

**IN THE COURT OF APPEALS**

**7/15/97**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-01154 COA**

**JIMMY MITCHELL**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

**THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND**

**MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B**

**TRIAL JUDGE: HON. HENRY L. LACKEY**

**COURT FROM WHICH APPEALED: LAFAYETTE COUNTY CIRCUIT COURT**

**ATTORNEY FOR APPELLANT:**

**DAVID O. BELL**

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: LARRY L. LITTLE

NATURE OF THE CASE: CRIMINAL -- RAPE

TRIAL COURT DISPOSITION: ENTERED JUDGMENT OF APPELLANT'S GUILT OF RAPE AND SENTENCED HIM TO SERVE THIRTY FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

MANDATE ISSUED: 8/5/97

BEFORE BRIDGES, C.J., COLEMAN, AND PAYNE, JJ.

COLEMAN, J., FOR THE COURT:

A jury in the Circuit Court of Lafayette County returned a verdict of "Guilty as charged." against the Appellant, Jimmy Mitchell, whom the State prosecuted on an indictment for the crime of rape. Because the jury did not fix Mitchell's sentence at life imprisonment, the trial judge sentenced him "to serve a term of thirty five years in an institution to be designated by the Mississippi Department of Corrections." The trial judge advised Mitchell in the presence of his trial counsel at the sentencing hearing that he had arrived at the figure of thirty five years by determining that Mitchell, who was then nearer twenty eight years of age than twenty seven years of age, had a life expectancy of 39.9 years according to the mortality table published by the United States National Center for Health Statistics. In the appeal of his conviction, Mitchell complains only that the trial judge ought to have granted the request of his trial counsel, Timothy Balducci, whom the court had appointed to defend him as an indigent, that he, Balducci, be removed as Mitchell's counsel. Balducci made his request to be removed as Mitchell's defense counsel on the morning that Mitchell's trial began. Mitchell contends that this refusal denied his constitutional right to the effective representation of counsel. The trial judge appointed another lawyer to represent Mitchell in his appeal of his conviction of rape, but after the State filed its brief in response to Mitchell's initial brief in which he raised this one issue, Mitchell *pro se* filed a reply brief in which he raised four issues not included in his initial brief. Before the Mississippi Supreme Court transferred this case to the Court of Appeals, the State moved that the supreme court strike Mitchell's reply brief; but the supreme court denied the motion. For the reasons which are contained in this opinion, this Court affirms the trial court's judgment of Mitchell's guilt of the felony of rape and sentence contained in said judgment.

## I. Facts

This Court need not dwell on the facts from which the grand jury garnered its indictment of Mitchell for the crime of rape of AG. [\(1\)](#) Suffice it to relate that on the evening of September 19, 1993, AG, Shirley Pegues, Willie Rogers, Jr., who was Shirley Pegues' brother, and Mitchell went to the Club

9000 located in Marshall County, where they spent the evening dancing and drinking some beer. They returned to Pegues' home, where AG had been living in anticipation of resuming her studies at the University of Mississippi, about one o'clock that morning. Sometime later in the early morning hours, AG accompanied Mitchell, who drove his car to the Double Quick in Oxford to get some cigarettes. Instead of his returning AG to Pegues' home after he bought the cigarettes, Mitchell drove around in Lafayette County and finally stopped the car. According to AG, Mitchell then proposed that they engage in sex, which proposal AG rejected. According to AG's version of subsequent events, her resistance to Mitchell's unwanted sexual advances resulted in both her and Mitchell's spilling out of the car onto the ground, where they wrestled and she attempted to run away. But the episode ended with Mitchell's throwing her back into the front seat of his car, where he ravished her. Following his sexual attack on AG, Mitchell returned her to Pegues' home, where AG, still crying, awakened Pegues to tell her repeatedly, "He raped me. He raped me." A neighbor called an ambulance, which took AG to the hospital in Oxford, where she was examined and a rape kit used by a nurse who was on duty at the time. Had Mitchell testified, it is likely that he was prepared to testify that he and AG had engaged in consensual sex at Pegues' home after they had returned from the Club 9000.

## II. Trial

The trial-long saga which begot the issue which Mitchell presents for our resolution began when, during his voir dire of the venire persons, the trial judge asked Mitchell to stand. The record reflects the following:

TRIAL JUDGE: Mr. Mitchell, I assume, is seated here. If you will stand, Mr. Mitchell. Mr. Mitchell. Mr. Mitchell, do you hear me? Let me ask you, Mr. Balducci, is this Jimmy Mitchell seated there with you?

