IN THE SUPREME COURT OF MISSISSIPPI
NO. 2010-KA-00312-SCT

MONTAE BLANCHARD — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

# BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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**CERTIFICATE OF INTERESTED PERSONS**

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

1. State of Mississippi
2. Montae Blanchard

THIS 19th day of April, 2010.

Respectfully submitted,

MONTAE BLANCHARD

By: George T. Holmes

George T. Holmes,
Mississippi Office of Indigent Appeals

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## STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Monroe County, Mississippi where Montae Blanchard was convicted of armed robbery in a jury trial conducted February 18, 2010, with Honorable Thomas J. Gardner, III, Circuit Judge, presiding. Blanchard was sentenced to fifty (50) years and is presently incarcerated.

## FACTS

In Aberdeen, David Mink was tending the business of Terrific Tax on January 8, 2008. [T. 106-07]. For about an hour, two young people were hanging around outside in the late afternoon. [T. 99-100, 105]. The owner of Terrific Tax, Dale Pierce, who was not at the business, said he passed by on his way to get a haircut and seeing the two individuals outside, inquired if they needed any assistance. [T. 99-100 ]. Peirce was told they were waiting for their cousin to return an automobile, so Peirce left. *Id.*

Mink said that just before 5:00 p. m., one of the two loiterers came in, she was a

black female. [T. 109-10, 152-53]. There was some short incidental conversation between Mink and the female, then the other person came in, a black male, wearing what was described as black stocking cap, short "dread-locks" with a longer extension of the cap in the back. [T. 110-11, 124-25].

The male reportedly pulled a gun out and pointed it at Mink who was told to sit down. [T. 112-13, 124-25, 136-38, 156, 159]. The male handed the gun to the female and then went behind the counter and grabbed "the money bag" containing about $5000.00. *Id.* The male told Mink his name was "Chris from Amory." [T. 114, 125]. The two robbers left together. *Id.*

From the description of the robbers, an Aberdeen police investigator thought he recognized the female and showed Mink a photographic line-up containing a photograph of Victoria Blanchard. [T. 58-59]. David picked out Victoria Blanchard as the female robber, confirming the investigator's suspicion. *Id.*

Victoria Blanchard was questioned and identified Montae Blanchard as the male participant. [T. 132-38 ]. She said that she and Montae were cousins and that Montae approached her about the robbery, but, she did not want to participate. [T. 132-33, 135]. Victoria described the details of the robbery incident similarly to Mink. [T. 136-38, 156, 159]. Victoria also said she saw Montae a couple of days after the incident and his hair had been cut. [T. 144, 149].

Montae came into the police department and provided an alibi that he was with

two female friends in Tupelo at the emergency room of North Mississippi Medical Center at the time of the robbery. [T. 59, 78-80]. The Aberdeen investigator testified that he then called the hospital's security personnel who reportedly reviewed security video and told the investigator that the two females were not accompanied by anyone in the hospital. [*Id.* and T. 86].

The investigator also testified that he interviewed the two females whose names were given by Montae and one of them said she had been with Montae at the hospital in Tupelo, but the other girl denied that Montae Blanchard had been with them. [T. 82]. There was no objection to any of this hearsay testimony.

David Mink identified a photo of Montae Blanchard as the male who entered the business and took the money bag. [T. 66-67, 116]. Mink also said that while he was at the police station, he saw Montae Blanchard through a two-way mirror. [T. 120-21]. But, this time, there were no dread-locks. *Id.* Mr. Peirce who also identified Montae Blanchard from a photo at the police station as the male he encountered before the robbery. [T. 102-03]. It appears that Peirce and Mink made their photo identifications together, but there was no challenge to this process by defense trial counsel. [T. 122].

Victoria's charges were handled through Youth Court. [T. 146-48]. When Montae's trial came around, he did not appear and the trial was conducted in his absence, *in toto*, without objection from trial counsel and without a request for continuance. [T. 88-92].

## SUMMARY OF THE ARGUMENT

Montae Blanchard's trial should not have been conducted in his absence. His trial counsel was ineffective and the weight of evidence does not support the verdict.

