

IN SUPREME COURT OF MISSISSIPPI
NO. 2010-KA-0448-SCT

KEVIN ELDRIDGE

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLANT

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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. Kevin Eldridge

THIS 24 day of June, 2010.

Respectfully submitted,

KEVIN ELDRIDGE

By: 
Chris N. K. Ganner, His Attorney

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STATEMENT OF THE ISSUES

- ISSUE NO. 1: WHETHER THE STATE'S ATTORNEY, WHO PREVIOUSLY REPRESENTED THE APPELLANT IN THIS CASE, SHOULD HAVE RECUSED HIMSELF?
- ISSUE NO. 2: WHETHER APPELLANT'S TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE?
- ISSUE NO. 3: WHETHER THE WEIGHT OF EVIDENCE SUPPORTS THE VERDICT?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Rankin County, Mississippi, where Kevin Eldridge was convicted of house burglary and sentenced to twenty-five (25) years as an habitual offender under MCA §99-19-1981 (1972). A jury trial was conducted March 13, 2008, with Honorable Samac Richardson, Circuit Judge, presiding. Eldridge is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Selma Yelverton owned a mobile home in Rankin County just outside of Florence on Shannon Trey Drive.[T. 73]. The mobile home was damaged when Hurricane Katrina passed through in August of 2005. [T. 74-75]. Since she had no insurance nor money to immediately repair the home, Ms. Yelverton moved out, and the home stayed empty. *Id.*

Ms. Yelverton moved in with her fiancé and routinely checked on the mail and

maintained upkeep of the yard of the Shannon Trey Drive property. [T. 84]. She also kept the utilities engaged, and she testified that all of the doors and windows remained secured. [T. 84]. *Id.* The across-the-street neighbors helped Ms. Yelverton keep an eye on things. *Id.*

One day in January of 2007 when Ms. Yelverton went to check on the trailer, she said she went inside and smelled cigarette smoke and saw a loaf of bread and dishes in the sink and she noticed the windows had been covered. [T. 77]. She surmised someone was there and left, picking up the mail on the way out. *Id.* Ms. Yelverton noticed that her electric bill was a little high. *Id.* She checked with the neighbors who said they did not notice anything unusual. *Id.*

Later that same evening, Ms. Yelverton, with her fiancé and daughter, went back to the mobile home. [78-79]. Ms. Yelverton and her daughter remained in their vehicle while the fiancé went to check inside. *Id.*

Ms. Yelverton heard her fiancé talking in a loud voice and she exited the vehicle, leaving her daughter behind with instructions to call 911 if anything transpired. *Id.* When Ms. Yelverton arrived at the back of the trailer where her fiancé was, she discovered him speaking with a young man who reportedly said his name was Kevin Eldridge. *Id.*

According to Ms. Yelverton, Mr. Eldridge indicated that he had been staying in the trailer house a short while. [T. 80, 87]. According to Ms. Yelverton, Eldridge agreed

to vacate the premises and everybody left. [T. 93].

Ms. Yelverton went back to her mobile home several days later and discovered that things had been torn up and that certain items were missing. [T. 80]. Ms. Yelverton described a part of the storm door as being broken. [T. 84].

The day after discovering the alleged missing items, Ms. Yelverton said she called Eldridge's mother Charlotte Ball and told her that Kevin had been staying at the vacant mobile home. [T. 80, 84, 89-90, 93]. Ms. Yelverton adamantly denied ever giving anyone permission for Kevin Eldridge to stay in the mobile home. [T. 80, 94].

In February 2007, Kevin Eldridge's step father, Vernon Ball, testified that Kevin brought several items to their house. [T. 58-59, 96-97; Ex.1]. The items consisted of a jewelry box some baseball cards, some collectible coins and paper money, and two charms. *Id.* Photographs of these items were introduced into evidence. *Id.* Mr. Ball notified the Rankin County Sheriff's department about the items and took the items and turned them in to an investigator. *Id.*

After speaking with Charlotte Ball, Ms. Yelverton called the Rankin County Sheriff's department about a week later. [T. 65]. The investigator to whom Mr. Ball had given the items showed them to Ms. Yelverton who identified them for the investigator, and ultimately to the jury, as the items missing from her home. [T. 85-86].

Kevin Eldridge presented the testimony of his mother, Charlotte Ball, who stated that Ms. Yelverton called her after discovering Kevin at the trailer. [T. 104-05]. Ms. Ball

said that Ms. Yelverton told her that Kevin could remain at the mobile home for a little while longer. [T. 104-05].

