response to a granted motion to compel additional discovery, the District Attorney's office over their objections, released to Conwill's Attorneys a relevant letter outlining the State's plea offer to Conwill's former attorney over the signature of Madison County District Attorney Michael Guest, dated February 13, 2008, (Exhibit C) as attached, which contains:

> **"I spoke with the Madison County Sheriff's Department after you left and I was informed that they had a recorded phone conversation where your client admitted to possessing the controlled substance in question. Your client was speaking with his girlfriend about the case and he admitted to knowing about the narcotics. I was also informed that your client had tested positive for cocaine. Based upon this new information I will make you the same offer, but your client will have to plea on both charges and I will agree to run them concurrently". (underline added)**

In ***Brown v. Ohio***, 432 U.S. 161 (1977), a seminal case involving double jeopardy issues, and later repeated almost verbatim in ***Harris v. Oklahoma***, 433 U.S. 682 (1977), Mr. Justice Brennan joined in the Court's opinion reversing convictions on ***Blockburger*** double jeopardy grounds and, joined by Justice Marshall, cited ***Ashe v. Swenson***, 397 U.S. 436 (1970) [the landmark - collateral estoppel/double jeopardy case] in stating the following dictum that he would have reversed

> **"on the ground not addressed by the Court, that the State did not prosecute the petitioner in a single proceeding." He went on to state that "I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."**

As set forth in numerous legal dictionaries and journal discussions searchable online (i.e., uslegal.com): "Collateral estoppel is the legal doctrine that holds that the determination of the facts litigated between the parties to a proceeding are binding **and conclusive** on those parties in any future litigation. It is also referred to as 'issue preclusion.' **The constitutional ban on double jeopardy includes the right to plead collateral estoppel.** Under collateral estoppel, once a court has decided an issue or fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." An enlightened discussion of these matters occurs in the dissenting opinion of Justices White, Blackmun and Powell in ***Green v. Ohio***, 455 U.S. 976 (1982), and in ***State v. Scarbrough***, 181 S.W.3d 650 (Tenn. 2005), the Tennessee Supreme Court presents a thorough discussion of various aspects of the collateral estoppel doctrine. Inter alia, as used by the District Attorney's office in persuading Conwill's plea to the original charges, the recorded unsworn telephone statement by Conwill was readily available to the prosecution at the time the first 2 charges were pled and adjudicated and was one of the chief reasons Conwill elected not to contest the possession charge at trial. To avoid constitutionally impermissible collateral estoppel/double jeopardy as outlined above, a perjury indictment utilizing this purported evidence arising out of that transaction would have had to have been brought forth at the same time the other charges were adjudicated. To do so now at this late date not only is unconstitutional based on collateral estoppel aspects of double jeopardy, but violates long held tenants of finality and res judicata and would appear to represent the sort of egregious, vindictive, prosecutorial overreaching which the U.S. Supreme Court has condemned on a number of occasions.

(5) Lack of Two Contradictory Sworn Statements:

The state's submission of an alleged **unsworn** audio recording of a contradictory statement made by Conwill as its sole corroborating evidence for the perjury indictment at bar fails to meet the requirements of law necessary to convict Conwill of perjury concerning the knowing possession charge to which he has already pled and for which he has been punished. This failure should prohibit prosecution for perjury in this case. As stated in ***McFee v. State***, 510 So.2d 790 (Miss. 1987), the Mississippi Supreme Court held that:

> **" ... this Court holds that when proof of one accused of perjury who made sworn Statements which conflict with the sworn statement upon which the perjury is founded, is supported by corroboration of a single witness, such is sufficient to warrant a conviction. This Court requires that both contradictory statements be under oath."**

[See also, ***Mississippi Code Ann.*** § 99-9-59, Judicial Decision Footnote 7 (1972, as amended)].

> **"to sustain conviction, both contradictory statements must be under oath."**

The Mississippi Supreme Court has stated that:

> **"Perjury requires stringent proof of a direct and compelling character ... this burden is comparable to that required to prove treason." *Smallwood v. State*, 584 So.2d 733, 741 (Miss. 1991).**

In ***People v Huttenega***, the Michigan Court of Appeals cited the Mississippi Supreme Court in ***Smallwood***, Supra, and **60A *Am Jur* 2d**, Constitutional Law § 847; Criminal Law §§ 784, 829; Perjury §§93-95 and noted that:

> **"The requirements of proof in a perjury case are more stringent than those in any other area of law except treason."**

In our case at bar, we contend that the state's corroborative "proof" comes nowhere near to meeting this "treason" level or standard.