## ARGUMENT

### ISSUE NO. 1: WHETHER IT WAS ERROR TO TRY MONTAE BLANCHARD IN ABSENTIA?

The United States Supreme Court recognizes that "the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." *Rushen v. Spain*, 464 U. S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983). The Sixth Amendment establishes a criminal defendant's right to be present at trial and "to be confronted with the witnesses against him." U. S. Const., Sixth Amend., *Illinois v. Allen*, 397 U. S. 337, 338, 90 S. Ct. 1057, 1058, 25 L. Ed. 2d 353 (1970). The right to be present at trial can be waived. *Taylor v. United States*, 414 U. S. 17, 19-20, 94 S. Ct. 194, 195-96, 38 L. Ed. 2d 174 (1973).

In Mississippi, trials in the absence of defendants is covered under MCA§ 99-17-9 (Rev. 2005):

> In criminal cases the presence of the prisoner may be waived (a) if the defendant is in custody and consenting thereto, or (b) is on recognizance or bail, has been arrested and escaped, or has been notified in writing by the proper officer of the pendency of the indictment against him, and resisted or fled, or refused to be taken, or is in any way in default for nonappearance, the trial may progress at the discretion of the court, and judgment made final and sentence awarded as though such defendant were personally present in court.

Montae's trial counsel provided the following details regarding his absence at trial: he was advised multiple times by telephone of the date of his trial. [T. 89-90; R. E. 15-18]. Montae had appeared on a previous "plea date". *Id.* On the day before the trial began, counsel had her secretary call Montae who told the secretary "that he was in Columbus" concerning prospective employment, and the secretary told him to come to court the next day. *Id.*

Counsel said she spoke twice with Montae the afternoon of the day before trial and she told him to be at the courthouse. [T. 91-92]. Montae reportedly said he was "stuck in Columbus" and could not attend, but eventually allegedly said he would be at the courthouse in the morning. [T. 91-92; R. 89-91]. Counsel did not say that Montae was ever advised *in writing* of his trial date. There is no record of written trial notice to Montae.

In *Jay v. State,* 25 So. 3d 257, 258-59 (Miss. 2009), the court applied MCA§ 99-17-9 (Rev. 2005). Jay, who claimed to have a mental illness, was charged with drug possession and was tried and convicted in absentia similarly to Montae Blanchard. The *Jay* court reversed because the trial court did not, under the circumstances, conduct a mental evaluation and, thus, could not have determined a free, voluntary and knowing waiver of the Jay's right to be present at trial.

On the day of his trial, Jay had been present earlier for docket call. *Id.* Yet, Jay could not be located after his case was called for trial, the trial proceeded without him. *Id.*

Jay's trial counsel objected to the trial in absentia and moved for a continuance. *Id.* In denying the continuance, the trial court noted that Jay had been present earlier and that he had been informed of his trial date the prior week. Jay was also present on another day later the previous week for "his motion" when he was informed of the trial date as well. *Id.*

Jay argued that the trial court acted arbitrarily by conducting the trial in his absence and argued that the case of *Sandoval v. State*, 631 So. 2d 159 (Miss. 1994), supported his position and controlled. However, the *Jay* court recognized that the Court of Appeals reasoned in *Sessom v. State*, 942 So. 2d 234, 237 (Miss. Ct. App. 2006), that *Sandoval* had been superseded by amendments to MCA§ 99-17-9 in 2005. *Jay* at p. 263-64.

Under *Sandoval, supra*, a circuit court was prohibited from trying felony defendants in absentia. *Sandoval* at p.164. The legislative amendments eased this prohibition allowing for waiver of presence in certain circumstances. *Jay* at p. 263-64. Nevertheless, the *Jay* court also noted that the legislative amendments merely codified the exceptions to *Sandoval* created in *Jefferson v. State*, 807 So. 2d 1222, 1226-27 (Miss. 2002), "based on willful, voluntary and deliberate actions by a defendant in avoiding trial."

Jay's position was that mental illness prevented him from fully understanding his obligations to appear at trial and prevented a valid waiver of his right to be present at his

trial. *Jay* at p. 263-64. Had Jay been found mentally competent, the *Jefferson* exceptions to the *Sandoval* rule would have applied, allowing Jay to be tried in absentia, based on a willful, voluntary, and deliberate absence from trial. Contrarily if Jay had been found incompetent to stand trial, the issue would be moot. *Id.*

Applying *Jay* to the present case, it is the appellant's position that, first of all, all of the requirement of MCA § 99-17-9 were not applied here as there was no proof of written notice of the trial to Montae Blanchard and, more importantly, that his absence was not shown to be the product of a free, voluntary and knowing waiver.

