IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STACY MARSHALL — APPELLANT

V. — NO. 2006-KA-0113-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE 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. Stacy Marshall, Appellant
3. Honorable Anthony J. Buckley, District Attorney
4. Honorable Billy Joe Landrum, Circuit Court Judge

This the 5th day of May, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO 1.: WHETHER THE TRIAL COURT PERMITTED PLAIN ERROR IN ALLOWING MULTIPLE REFERENCES BY THE STATE TO THE DEFENDANT EXERCISING HIS CONSTITUTIONAL RIGHTS TO REMAIN SILENT AND TO NOT TESTIFY ON HIS OWN BEHALF ?

ISSUE NO. 2: WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR IN ALLOWING THE STATE'S ATTORNEY TO MAKE COMMENTS ATTACKING THE TRUTHFULNESS OF DEFENSE COUNSEL SUGGESTING COUNSEL WAS NOT BEING TRUTHFUL WITH THE JURY ?

ISSUE NO. 3: WHETHER THE CUMULATIVE EFFECT OF ERROR REQUIRES REVERSAL OF THIS MATTER ?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Jones County, Second District, Mississippi, and a judgement of conviction for the crime of possession of cocaine (972.18 grams) and a sentence of thirty years with five years suspended after serving twenty-five following a jury trial commenced on October 6, 2005, Honorable Billy Joe Landrum, Circuit Judge, presiding. Stacy Marshall is currently incarcerated with the Mississippi Department of Corrections.

FACTS

The State commenced its case with the testimony of Robert Strickland, ["Strickland"], an eight year veteran of the Laurel Police Department. Strickland had received information leading to his surveillance of a home and ultimately a search warrant for the house. (T. 53-57) Along with several other officers, Strickland executed the warrant on September 8, 2004. A "special response team" sent some officers to the door as others surrounded the house. As the warrant was executed, Stacy Marshall, ["Marshall"], ran out the back door. There were three or four occupants remaining who did not run. (T. 58-61) Marshall was "apprehended" by officers Flowers and Van Syckel. (T. 61)

Inside, a strong box was found in a rear bedroom. The box was locked. Sergeant Bounds opened the box with a key found in Marshall's possession. (T. 63-65) The box contained two packages of cocaine, later determined to weigh over two pounds. A scale was also found.

During cross examination, Strickland agreed the search warrant indicated that the last names of the persons included were unknown. A "Stacy" (last name unknown) included in the warrant was described as having gold teeth, which Marshall did not. (T. 71-74) Strickland testified that the home did not belong to Marshall. Several other key points were adduced, including the failure to search the owners of the house, and that the keys belonging to the owners could have also included a key to the strong box. Dominique Bell, the owner of the house, was smoking marihuana when the warrant was executed. The information used in procuring the warrant alleged that Marshall had gold teeth, which proved to be false.

The State, during it's redirect examination, asked Strickland: "[d]id you ever hear Mr. Marshall or did Mr. Marshall ever state to you that it was not his key or his key chain?" and then "did you ever hear him explain or make any statement to anybody else how that key got on his key

chain?" After an objection to leading the State again referred to Marshall's silence after his "apprehension" by asking"[d]id you ever hear Mr. Marshall make any comments about how the key got on his chain?" (T. 93-94) The trial court permitted Strickland to testify, that while Marshall initially was silent to these questions, he later acknowledged ownership of the key. (T. 94)

Mitch Van Syckel, ["Van Syckel"], a narcotics officer with the Laurel police obtained the search warrant. He and officer Flowers had gone to the south side of the house as the warrant was executed. They observed Marshall exit the rear door. Marshall was ordered to stop. Flowers had his sidearm un-holstered and apparently pointed in the direction of Marshall. Marshall was instructed to get on the ground, where he was patted down and handcuffed. Van Syckel claimed Marshall was not under arrest at this time, despite his being apprehended at gunpoint and handcuffed. (T. 98) His set of keys was confiscated. As the search warrant included vehicles, the keys were tried on vehicles present. The keys did not open any of the cars. (T. 98-101)

Van Syckel testified that luggage was on the floor in the living room. A bag was opened and found to contain a Wal-Mart receipt for a strongbox and a picture I.D. of Marshall. (T. 101) The strongbox was brought in and the keys obtained from Marshall opened the box. (T. 101-106) The prosecutor then asked the witness:

> Q. When Mr. Bounds opened that safe up and started pulling out this cocaine, did Mr. Marshall over there say anything?
>
> A. I don't recall , sir.
>
> Q. Did he make any comment about, oh, that's not my key–
>
> MR. SMITH: Objection, your Honor.
>
> THE COURT: Sustained.

BY MR. PARRISH :

> Q. Did he make any comments at all?