(6) Violation of Due Process Rights Under the 6th and 14th Amendments:

Although Mississippi Courts have not, to our knowledge, recently addressed a case exactly on point, holdings in another jurisdiction are persuasive. The Michigan Court of Appeals, in ***People v Longuemire***, 87 Mich. App. 395; 275 N.W. 2d 12 (1978) held that adjudicative facts can form the basis for a perjury charge, but ultimate facts **cannot,** and provided a definition for distinguishing the two:

> **"A distinction must be drawn between perjury as to as to basic adjudicative facts and perjury as to issues of ultimate fact or law mixed with fact. Where the defendant's false testimony was in regard to ultimate fact questions such as denial of guilt of the crime charged or of a legal element of the crime, a prosecution for perjury is not permissible because the possibility of such a prosecution discourages the defendant from exercising his right to testify, without substantially benefitting the administration of justice."**

The ***Longuemire*** Court went on to note that:

> **"A prosecution for perjury based upon a criminal defendant's false testimony regarding ultimate fact questions ... is constitutionally impermissible ..."**

They further added:

> **"Any threat of prosecution for perjury based on testimony by the defendant in a criminal proceeding raises a potential conflict of interest. On the one hand, the fear of collateral repercussions from testifying may discourage an accused from taking the stand in his own behalf (*Scott v United States*, 135 U.S. App. DC 377;**

> **419 F2d 264 (1969). A defendant's right to testify on his own behalf is of constitutional magnitude ... As a rule of law to resolve this conflict, we hold that although a criminal defendant taking the stand in his own behalf does not have a license to lie *United States v Grayson*, 438 U.S. 41 (1978), he must be protected from threats of perjury prosecutions that unnecessarily chill his right to testify. CF. *United States v Jackson*, 390 U.S. 570 (1968). In determining whether a perjury information unnecessarily discourages a defendant from exercising his right to testify, a careful distinction must be drawn between perjury as to basic adjudicative facts and perjury as to ultimate issues of fact or law mixed with facts."**

The Michigan Supreme Court subsequently acknowledged, and did not overrule, this holding in ***People v White***, 411 Mich 366 (Mich. 1981). The Michigan Court of Appeals has since cited the holding in ***Longuemire***, Supra in deciding at least 2 other cases: ***People v Buie***, 126 Mich. App. 39 (Mich. 1983) and ***People v Forbush***, 170 Mich. App. 294 (Mich. 1988).

The Mississippi Supreme Court briefly discussed ***Longuemire***, Supra in ***Stephens v State***, 592 So. 2d 990 (Miss. 1991), but noted that the holdings in ***Longuemire*** were distinguished from, and not applicable to, the facts in ***Stephens***. We find no other Mississippi cases specifically citing the issues and holdings of ***Longuemire***, Supra. However, 90 years ago, the Mississippi Supreme Court, in essence, said the same thing as the ***Longuemire*** Court, when, after they reversed an appellant's **perjury** conviction based on grounds of insufficient proof, they went on to add the intriguing statement that:

> **"Even a negro vagrant should not be condemned to the penitentiary merely for taking the witness stand in his own behalf in a futile effort to prove his innocence." *Johnson v State***, 84 So. 140 (Miss. 1920)

To our knowledge, this holding has never been overturned by the Mississippi Supreme Court and serves to uphold the same principles held by the courts in Michigan. In our case at bar, Conwill is charged with perjury as to issues of ultimate fact during a preliminary habeas corpus hearing.

Applying the logic of the above holdings, this indictment and its accompanying habitual offender indictment should be dismissed with prejudice.

CONCLUSION

Appellant is entitled to have the action against him in this matter dismissed with prejudice based on any one of the motions filed with the lower court and appeals to this Court to hold accordingly. Conwill is entitled to have any further prosecution for perjury overruled and barred based on the arguments presented in his original motions and herein. To allow this ill-founded prosecution to continue further risks creating precedent that might well bode ill for the efficient future administration of plea negotiation processes insofar as it would compromise long-held principles of finality inherent in this process. The potential effect could be disastrous to accepted processes for efficiency in the court process. Conwill submits that an opinion of this Court upholding his arguments would resolve issues of general importance in the administration of justice and begs this Court to so-rule.

INDICTMENT

STATE OF MISSISSIPPI **CAUSE NO. _____**

VS.