MR. BALDUCCI: Yes, it is, Your Honor. I would ask for a brief recess, Court's indulgence.

The trial judge, the district attorney, Mitchell, his counsel, Timothy Balducci, and the court reporter then retired to the judge's chambers, where the saga continued:<sup>(2)</sup>

MR. BALDUCCI: Your Honor, we have just come in chambers with voir dire. The Court asked Mr. Mitchell to stand, and he is not responsive to the Court's request. I wanted to ask a brief recess and come in chambers and inquire of Mr. Mitchell as to whether or not he intends to participate in this trial or not. Up until now, he and I have had extensive discussions at the jail regarding the charges against him. I know that he's aware of the charges against him, the severity of the charges against him, because I have talked at great length about the case with him, and he's told me that he's going to participate in this trial. We've talked about his testimony, what he would testify to prior to trial, and this is the first incidence that he's given me this morning that he's not going to cooperate fully with the process, and I think it's incumbent on us and the Court, at this point, to voir dire him as to whether or not he intends to participate in this trial, and he needs to know the consequences that his trial is going to go on with or without his participation.

THE COURT: Thank you, Mr. Balducci.

Mr. Mitchell, I'm Henry Lackey, and I serve as one of the circuit judges here, and, of course, Mr. Balducci has been appointed to represent you. Now, do you -- have you talked to Mr. Balducci about the matter, about the case and y'all discussed it, gone over it?

MITCHELL: I remain silent.

THE COURT: Oh, okay. All right. I understand that. I've had this before, and I guess I'll have it in the future if these things happen. And you choose to remain silent, Mr. Mitchell? Is that what you're saying?

MITCHELL: Still remain silent.

THE COURT: All right. Well, you know that the case has been set for trial, now, and you can remain silent if you want to. I think that it's in your worst interest to remain silent. I don't think it's in your best interest is what I'm saying, but I don't have a crystal ball, and I don't know what's in your mind or who put it there, but I'm going to be as kind to you as you will allow me to be, and I'm going to be as long suffering as you will allow me to be.

It is your choice, as I understand it, after being fully advised that you do not intend to participate nor to assist your defense counsel in your defense. Is that correct? (NO RESPONSE) You choose to remain silent. (NO RESPONSE) Let the record reflect that Mr. Mitchell is here; that I've asked him a question. He refuses to answer.

The trial judge continued to question Mitchell about how much education Mitchell had received and about whether he intended to confer with his attorney during trial. Mitchell's response to the trial judge's questions was silence. Mitchell's defense counsel then recounted his preparation for the trial, which included several conferences with his client, and his efforts to arrive at a satisfactory plea bargain with the district attorney. The district attorney verified the extensive plea bargain negotiations with Balducci. Mitchell had also been indicted for other felonies, among which was aggravated assault. The trial judge inquired of Mitchell if he understood that he could be sentenced to life imprisonment if the jury convicted him of rape, to which the record reflects that Mitchell made no response.

Balducci then stated the following about his perception of his client's mental state:

For purposes of the record, I've had numerous discussions with Mr. Mitchell, in which time we talked at great length about the nature of the charges against him and the evidence presented, and we've had very lucid conversations about the case, and in my opinion, he is mentally competent to be here this morning and stand trial. If I had any reservations, at this point about him not understanding or being competent to be on trial today, then, I would take the appropriate steps to have him evaluated, but in

my opinion, based on my experience with him prior to this morning, that is not the case.

The trial judge asked Mitchell if anything mentally or emotionally were wrong with him and if he, Mitchell, were under then under the influence of alcohol or drugs. As before, silence was Mitchell's response. The record reflects that the district attorney advised the trial judge that his earlier offer regarding plea bargaining remained open if Mitchell wanted to discuss it with his defense counsel, but Mitchell continued to emulate the Sphinx.

Mr. Balducci then moved for the judge's leave to withdraw as counsel for Mitchell. Balducci offered the following explanation for his motion:

I feel that it's incumbent upon me, at this time, to move to withdraw as counsel in this case because, although he hasn't stated it specifically, I feel like there must be some reason that he's doing this, and it could possibly be that he's not satisfied with my services as his counsel, and therefore, I think in order to try to preserve his best interest and his constitutional rights, I ask the Court, at this time, to allow me to withdraw as his counsel and for the Court to appoint him new counsel and to continue this case to a later date in order that his new counsel may be afforded an opportunity to review the case and discuss it with him in order to protect his best interest.