When asked if Marshall was arrested at this time, Van Syckel conceded that Marshall was, in fact, already in custody, being already handcuffed. (T. 106)

Marshall's defense brought out the fact that he had not written a report, and that he had refreshed his memory by discussing the case at the District Attorney's office. He claimed that Marshall was not under arrest at the time he was put on the ground and handcuffed or when he was brought into the house. (T. 113)

Layne Bounds, ["Bounds"], was among the police executing the warrant that led to Marshall's arrest. (T. 115-116) Bounds testified that when he arrived at the rear of the house, Marshall was "in custody...lying face down...handcuffed..." (T. 117) He observed two adults and a child in the residence. Bounds found the lock box with scales on top. (T. 122) He retrieved Marshall's keys and opened box. (T.122-123) He took various photographs. Bounds searched for other lock box keys, but found none. (T. 127)

On cross examination it was again uncovered that another officer had failed to complete and file his own report on the incident. (T. 127-128)

Derryle Smith, an agent with the Drug Enforcement Agency, was responsible for getting the evidence to the crime lab. (T. 135-140) He also explained why his weight, of the entire package, was different from the crime labs weight of the substance only.

The state concluded its case with an expert from the crime lab who opined that the substance was cocaine weighing slightly over two pounds.

After the state rested, a motion for a directed verdict premised on insufficiency of the evidence of possession (constructive) was denied. The trial court advised Marshall on his right to testify or not.

SUMMARY OF THE ARGUMENT

In an otherwise weak constructive possession case, the State was allowed to fortify it's argument with questions asked of police officers by the State as to whether Stacy Marshall ["Marshall"] ever made a statement denying ownership of the drugs or safe they were stored in. At the time, Marshall was restrained and in handcuffs. These breaches of Marshall's constitutional right to remain silent were then amplified and exacerbated when the State, during it's closing argument, told the jury that "Ain't no evidence he's not guilty" clearly reminding the jury that the defendant did not testify on his own behalf.

The prosecutor opened the rebuttal portion of his closing argument with a comment on the honesty of Marshall's trial counsel, suggesting the attorney had concocted a false defense. Further improper comment was directed at defense counsel as an out of town/Jackson attorney, a comment clearly intended to improperly influence the jury.

This one-two sucker punch to Marshall's constitutional rights deprived Marshall of a fundamentally fair trial. Additional improper argument suggested that the defense did not call two witnesses, the other adults in the house, because they were sick of Marshall's drug dealing. As they did not testify, clearly this comment was not based on evidence, was not proper and was extremely prejudicial. Another series of closing arguments referred to "your town, in your community" , "[t]hat's what is going on in your town, in your county..." and then telling the jury to let him know how they felt about it. (T. 179) Such an argument treads perilously close to the banned "send a message" argument and was clearly an argument that was intended to inflame the passions of the jury about crime in their community.[1] Individually and as a whole, the constant barrage of improper

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[1] In Brown v. State, ___So. 2d ___, 2006 WL 3593199 (Miss. App., Dec. 12, 2006) the Court of Appeals specifically decried the urging of a jury to consider overall crime in the county as opposed to the crime charged.

comments and questions necessitates a new trial.

ARGUMENT

ISSUE NO 1.: WHETHER THE TRIAL COURT PERMITTED PLAIN ERROR IN ALLOWING MULTIPLE REFERENCES BY THE STATE TO THE DEFENDANT HAVING EXERCISED HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT AND TO NOT TESTIFY ON HIS OWN BEHALF ?

The Fifth Amendment to the United States Constitution, and Article 3, § 26 of the Mississippi Constitution, specifically guarantee any person under arrest the right to remain silent and strictly proscribe the State from making any comment to a jury on a defendant's exercise of that fundamental right. This same fundamental protection explicitly prohibits any comments by a prosecutor on a defendant's exercise of his constitutional right to not testify on his own behalf. Either violation causes irreparable harm and is reversible error, whether an objection is interposed or not. Together, such a double barreled breach of the Constitutional right to remain silent is error of enormous proportion.