The present case is similar to *Ali v. State,* 928 So. 2d 237, 239-40 (Miss. Ct. App. 2006) where the *Jefferson* waiver rule did not control. Ali was found guilty of felony DUI in absentia. In asking for a new trial Ali presented testimony that he did not understand his obligation to be present, even though he had been present at previous hearings. The *Ali* court reversed, because, under *Jefferson*, it was not shown that Ali acted willfully, voluntarily, and deliberately to avoid trial. *Id.*

The trial court here should have granted a continuance. Montae's explaining to his counsel that he was "tied up" out of town was tantamount to an objection to the trial continuing. It was reported to the court that Montae was in Columbus and could not get to Aberdeen by the next day. [T. 91-92; R. 89-91]. So, in effect, counsel informed the court that Montae's absence was not voluntary. Therefore, a finding that Montae freely, voluntarily and knowingly waived his fundamental right to be present at trial and confront

his accusers was erroneous.

Even if there were no objection and request for continuance, the issue is reviewable nonetheless. The Mississippi Supreme Court has held that, under the plain-error doctrine, the court "can recognize obvious error which was not properly raised by the defendant on appeal, and which affects a defendant's fundamental, substantive right." *Neal v. State,* 15 So. 3d 388, 403 (¶ 32) (Miss. 2009) (quoting *Smith v. State,* 986 So. 2d 290, 294 10) (Miss. 2008)).

Because Montae was tried in absentia without proof of free, voluntary and knowing waiver, he was denied his constitutional rights to confront his accusers under Miss. Const. Article III., § 26 (1890) and the Sixth and Fourteenth Amendments to the U. S. Constitution, and a new trial should be held.

**ISSUE NO. 2 WHETHER BLANCHARD'S TRIAL COUNSEL WAS INEFFECTIVE?**

The appellant suggests that his trial counsel was ineffective for not objecting to certain prejudicial hearsay. The hearsay testimony which should have been objected to was the Aberdeen police investigator's reporting to the jury what he was told by the Tupelo hospital's security personnel about what the hospital's security video showed, and, also, the investigator's testimony that he interviewed the two women and one of them said that Montae was not with them at the hospital. [T.78-82].

Appellant was also suggest ineffective trial counsel if the court finds that the

forgoing absentia issue was not preserved for appellate review. Counsel should have objected to the trial in absentia and asked for a continuance.

In *Madison v. State* , 932 So. 2d 252, 255 (Miss. Ct. App. 2006) the court reiterated:

> [the Supreme] Court applies the two-part test *from Strickland v. Washington*, 466 U. S. 668 (1984), to claims of ineffective assistance of counsel. *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). Under *Strickland*, the defendant bears the burden of proof to show that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* There is a strong but rebuttable presumption that counsel's performance fell within the wide range of reasonable professional assistance. *Id.* This presumption may be rebutted with a showing that, but for counsel's deficient performance, a different result would have occurred. *Leatherwood v. State*, 473 So. 2d 964, 968 (Miss. 1985). This Court examines the totality of the circumstances in determining whether counsel was effective. *Id.*

If the issue of ineffective assistance of counsel is raised, as is here, on direct appeal the court will look to whether:

> (a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed. *Id.*

The appellant hereby stipulates through present counsel that the record is adequate for this court to determine this issue and that a finding of fact by the trial judge is not needed.

*Failure to Object to Prejudicial Hearsay*

The failure to object resulted in a denial of Montae Blanchard's fundamental right to confront his accusers secured by the Sixth and Fourteenth Amendments to the U. S.

Constitution and Article 3 §26 of the Mississippi Constitution. From *Crawford v. Washington*, 124 S. Ct 1354, 541 U. S. 36, 158 L. Ed. 2d 177 (2004), we know that:

> The Sixth Amendment's Confrontation Clause provides that '[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.'
>
> * * *
>
> The text of the Confrontation Clause . . . applies to 'witnesses' against the accused – in other words those who 'bear testimony'. Testimony in turn is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact.
>
> * * *
>
> An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes casual remark to an acquaintance does not." *Id.* at1364.

The *Crawford* Court explained that statements given to police officers sworn to or not are clearly testimonial, "the Sixth Amendment is not solely concerned with testimonial hearsay. . ." it would also be concerned with "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had a prior opportunity for cross-examination." *Id.* at 1364-65.