The trial judge denied Balducci's motion and opined:

Mr. Balducci, I sympathize with your position, but, of course, Mr. Mitchell won't even talk to the Court, and I'm not -- I'm not -- I don't know whether he would talk to anybody if I appointed other counsel. I don't know what his problem is other than he's charged with a crime, and I don't know whether he would participate, and for that reason, I'm going to overrule your motion. The case was set for trial by order of this Court dated the 4th day of May, 1994, and I know that he's been aware that the matter was coming to trial, and -- on today, and for that reason, I'm going to overrule your motion.

The case proceeded to trial, and the record reflects that Mitchell's counsel effectively cross-examined the State's witnesses, among whom were Oxford Patrolman Alvis Lewis, Shirley Pegues, Willie Rogers, Jr., Lafayette County Deputy Sheriff Dennis Carwile, who took over the investigation of the crime when officer Lewis had ascertained that the crime had occurred outside the Oxford corporate limits, and AG, the victim. Deputy Dennis Carwile testified that after he had advised Mitchell of his right against self-incrimination, Mitchell told him that AG and he had engaged in consensual sex in Pegues' home in return for his having supplied AG with some rocks of crack cocaine. Deputy Carwile explained that he did not send the rape kit which a nurse in the hospital had applied to AG to the crime lab in Jackson because Mitchell had admitted that AG and Mitchell had engaged in consensual sexual intercourse. Analysis of the rape kit contents could only have established whether AG had engaged in sexual intercourse, which Mitchell admitted.

After the State rested and the trial judge denied Mitchell's counsel's motion for a directed verdict "to dismiss the indictment against him," Balducci asked the trial judge to inquire of Mitchell if he wished

to testify in his own behalf. The record reflects that the following occurred:

MR. BALDUCCI: Yes, sir, Your Honor. The State having rested, it is now time for the defense to put on its case in chief. I have conferred, attempted to confer with Mr. Mitchell. He's been non-responsive as to whether or not he wishes to testify in this case. I know from previous conferences, we have no witnesses to offer in his behalf. The only issue remaining is whether or not he will testify, and I would ask the Court to voir dire him on that point.

THE COURT: Mr. Mitchell, the jury is not in. The jury will not hear this. You have a right -- I'm certain you have been advised by your attorney -- You have a right to remain silent. No one can force you to testify. No one can force you to say anything. Of course, we respect that right. As I have told you in chambers two or three times, I'm going to be as kind to you as you will allow me, and I'm going to be as patient with you as you will allow me.

. . . .

This is the time in the trial, now, for you to present any defense that you have, and again, I remind you that you're charged with a very serious crime, one that the jury or the Court could sentence you to serve a term of life imprisonment, and this is a very serious, serious charge, as you have been advised.

Now, it's up to you to decide as to whether or not you want to present your side of the case or present a defense, and at this time, I'm going to ask you if you understand that you have a right to present witnesses; that you have a right to testify or you have a right to refuse to testify or decline to testify will be a better term, and I ask you do you understand? (NODDED HEAD UP AND DOWN) All right. Let the record reflect that the witness -- I mean the Defendant has indicated by nodding his head that he understands that in the affirmative.

Now, do you wish to testify, Mr. Mitchell? Do you wish to present anything in your defense?

THE DEFENDANT: Yeah.

THE COURT: You do wish to defend. All right, sir. Then, do you want to confer with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: All right, you do. Well, I think you made a wise decision. The Court, then, will allow you -- we're going to give you whatever time you need, now, to confer with your attorney. You've placed him in a situation that I'm sure none of us that have practiced law would like to be put in, but you will be allowed to confer with him during the lunch break, then.

The Court's going to be in recess until 1:00 o'clock. If you have any problems communicating, Mr. Mitchell, with your attorney, I want you to notify me. All right.

After the noon recess, Balducci addressed the trial judge as follows:

MR. BALDUCCI: Please the Court, the State having rested and time for the Defendant to put on his case in chief, when we broke for lunch, I had a long conference with my client. We talked about the events in the trial that have gone on. We conferred with each other about the nature of the trial and the events, if any, we need to put forth to the Court in his case in chief. We discussed Mr. Mitchell's right to testify, what would be gained or lost. He has advised me that he has decided to waive his right to testify in this case. I advised him that I think that's a good decision based on the facts and circumstances. We're in agreement, and he is going to waive his right to testify.