SUMMARY OF THE ARGUMENT

One of the prosecutors at the trial had previously represented Eldridge on the same charges and should have recused himself from participating in the trial. Eldridge's trial counsel was prejudicially ineffective and the evidence does not support the verdict.

ARGUMENT

**ISSUE NO. 1: WHETHER THE STATE'S ATTORNEY, WHO
PREVIOUSLY REPRESENTED THE APPELLANT IN
THIS CASE, SHOULD HAVE RECUSED HIMSELF?**

When Eldridge was indicted in this case in 2007, Honorable Dan W. Duggan, Jr., Attorney At Law, formerly one of the contract public defenders in Rankin County, was appointed to represent him. [T. 144-47, 154, 160-61; R. 9, 14]. In early 2008, Mr. Duggan became employed by the District Attorney for 20th Judicial District in Rankin County and, thereafter, actively participated in the trial of Mr. Eldridge on behalf of the state along with another assistant district attorney. [T. 1, 96-97, 116-22; R. 42]. Eldridge suggests that this is a direct conflict of interest for which Mr. Duggan should have recused himself and since he did not, a new trial is required.

Mr. Duggan stood in with Eldridge at arraignment and signed Eldridge's Waiver of Arraignment form and Order Setting Trial, both dated June 19, 2007. *Id.* An order of continuance in the case was approved subsequently by Mr. Duggan's law partner, Honorable Mary Jane Lemon, on October 1, 2007. [R. 15].

Rankin County Jail records show that Mr. Duggan visited Eldridge at least once on June 19, 2007. [T. 160-61; Mot. Ex. 1]. Jail records show Ms. Lemon visited two times thereafter. [Mot. Ex. 1]. At the hearing on Eldridge's motion for new trial raising this issue, Mr. Duggan indicated that it was his recollection that Ms. Lemon was actually Mr. Eldridge's appointed counsel and that he merely stood in at arraignment. [T.156].

Eldridge said he met with Mr. Duggan in the jail again in July of 2007, and the case was discussed further. [T. 146]. Eldridge indicated that, at his meetings with Mr. Duggan, facts of the case and defenses were discussed. *Id.*

Mr. Duggan informed the trial court, at the motion for new trial hearing, that he was reminded by Ms. Lemon that he discussed Mr. Eldridge's options regarding a guilty plea with both Mr. Eldridge and Ms. Lemon. [T. 156-58]. Both Mr. Duggan and Ms. Lemon gave Mr. Eldridge legal advice and counseling about his guilty plea options. *Id.*

In *Gray v. State*, 469 So. 2d 1252, 1254 (Miss. 1985), the defendant was convicted in Hinds County of grand larceny after being caught in a store with the victim's money bags. After the arrest, Gray met with Honorable Robert Taylor for forty-

five minutes in the jail; but Taylor was not hired. Subsequently, Taylor went to work for the Hinds County District Attorney's office and actively participated in the prosecution of Gray who objected that Taylor had confidential information and should have been removed from the case. *Id.* Taylor advised the court that he had no recollection of ever meeting with Gray, but the attorney visitation log at the jail confirmed the visit. *Id.*

The general rule is that:

... a prosecuting attorney is disqualified from action in a criminal case if he has previously represented or been consulted professionally by the accused with respect to the offense charged ...[because it would be] inherently incompatible with the right of a criminal defendant to receive a fair trial. *Id.* at 254.

The *Gray* court reversed holding that the trial court erred in refusing Gray's motion for new trial "to eliminate the very serious appearance of impropriety" and to preserve confidence in the attorney client privilege. *Id.* at 1255. The *Gray* court said that it could not conclude that no confidential information was obtained by Taylor. *Id.*

The principles in *Gray* apply here in Eldridge's case, perhaps even more so. Where Gray only met once with Taylor, who was not even hired, in Eldridge's case, Duggan was appointed and met twice with Eldridge – alone on the date of arraignment and subsequently to advise Eldridge about guilty plea options, with Ms. Lemon present.

One insignificant difference from *Gray* is that Eldridge did not object at trial to Duggan's participation. This point is inconsequential. The *Gray* court expressed that the duty to respond to a conflict of interest that arises rests equally with both the client and

the attorney involved and the lack of objection does not necessarily waive the issue. *Id.*

In *Wagner v. State*, 624 So. 2d 60, 60-64 (Miss. 1993), a murder case, Wagner was temporarily represented by Honorable William Martin as court appointed counsel. The relationship was terminated and thereafter Martin went to work for the district attorney in Harrison County. Martin did not participate in any aspect of the prosecution of Wagner. The trial court in *Wagner* made a finding that no member of the district attorney's office had received any confidential information from Martin and Martin was ordered to be isolated from the prosecution of the case against Wagner. The *Wagner* court explained that in such situations, the state has the burden of showing that the defendant's confidences remained inviolate. Since Martin was screened and shared no information, the *Wagner* court found no conflict. None of these screening measures occurred here in Eldridge's case.