DAVID CONWILL **DEFENDANT**

FILED
THIS DAY
NOV 0 8 2007
LEE WESTBROOK
CIRCUIT CLERK

INDICTMENT FOR THE OFFENSE OF POSSESSION OF A CONTROLLED SUBSTANCE, MISS. CODE ANN. §41-29-139

STATE OF MISSISSIPPI
COUNTY OF MADISON

IN THE CIRCUIT COURT OF SAID COUNTY, JULY TERM, 2007
RECALLED OCTOBER 17, 2007

The Grand Jurors of the State of Mississippi, taken from the body of good and lawful citizens of said county, elected, summoned, empaneled, sworn and charged to inquire in and for the body of the county aforesaid, at the term aforesaid of the Court aforesaid, in the name and by the authority of the State of Mississippi, upon their oath present that,

DAVID CONWILL

late of the county aforesaid, on or about the 11TH day of September, 2007, in the county aforesaid and within the jurisdiction of this Court, did unlawfully, willfully, knowingly and feloniously possess, one tenth (0.1) gram but less than two (2) grams of Cocaine, a Schedule II controlled substance, in Madison County, Mississippi, in violation of Mississippi Code Annotated §41-29-139 (1972), as amended,

against the peace and dignity of the State of Mississippi.
Endorsed: A True Bill

FOREMAN OF THE GRAND JURY ASST. DISTRICT ATTORNEY

EXHIBIT A

AFFIDAVIT OF FOREMAN OF THE GRAND JURY

STATE OF MISSISSIPPI
COUNTY OF MADISON

PERSONALLY APPEARED BEFORE ME, the undersigned Circuit Clerk of Madison County, Mississippi, Lee Nutt, known to me to be the Foreman of the July, 2007 Grand Jury, recalled into session October 17, 2007, who after having been duly sworn by me, deposes and says that this indictment was concurred on by twelve (12) or more members of the Grand Jury and that at least fifteen (15) members of the Grand Jury were present during the deliberations.

FOREMAN OF THE GRAND JURY

SWORN TO AND SUBSCRIBED BEFORE ME, this the 8th day of November, A. D., 2007.

LEE WESTBROOK, CIRCUIT CLERK

BY: Julia Shelps, D.C.

EXHIBIT A (CONT)

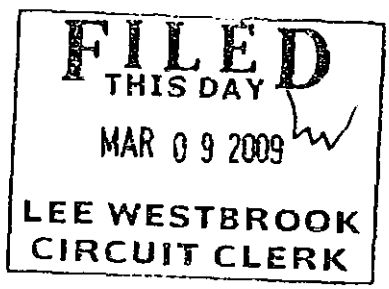
INDICTMENT

STATE OF MISSISSIPPI

VS. CAUSE NO. _____

DAVID CONWILL

Indictment for the offense of:
PERJURY
AS AN HABITUAL OFFENDER
Miss. Code Ann. §§97-9-59 and 99-19-81



STATE OF MISSISSIPPI
COUNTY OF MADISON

IN THE CIRCUIT COURT OF SAID COUNTY, OCTOBER TERM, 2008

Recalled January 28, 2009

The Grand Jurors for the State of Mississippi, taken from the body of good and lawful citizens of said county, elected, summoned, impaneled, sworn and charged to inquire in and for the body of the county aforesaid, at the term aforesaid of the Court aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present that:

DAVID CONWILL,

on or about the 20th day of September, 2007, in the county aforesaid and within the jurisdiction of this Court, 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 his 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), and

EXHIBIT B

The Grand Jury also finds that the said DAVID CONWILL is an habitual offender, pursuant to Miss. Code Ann.§99-19-81, (1972, as amended). See attached Exhibit "A", Habitual Offender Attachment.

All being against the peace and dignity of the State of Mississippi.

Endorsed: A True Bill

Mattie Coburn
FOREMAN OF THE GRAND JURY

Don Yoder
ASSISTANT DISTRICT ATTORNEY

AFFIDAVIT

COMES NOW Mattie Coburn, Foreman of the January 28, 2009, Madison County Grand Jury, and makes oath that this Indictment presented to this Court was concurred by twelve (12) or more members of the Grand Jury, and that at least fifteen (15) members thereof were present during all deliberations.

Mattie Coburn
FOREMAN OF THE GRAND JURY

SWORN TO AND SUBSCRIBED before me on this, the 9 day of March, 2009.

CIRCUIT COURT MADISON COUNTY, MISS.

LEE WESTBROOK, CIRCUIT CLERK
OF MADISON COUNTY, MISSISSIPPI

BY: Lee Westbrook

EXHIBIT B (CONT)

EXHIBIT "A"
NON-VIOLENT HABITUAL OFFENDER ATTACHMENT
Miss. Code Ann. 99-19-81

He, the said **DAVID CONWILL**, having been convicted at least twice of a felony or federal crime upon charges separately brought and arising out of separate incidents at different times and sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, as follows:

(1) *Petition to Enter Guilty Plea* filed herein on February 20, 2008, and *Judgment of Conviction and Sentence Instanter* filed herein on Febraury 21, 2008, whereby David Conwill was sentenced to five (5) years (4 years suspended) in the custody of the Mississippi Department of Corrections on the charge of *Possession of a Controlled Substance,* in the Circuit Court of Madison County, Mississippi, Cause No. 2007-0533; and,

(2) *Petition to Enter Guilty Plea* filed herein on February 20, 2008, and *Judgment of Conviction and Sentence Instanter* filed herein on Febraury 21, 2008, whereby David Conwill was sentenced to five (5) years (4 years suspended) in the custody of the Mississippi Department of Corrections on the charge of *Driving Under the Influence,* in the Circuit Court of Madison County, Mississippi, Cause No. 2007-0534.