Mitchell then rested; the trial judge instructed the jury; final arguments by the State and Mitchell's counsel were presented to the jury; and the jury subsequently convicted Mitchell as we have already noted. The trial judge appointed another Oxford lawyer to represent Mitchell in his appeal.

### **III. Resolution of Mitchell's one issue**

This Court quotes Mitchell's one issue *verbatim* from his brief:

The Trial Court denied the defendant his Sixth Amendment right to counsel when he denied trial counsel's motion to withdraw as counsel for the defendant when it was clear that the trial counsel wished to withdraw and have other counsel substituted to represent the defendant.

The State cites two cases which, this Court finds, dispose of this issue adversely to Mitchell. The first case is *Burney v. State*, 515 So. 2d 1154 (Miss. 1987). In *Burney*, the appellant had moved *ore tenus* to substitute counsel on the ground that his counsel was not prepared for trial. *Id.* at 1157. When the trial court denied his motion, Burney became uncooperative and failed effectively to assist his counsel in the preparation and presentation of his defense. *Id.* While Mitchell did not move the trial judge to remove Balducci as his defense counsel, Mitchell remained silent throughout his trial until after the State had rested. In *Burney*, the Mississippi Supreme Court said the following about Burney's argument that the trial court erred when it did not grant his motion to substitute counsel:

It seems an untenable proposition to this Court to base a claim of ineffective assistance of counsel upon the defendant's uncooperativeness. Mr. Burney raised the issue on a pre-trial motion that his court-appointed attorney be allowed to withdraw. The trial judge examined Mr. Burney under oath about his financial situation and determined that Mr. Burney was indigent and eligible for court-appointed counsel. The trial court also examined Mr. Burney as to why he was displeased with the work his counsel had done. The pertinent reason was that his counsel did not "have his heart" in representing him. The trial judge found, on a review of the court file, that the attorney was "very diligent" in trial preparation and is "very competent" [and] "able." The trial judge denied the motion to allow the attorney to withdraw. Mr. Burney raised the issue again on motion for a new trial, which

was overruled.

Mr. Burney, in essence, raised a claim of ineffective assistance of counsel through his motion for substitute counsel. Although it is somewhat unusual to raise this claim at this point in the proceedings, the trial judge wisely carried out a hearing and made findings of fact. Because the trial judge is far better equipped than we are to make such findings of fact, and under our limited scope of review on such findings, we will not disturb his ruling where it is substantiated by the record.

Furthermore, Mr. Burney has not met the two prongs of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984), in alleging ineffective assistance. Review of the record does not reveal any breakdown of the adversary process due to the assistance rendered by Mr. Burney's trial counsel. On the contrary, trial counsel performed well under the facts of this case where there was such overwhelming proof against his client. This assignment of error is without merit.

*Burney*, 515 So. 2d at 1157. The transcript of the trial in the case *sub judice* is a narration of Balducci's thorough knowledge of the facts in this case and illustrates that he had conferred effectively with Mitchell. Balducci's cross-examination was also thorough and proficient. Even though Mitchell elected not to testify in response to the trial judge's colloquy with him on that subject, Balducci still elicited testimony from Deputy Carwile that Mitchell had told him that his sexual activity with AG had been at Pegues' house and had been consensual. Balducci's closing argument covered thoroughly the evidence and effectively asserted his client's defense to the jury.

The second case on which the State relies in its brief is *Corley v. State*, 536 So. 2d 1314, 1318 (Miss. 1988), in which the Mississippi Supreme Court stated: "A defendant cannot base a claim of inadequate representation upon his refusal to cooperate with appointed counsel. Such a doctrine would lead to absurd results." (citations omitted). Mitchell's silence throughout his trial until after the State rested constituted a blatant lack of cooperation with his defense counsel. Mitchell's response to the trial judge's questioning him about whether he wished to testify in his own behalf after the State had rested, and Balducci's statement to the trial judge about his client's desire not to testify after the noon recess, all of which we have quoted in this opinion, demonstrate that Mitchell was fully capable of cooperating with his counsel throughout his trial. Only Mitchell is responsible for his failure to cooperate with his defense counsel, who performed very well even when he encountered Mitchell's sulking on him. This Court affirms the trial court's denial of Mitchell's defense counsel's motion to withdraw as counsel for Mitchell and resolves this issue against Mitchell.