A fair reading and application of *Gray* and *Wagner* to the facts of the present case, therefore, requires reversal. This is the relief Mr. Eldridge respectfully requests.

**ISSUE NO. 2: WHETHER APPELLANT'S TRIAL COUNSEL WAS
PREJUDICIALLY INEFFECTIVE?**

It is suggested that Eldridge's trial counsel, appointed after Mr. Duggan, was deficient by failing to review the records of the trial court, so as to be aware of prior counsel, and by failing to inquire with Mr. Eldridge about his previous lawyer. Also,

trial counsel was ineffective for not filing a motion for new trial and not filing a notice of appeal.

Eldridge's trial counsel did not seek to withdraw from representing Eldridge and there was no order authorizing withdrawal. Regarding the lack of any post trial motions and timely notice of appeal, trial counsel explained at the hearing on the motion for new trial held February 22, 2010, that "a family member" of Mr. Eldridge called her office several times soon after the trial, "[a]nd at some point there was an indication that they were going to hire another lawyer," so, she "was under the impression that a new lawyer was going to be retained at that point." [T. 169-71]. Eldridge did not inform trial counsel that substitution of lawyers was desired.

In *Stringer v. State*, 454 So. 2d 468 (Miss. 1984), the Mississippi Supreme Court adopted the standards set out in *Strickland v. Washington*, 466 U. S. 668, 688, 104 S. Ct. 2052, 2065 (1984), for review of claims of ineffective assistance of counsel. *Strickland* requires the resolution of two questions, "(1) whether counsel's performance was deficient, and, if so, (2) whether the deficient performance was prejudicial to the defendant [so that] confidence in the correctness of the outcome is undermined." *Strickland* 466 U.S. at 687-88, 104 S.Ct. at 2064. A lawyer's representation is deemed deficient if errors are so serious that counsel was not, in effect, functioning as the "counsel" guaranteed by the Sixth Amendment or if counsel's performance deprives a criminal defendant of a fair trial. *Id.*

There is a rebuttable presumption that counsel's performance falls within the realm of reasonable professional legal assistance. *Strickland*, 466 U. S. at 689, 104 S. Ct. at 2065; *Schmitt v. State*, 560 So. 2d 148, 154 (Miss. 1990). To rebut the presumption, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Schmitt*, 560 So. 2d at 154, quoting *Strickland*, 466 U. S. at 694, 104 S. Ct. at 2068.

In *Parker v. State*, 30 So. 3d 1222, 1233 (Miss. 2010), the court pointed out that, even though "ineffective assistance claims are more appropriately brought during post-conviction proceedings," if the record is adequate, the Court may, nevertheless, decide a claim of ineffectiveness "on direct appeal if the presented issues are based on facts fully apparent from the record." *Id.* citing Miss. R. App. P. 22(b).¹ The appellant hereby stipulates through present counsel that since there is complete testimony on this issue and a direct finding by the trial court's ruling on Eldridge's new trial motion, the record is adequate for this Court to determine the *Strickland* issues, and that more findings of fact by the trial judge are not needed. [T. 176-79; R. 77]. See *Read v. State*, 430 So. 2d 832, 841 (Miss. 1983).

In *Holland v. State*, 656 So. 2d 1192 (Miss. 1995), the issue was whether a

¹Rule 22(b) of the Mississippi Rules of Appellate Procedure provides: Issues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

criminal defense lawyer's failure to file any post-trial motions constituted ineffective assistance of counsel. The *Holland* court found the lawyer's performance was deficient enough to amount to "ineffective assistance of counsel because the omissions (1)'deprived the trial judge of the of the opportunity to reexamine possible errors at trial' which (2) 'deprived Holland of a fair trial.'" *Id.*

Like *Holland*, *Eldridge* was prejudiced under the second *Strickland* standard, by trial counsel failure to investigate any possible conflict of interest issues with prior counsel and failure to file a timely motion for new trial or notice of appeal. If timely raised, these matters could have been addressed in the trial court, possibly even before trial. The trial court might have read the *Gray* case from Issue No. 1 differently before trial, rather than after.