In *Quimby v. State*, 604 So.2d 741, 746-47 (Miss. 1992), a police detective was allowed to repeat what a forgetful child victim recounted about her alleged abuse. The *Quimby* court said, "[o]ur hearsay rule, M.R.E. 802, states in no uncertain terms that '[h]earsay is not admissible except as provided by law. The prohibition is loud and clear. 'Hearsay is incompetent evidence.'"

In *Ratcliff v. State*, 308 So. 2d 225, 226-27 (Miss. 1975), a police officer was

allowed to testify about what a witness had told him during the officer's investigation. The court said, "[i]nvestigators cannot be permitted to relate to a jury hearsay which is incriminating in its effect as to a defendant on trial for a crime . . . [w]hat an informant told [the investigating officers] was hearsay and inadmissible to the jury." *Id.* The *Ratcliff* court reversed and remanded the armed robbery conviction based, in part, on the circumvention of the defendant's cross-examination rights which resulted from the admission of the hearsay. *Id.*

The case of *Clark v. State*, 891 So.2d 136, 140 (Miss.2004), is also informative. In *Clark*, the Court applied *Crawford*, and found error in the fact that a police officer was allowed to restate to the jury what witnesses had told him. The *Clark* court did not overrule because the erroneous evidence was cumulative of other "overwhelming" evidence. *Id.*

These cases support the conclusion that, had trial counsel objected, the trial court would have been required to sustain the objection. To the contrary, without an objection, the state's case was supported by incompetent unchallenged hearsay.

*Failure to Object to Trial in Absentia*

Contemporaneous objections are required to preserve an error for appellate review, and, if no objection is made, there is a waiver of the error. *Smith v. State*, 530 So. 2d 155, 161-62 (Miss. 1988). Trial counsel here did not object or ask for a continuance and so, arguably, waived review of the issue of proceeding to trial in Montae Blanchard's

absence. *Mallard v. State,* 798 So. 2d 539, 542 (¶¶ 8-9) (Miss. 2001).

Trial counsel was also ineffective for not providing Montae Blanchard with written notice of his trial in compliance with MCA§ 99-17-9. If counsel had done so, the trial court would have been required to grant a continuance as argued in Issue No. 1, *supra.* Therefore the nonfeasance is outcome determinative, and a new trial is warranted.

**ISSUE NO. 3: WHETHER THE VERDICT IS SUPPORTED BY THE WEIGHT OF EVIDENCE?**

The standard is that the court on appeal will not reverse under a weight of the evidence challenge unless, accepting as true the evidence supporting the verdict, the record shows that the jury's verdict "is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. " *Herring v. State*, 691 So. 2d 948, 957 (Miss. 1997). See also, *Boone v. State*, 973 So. 2d 237, 243 (Miss. 2008).

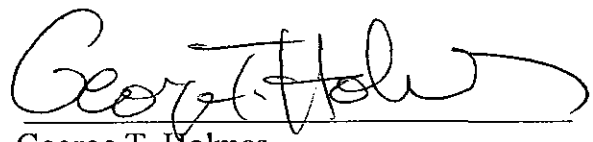
The description of the male who participated in the alleged robbery does not fit Montae Blanchard. The testimony of Victoria Blanchard is unreasonable and unreliable. No physical evidence ties Montae Blanchard to the events of the crime charged. So, the evidence does not support the verdict because it is, at best, unreliable and insufficient, and a reversal with acquittal is called for. See *Edwards v. State,* 736 So. 2d 475 (Miss. 1999), *Hall v. State*, 644 So. 2d 1223, 1228 (Miss. 1994), and *Guilbeau v. State*, 502 So. 2d 639, 641 (Miss. 1987).

## CONCLUSION

Montae Blanchard is entitled to have his convictions reversed with remand for a new trial.

Respectfully submitted,

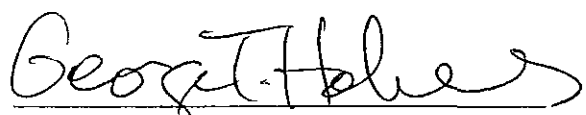
MONTAE BLANCHARD

By: 

George T. Holmes,
Mississippi Office of Indigent Appeals

## CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 14th day of April, 2010, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Thomas J. Gardner, III, Circuit Judge, P. O. Box 1100, Tupelo MS 38802, and to Hon. Larry Baker, Asst. Dist. Atty., P. O. Box 7237, Tupelo MS 38802, and to Hon. Scott Stuart, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



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