#### **IV. Mitchell's reply brief**

Earlier we noted that Mitchell *pro se* filed a reply brief in which he raised four issues. Those issues were the following:

##### **I.**

Trial counsel waived [a]ppellant's right to a [p]reliminary [h]earing without consultation or consent,

thereby denying [a]ppellant [d]ue [p]rocess through ineffective assistance of counsel.

## II.

Trial counsel waived [a]ppellant's right to a [s]peedy [t]rial without consultation or consent, thereby denying [a]ppellant [d]ue [p]rocess through ineffective assistance of counsel.

## III.

Trial counsel waived [a]ppellant's right to a [f]air [t]rial through his failure to object to hearsay testimony from two (2) witnesses for the prosecution, thereby denying [a]ppellant effective assistance of counsel.

## IV.

Trial counsel waived [a]ppellant's right to a [f]air [t]rial through his failure to move for a mistrial pursuant to an alternate juror[s] being allowed into the jury deliberation room, thereby denying [a]ppellant effective assistance of counsel.

Ordinarily, issues raised for the first time in an appellant's reply brief will not be considered. *Sanders v. State*, 678 So. 2d 663, 669 (Miss. 1996). "Appellants cannot be allowed to ambush appellees in their Rebuttal Briefs, thereby denying the appellee an opportunity to respond to the appellant's arguments." *Id.* Accordingly, we would decline to address these four issues; but because they are so patently erroneous, we dispose of them as follows:

First Issue: Trial counsel waived [a]ppellant's right to a [p]reliminary [h]earing without consultation or consent, thereby denying [a]ppellant [d]ue [p]rocess through ineffective assistance of counsel.

Mitchell's first issue as he has framed it is totally misleading, as his argument indicates. The record reflects that during Mitchell's trial, Mitchell's counsel cross-examined AG about portions of her testimony at Mitchell's preliminary hearing which was conducted on September 27, 1993, prior to the grand jury's having returned the indictment against Mitchell. During his cross-examination of AG, Mitchell's defense counsel asked her about inconsistencies in her testimony at the preliminary hearing, which inconsistencies were about a knife which AG had wielded unsuccessfully to resist Mitchell's attack and Mitchell's pulling a gun on her after he had raped her. AG admitted that she had said nothing about the gun at the preliminary hearing. Mitchell's counsel even confronted AG with a transcript of her testimony which he had recorded at the preliminary hearing held on September 27 of the previous year.

Thus, the record demonstrates that Mitchell received a preliminary hearing at which Balducci represented him. In *Thorson v. State*, 653 So.2d 876, 892 (Miss. 1994), the Mississippi Supreme

Court held that "[f]ailure to afford [the appellant] a preliminary hearing . . . prior to indictment was not reversible error . . . ." In the case *sub judice*, Mitchell was the beneficiary of a preliminary hearing at which he was represented by the same attorney who served as his defense counsel at his trial and who used his examination of AG from the preliminary hearing to cross-examine her during Mitchell's trial. Had this issue been included in Mitchell's initial brief, it would have been wholly unsupported by the record and would have been decided adversely to him, as we do now.

Second Issue: Trial counsel waived [a]ppellant's right to a [s]peedy [t]rial without consultation or consent, thereby denying [a]ppellant [d]ue [p]rocess through ineffective assistance of counsel.

Mitchell is correct in this argument on this second issue that Section 99-17-1 of the Mississippi Code of 1972 requires that "[u]nless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." Miss. Code Ann. 99-17-1 (1972). However, the record again demonstrates that Mitchell's position on his second issue is wrong. The indictment for the rape of AG on which Mitchell was tried was filed December 14, 1993. Mitchell's arraignment on that charge occurred after that date. Mitchell was tried August 3 and 4, 1994. August 3, 1994, was 232 days after the indictment was filed on December 14, 1993. Thus, this Court finds that the State complied with the dictates of Section 99-17-1 by trying Mitchell on the indictment for rape within 270 days of his arraignment on that charge. Had this second issue been included in Mitchell's initial brief, it would have been wholly unsupported by the record and would have been decided adversely to him, as we do now.

Third Issue: Trial counsel waived [a]ppellant's right to a [f]air [t]rial through his failure to object to hearsay testimony from two (2) witnesses for the prosecution, thereby denying [a]ppellant effective assistance of counsel.