Upon conviction, the defendant shall be sentenced to the maximum term of incarceration prescribed under the Statute, which sets the penalty for this felony crime, and such sentence shall be without the possibility of parole, probation or other reduction, pursuant to Miss. Code Ann. §99-19-81 (1972, as amended), against the peace and dignity of the State of Mississippi.

EXHIBIT B (CONT)

OFFICE OF THE DISTRICT ATTORNEY

MICHAEL GUEST
DISTRICT ATTORNEY
TWENTIETH JUDICIAL DISTRICT
RANKIN, MADISON COUNTIES

February 13, 2008

Bill Featherston, Esq.
419 S. State Street
Jackson, MS 39201

Re: State v. David Conwill

Bill:

I spoke with the Madison County Sheriff's Department after you left and I was informed that they had a recorded phone conversation where your client admitted to possessing the controlled substance in question. Your client was speaking with his girlfriend about the case and he admitted to knowing about the narcotics. I was also informed that your client had tested positive for cocaine. Based upon this new information I will make you the same offer, but your client will have to plea on both charges and I will agree to run them concurrently. If you have any questions please feel free to give me a call.

Michael Guest

EXHIBIT C

RANKIN COUNTY: POST OFFICE BOX 68 • BRANDON, MS 39043 • 601-825-1472 • FAX 601-825-9605
MADISON COUNTY: POST OFFICE BOX 121 • CANTON, MS 39046 • 601-859-7838 • FAX 601-859-8880

CERTIFICATE OF SERVICE

I, Doug Wade, one of the Atttorneys of Record for David E. Conwill, certify that I have hand-delivered the original and 3 true and correct copies of the attached Appellant's Brief in Cause No. 2010-IA-228-SCT to the Clerk of the Supreme Court of the State of Mississippi.

This the 25th day of August 2010.

Doug Wade, Attorney at Law

Doug Wade, Attorney at Law
111 Belle Meade Pointe, Suite A
Flowood, MS 39232
(601) 919-0078 Phone
(601) 919-8994 FAX

CERTIFICATE OF SERVICE

I, Doug Wade, one of the Atttorneys of Record for David E. Conwill, certify that I have hand-delivered a true and correct copy of the attached Appellant's Brief in Cause No. 2010-IA-228-SCT to the offices of the Honorable Jim Hood, Attorney General, State of Mississippi.

This the 25th day of August 2010.

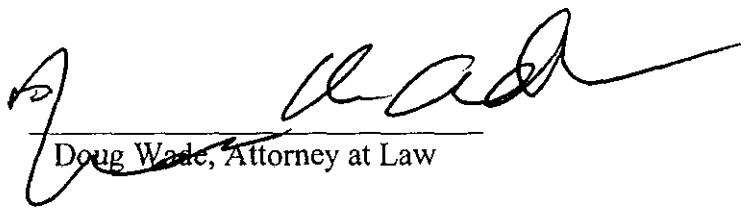
Doug Wade, Attorney at Law

Doug Wade, Attorney at Law
111 Belle Meade Pointe, Suite A
Flowood, MS 39232
(601) 919-0078 Phone
(601) 919-8994 FAX

CERTIFICATE OF SERVICE

I, Doug Wade, one of the Atttorneys of Record for David E. Conwill, certify that I have hand-delivered a true and correct copy of the attached Appellant's Brief in Cause No. 2010-IA-228-SCT to the offices of the Honorable William Agin, Acting Circuit Judge for Madison County, Mississippi and the Honorable Michael Guest, District Attorney for Madison County, Mississippi.

This the 25th day of August 2010.



Doug Wade, Attorney at Law

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111 Belle Meade Pointe, Suite A
Flowood, MS 39232
(601) 919-0078 Phone
(601) 919-8994 FAX

CERTIFICATE OF SERVICE

I, Doug Wade, one of the Atttorneys of Record for David E. Conwill, certify that I have hand-delivered a true and correct copy of the attached Appellant's Brief in Cause No. 2010-IA-228-SCT to the offices of Dr. Mary M. Currier, Mississippi State Health Officer, for the Mississippi State Department of Health.

This the 25th day of August 2010.

Doug Wade, Attorney at Law

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