

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-KA-00363-COA

ORIGINAL

FILED

DEXTER JOHNSON

APPELLANT

VS.

DEC 10 2015

STATE OF MISSISSIPPI

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

APPELLEE

MOTION FOR REHEARING

COMES NOW the Appellant, Dexter Johnson, by and through himself, pursuant to Rule 40 of the Mississippi Rules of Appellate Procedure, and moves this Court to grant rehearing of its decision handed down in this matter on October 27, 2015. In support thereof, Johnson would show unto this Court the following.

STANDARD OF REVIEW

Rule 40 of the Mississippi Rules of Appellate Procedure provides that "the motion for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain[.]" M.R.A.P. 40. Rule 40 also provides that "[t]he motion shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misapprehended. . . ." Id.

MOTION#

2015

5469

ARGUMENT

- I. INEFFECTIVE ASSISTANCE OF COUNSEL: TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT AND THE DEFICIENCY PREJUDICED JOHNSON'S CASE.

Johnson's counsel was ineffective when he failed to continue to pursue the challenge to the confession made by Johnson. Defense counsel failed to be persistent in the request for a hearing on the motion to suppress and failed to put on his evidence that such confession was a result of persistent and repeated interrogation techniques and continuous questioning of Johnson

by several law enforcement officers in the absence of counsel. The police failed to afford Johnson the opportunity to confer with counsel. Defense counsel abandoned the motion to suppress by, in fact, informing the Court that there was no objection to the introduction of the confession which thereby sold Johnson out and amounted to a drastic and critical change from the position taken in the motion. by filing a motion to suppress. Additionally, counsel totally failed to demand a mistrial after the trial court dismissed two of the jurors. Such jurors were improperly dismissed by the trial court and a challenge to such, by seeking a mistrial, would have been the appropriate action to take. Otherwise waived issues may be considered if they present plain error. That requires that the error affect "substantial rights" of the accused. M.R.E. 103(d).

An ineffective assistance of counsel claim requires a showing both that trial counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Here, the actions of counsel announcing no objections to the coerced statement when he had actually filed a motion in opposition to the statement deprived Johnson of the fundamental right to present a defense. Johnson was fully entitled to challenge the confession as well as to move the court for a mistrial on the basis of the dismissal of the two jurors. Thus, counsel's performance effectively denied Johnson his right to a fair trial.

The Court hinges its holding here upon the fact that trial counsel announced that he was not objecting to the introduction of the statement because of trial strategy. It was incumbent upon defense counsel to pursue the motion to suppress to its conclusion after having filed such motion. Neither the State nor this Court appropriately appreciates the word "gravamen" as it relates to the circumstances and issues in the case. The "Gravamen" refers to "the substantial point or essence of a claim, grievance, or complaint." *Black's Law Dictionary* (9th ed. 2009). In

the instant case the graveman was that counsel accused the law enforcement of the serious. This deficiency of Johnson's counsel substantially prejudiced his defense—Johnson was, in effect, altogether deprived of a fair trial. Thus, rehearing is warranted, and remand for a new, fair trial is required.

II. DEFENSE COUNSEL WAS GROSSLY INEFFECTIVE IN FAILING TO SEEK A MISTRIAL WHEN THE TRIAL COURT DISMISSED TWO JURORS ILLEGALLY.

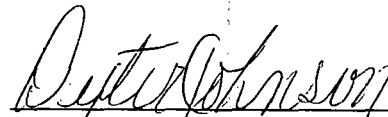
Johnson has a right to be tried in accordance with the rules of law." Rutherford v. United States, 258 F. 855, 863 (2nd Cir. 1919). The judge's obligation to remain neutral in word and deed is even strict in criminal cases. "It is the supreme duty of a trial judge, in so far as it is humanly possible, to hold the scales of justice evenly balanced between the litigants." West v. State, 519 So.2d 418, 422 (Miss. 1988). "[P]otential prejudice lurks behind every intrusion into a trial made by a presiding judge. The reason for this is that a trial judge's position before a jury is overpowering. His position makes his slightest action of great weight with the jury." *Id.* at 423 (quoting United States v. Hickman, 592 F.2d 931, 933 (6th Cir. 1979)). By dismissing members of the jury improperly, especially where the judge dismissed a juror because he bumped into an alleged member of the defendant's family. This Court should reconsider it's findings here and find that defendant was denied a fair trial and that trial counsel should have filed a mistrial motion. The dismissal of the jurors by the Court, after they had been duly selected and placed on the jury, constituted critical error by the Court and ineffective assistance of counsel on counsel's behalf where counsel failed to request a mistrial. This Court's denial of relief on that claim should be reconsidered and reversed. Johnson is serving a sentence of life and 30 years which will effectively potentially keep him in prison for the rest of his life. Due process demands that all rules of law be followed before one can be deprived of his freedom for the rest of his life in

any case. Here the rules of law were not followed. This Court appears to be willing to overlook that fact and make amends for the trial court at the expense of keeping Johnson in prison upon an improperly obtained conviction

WHEREFORE, PREMISES CONSIDERED, Johnson respectfully requests this honorable Court grant this Motion for Rehearing.

Respectfully submitted,

BY:


Dexter Johnson

CERTIFICATE OF SERVICE

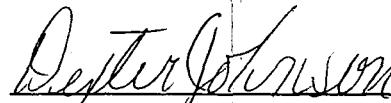
I, Dexter Johnson, hereby certify that I have this day served a true and correct copy of the above and foregoing Motion for Rehearing, by United States Postal Service, first class postage prepaid, upon:

Laura Hogan Tedder
Assistant Attorney General
Post Office Box 220
Jackson, MS 39205

This, the 7 th day of December, 2015

Respectfully submitted,

BY:



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