Mitchell complains that Willie Rogers, Jr., and Shirley Pegues testified about details of the alleged crime of the rape of AG which were hearsay, to which his trial counsel did not object. Mitchell cites *Gill v. State*, 485 So. 2d 1047 (Miss. 1986), in which the Mississippi Supreme Court held that the trial court erred when it allowed hearsay testimony from a prosecution witness concerning details of the alleged crime; but he does not identify what parts of Rogers' and Pegues' testimony was hearsay. The record contains objections by Balducci, Mitchell's defense counsel, to portions of Pegues' and Rogers' testimony on the grounds that their testimony was hearsay, although the trial judge overruled those objections. Rule 103 of the Mississippi Rules of Evidence provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Because Mitchell does not specify the rulings of the trial judge on his counsel's objections to which he objects, this Court cannot effectively review this issue. Rule 103 of the Mississippi Rules of Evidence mitigates against reversal of a criminal conviction on the basis of errors in the admission or exclusion of evidence. As with the first two issues, we resolve this issue adversely to Mitchell, which we would have done had it been included in his initial brief.

Fourth Issue: Trial counsel waived [a]ppellant's right to a [f]air [t]rial through his failure to move for a

mistrial pursuant to an alternate juror['s] being allowed into the jury deliberation room, thereby denying [a]ppellant effective assistance of counsel.

As with Mitchell's first two issues in his reply brief, the record contradicts that an alternate juror accompanied the jury into the jury room when they began their deliberations on whether he was guilty of the crime of rape of AG. We quote the following excerpt from the record which appears after the conclusion of closing arguments by the State and Mitchell's counsel:

THE COURT: Is everyone feeling all right? Good. Mr. Parker, Ronald Parker and Cathy Laswell were the alternate jurors. If you'll remain seated, please, in the court room.

All right. The other twelve of you will retire to the jury room and consider your verdict.

(JURY RETIRED APPROXIMATELY 2:30 P.M.)

THE COURT: Mr. Parker, Ms. Laswell, I certainly appreciate your kind attention, your willingness to give your time and service. This will terminate your service to Lafayette County in this venture, and you're free to go.

(ALTERNATE JURORS EXCUSED BY THE COURT.)

Mitchell has done nothing to supplement the record to contest the accuracy of foregoing part of the record which reflects that the two alternate jurors remained in the courtroom as the trial judge instructed them after the twelve jurors exited the courtroom to begin their deliberations. Thus, because the record refutes the basis for Mitchell's fourth issue, this Court likewise decides it against Mitchell as indeed it would have had it been included in Mitchell's initial brief.

Although this Court was not required to address Mitchell's four issues contained in the reply brief which he filed *pro se*, it has done so to illustrate that the record either fails to support this allegations on which he bases those issues or patently contradicts those allegations. Had all four of these issues been included in Mitchell's initial brief which his counsel for appellate purposes filed in this case, this Court would have decided them adversely to Mitchell, as we have now done.

## **V. Summary**

Mitchell's defense counsel's motive for moving to withdraw as defense counsel is not opaque to this Court. However, the transcript of Mitchell's trial demonstrates that after the trial judge denied his motion, Timothy Balducci re-entered the courtroom and discharged his duty to his client, Jimmy Mitchell, as effectively as his client's silence would permit. Just as the Mississippi Supreme Court refused to do, this Court declines to permit an appellant from a criminal conviction to base a claim of his counsel's inadequate representation upon that appellant's refusal to cooperate with his counsel whom the court has appointed to represent him because of the appellant's poverty. *See Corley*, 536

So. 2d at 1314. Although this Court was not required to review the four issues which Mitchell included in the reply brief which he filed *pro se*, it elected to do so to demonstrate that the record either failed to support or outright contradicted the basis which Mitchell alleged supported those four issues. The judgment of sentence of the Circuit Court of Lafayette County is affirmed.

**THE LAFAYETTE COUNTY CIRCUIT COURT'S JUDGMENT OF APPELLANT'S GUILT OF THE CRIME OF RAPE AND ITS SENTENCE OF APPELLANT TO SERVE THIRTY FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ARE AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO LAFAYETTE COUNTY.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.J.J., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**

1. In deference to the victim of Mitchell's crime, she is identified in this opinion by her initials only.
2. This Court acknowledges that it quotes perhaps too extensively from the record, but it does so to illustrate Mitchell's behavior, his defense counsel's concern about it, and the trial judge's commendable patience in dealing with it.