Here in the present case, if a timely motion for new trial had been filed and argued, the trial court would have had the opportunity to review whether Dan Duggan's conflict of interest required a retrial and would also have been able to review the weight of evidence against *Eldridge*.

Relative to trial counsel's failure to investigate and recognize the conflict of interest with Mr. Duggan's participation in the case is the decision in *Payton v. State*, 708 So. 2d 559, 560-64 (Miss. 1998). In *Payton*, the court found that defense counsel's failure to investigate factors effecting *Payton*'s defenses rendered the representation constitutionally ineffective. *Id.* *Payton*'s counsel basically did not make any effort to

interview easily available witnesses nor investigate physical aspects of the case. *Id.* By thus failing, the court found that Payton's counsel did not provide a basic defense. *Id.*

In *Payton*, the case boiled down to the defendant's word against the victim's word. The court found that the lack of investigation "affecting the outcome of the trial by casting doubt on the credibility of the complaining witness". *Id.* Here in Eldridge's case, the conviction rests on the unreliable testimony of Ms. Yelverton who waited over a week to contact authorities of the commission of any alleged crime. The inability of Eldridge to object to the conflict of interest affected the outcome of the case and may have damaged the appearance of impropriety of prosecutions in the circuit court district.

The *Payton* court labeled counsel's investigation there "non-existent." *Id.* Here, Eldridge's trial counsel's failure to at a minimum be aware of who Eldridge's previous lawyer was, equaled deficiencies in *Payton*. The *Payton* court reversed and the same relief is respectfully requested by Eldridge. See also, *Doss v. State*, 19 So. 3d 690 (Miss. 2009).

It follows that Eldridge did not receive effective counsel as secured by the Sixth and Fourteenth Amendments to the U. S. Constitution and Article 3 §26 of the Mississippi Constitution of 1890. A new trial is respectfully requested.

ISSUE NO. 3:

**WHETHER THE WEIGHT OF EVIDENCE
SUPPORTS THE VERDICT?**

Ms. Yelverton did not report the alleged incident with Kevin Eldridge for over a week. [T. 81-82]. She never really gave a good explanation for the delay. *Id.*

Investigating officers never went to the scene of the alleged crime. [T. 80, 90]. So, the evidence of an unauthorized breaking and entering was lacking. Ms. Yelverton did describe a door as being broken, but the jury was without any evidence as to whether this damage to the door was such that entry was gained by it. So, the state's evidence was lacking in these regards and unsupportive of a guilty verdict.

In *Magee v. State*, 96 So. 3d 173 (Miss. Ct. App. 2007), the defendant was convicted of burglary and rape. 96 So. 3d 176. Magee's position was that he entered the house of the victim with a key and that the sex was consensual. However, there were fresh tool marks on the door jam and other indicia of breaking and entering such as the locking mechanism was still in the locked position when police were investigating. 96 So. 3d 177.

The present case is distinguishable from *Magee*. Here, not only was the damage to the door not shown to be associated with entry, it was not shown to be new, there was no other evidence of a breaking and entering, and no law enforcement observation and evaluation. The verdict of guilty was clearly contrary to the evidence entitling Eldridge to a reversal and rendering of acquittal, or alternatively to a new trial. *Hall v. State*, 644 So. 2d 1223, 1228 (Miss. 1994), *Brown v. State*, 829 So. 2d 93, 103 (Miss. 2002).

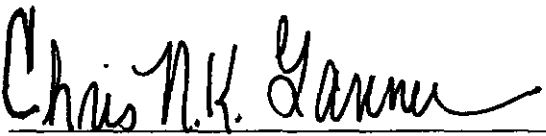
When a jury's verdict is so contrary to the weight of the credible evidence or is not supported by the evidence, a miscarriage of justice results and the reviewing appellate court must reverse and grant a new trial. *Kelly v. State*, 910 So. 2d 535, 539-40 (Miss. 2005).

CONCLUSION

Kevin Eldridge is entitled to have his convictions reversed with remand for a new trial.

Respectfully submitted,

KEVIN ELDRIDGE

By: 
Chris N. K. Ganner, His Attorney

CERTIFICATE

I, Chris N. K. Ganner, do hereby certify that I have this the 24 day of June, 2010, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Samac Richardson, Circuit Judge, P. O. Box 1885, Brandon MS 39043, and to Hon. Marlin Miller, Asst. Dist. Atty., P. O. Box 68, Brandon MS 39043, 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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