In the matter at hand, as set forth in the facts above, the State evinced nothing but disdain for these fundamental rights. Upon execution of the search warrant, Marshall was seized by the officers. Though not formally told he was under arrest, Marshall was ordered to the ground at gunpoint and handcuffed. He was brought from the outside of the house back inside, in handcuffs and clearly not free to leave. As such, Marshall's fundamental right to remain silent had attached. Marshall was undeniably under arrest.[2] He had a gun drawn on him, was told to get on the ground and was handcuffed. The Mississippi Supreme Court has outlined the test to be used here. "If the potential arrestee 'could not have believed under such circumstances that he was free to leave,"' then the arrestee is in fact under arrest." *Turner v. State,* 732 So.2d 937, 945 (Miss. 1999) Marshall was

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[2]Although Strickland denied having "arrested" Marshall, by the time Marshall was brought into the house, Marshall was "in custody" according to Officer Layne Bounds. (T. 117)

clearly arrested for the purposes of Miranda. A citizen is deemed to be under arrest when they are not free to leave, such as being handcuffed. *Seeling v. State*, 844 So. 2d 839, 444 (Miss. 2003) And when a gun is pointed at the individual, both common sene and case law dictate that a citizen is in fact not free to leave and is under arrest. *Riddles v. State*, 471 So.2d 1234 (Miss.1985). Marshall thus had the right to remain silent and any comment on the exercise of that right constitutes error.

The State began it's assault on Marshall's right to remain silent with its very first witness. By multiple questions Marshall's silence was used to imply "admissions" by Marshall via his absence of denial. In it's redirect examination, the State asked Robert Strickland of the Laurel Police Department: "[d]id you ever hear Mr. Marshall or did Mr. Marshall ever state to you that it was not his key or his key chain?" and then "did you ever hear him explain or make any statement to anybody else how that key got on his key chain?" Possession of the key to the safe box which contained cocaine was the linchpin of the evidence against Marshall. After an objection to leading the State again referred to Marshall's silence after his "apprehension" by asking"[d]id you ever hear Mr. Marshall make any comments about how the key got on his chain?" (T. 93-94) "[U]se of the defendant's post-arrest silence in this manner violates due process..." *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S.Ct. 2240, 2241 (U.S.Ohio,1976)

It is anticipated that the State will argue that, as the record contains no mention of Marshall having been advised of his Miranda rights, pursuant to *McGrone v. State*, 807 So. 2d 1232 (Miss. 2002), that questions or comment on an accused remaining silent are permitted. Such would be a misapplication of *McGrone*, which, it is argued here, only allows the cross examination of the defendant themselves, where they have taken the stand, as to their prior silence. Such questions are allowed only to impeach the defendant's present inconsistent testimony. It should not allow a prosecutor the artifice of asking a police officer witness if the defendant denied his guilt upon his

arrest.

The questions of police officer witnesses concerning Marshall's post-apprehension silence did not end with Officer Strickland. Mitch Van Syckel, a narcotics officer, was questioned upon direct examination as follows:

> Q. When Mr. Bounds opened that safe up and started pulling out this cocaine, did Mr. Marshall over there say anything?
>
> A. I don't recall, sir.
>
> Q. Did he make any comment about, oh, that's not my key–
>
> MR. SMITH : Objection, Your Honor.
>
> THE COURT : Sustained.

BY MR. PARRISH :

> Q. Did he make any comments at all?

Thus, it was suggested to the jury three times with this one witness that Marshall's silence should be used by the jury against him, to infer that was required to protest his innocence or the jury could therefore infer his guilt. Marshall's constitutional right to remain silent was repeatedly ignored. By the time the State had completed its case in chief, Marshall's silence had been used against him as a suggestion of an admission by the State multiple times.

However, abuse of Marshall's right to not incriminate himself, was just beginning. Marshall, chose not to testify. Again, his exercise of his Constitutional protections, was used as a weapon against him. In what can only be interpreted as a direct comment on Marshall's decision to not testify, the State made the following assertion during its closing:

> There ain't no evidence. Ain't no evidence he's not guilty. (T. 177-178)

This is exactly the kind of comment that has been explicitly condemned. It is the functional

equivalence of saying that " if {the State's witnesses] were not telling you the truth, [the defendant] would have taken this witness stand and denied it." *Davis v. State*, 970 So. 2d 164, 171 (Miss. App. 2006). This argument places the burden on Marshall to take the stand and put on evidence, to proclaim he is not guilty. It is not the permissible sort of comment found in *Carr v. State*, 655 So. 2d 824 (Miss. 1995), but is instead is tantamount to the examples of improper argument enumerated in *Carr, Id.* at 841

> Carr cites many of this Court's opinions that condemn prosecutorial comment on the defendant's failure to testify. However, the language this Court condemned in those cases was much more direct than in the case sub judice. See, e.g., Brown v. State, 340 So.2d 718, 721 (Miss.1976) ("It's undisputed. Nobody disputed his testimony."); Martin v. State, 200 Miss. 142, 26 So.2d 169, 171 (1946) ("undisputed by any testimony"); Lambert v. State, 199 Miss. 790, 25 So.2d 477 (1946) ("Where is the testimony that he did not do it?).

Therefore, it is obvious that the prosecutor has commented on Marshall's election to not testify. The impact is unavoidable.

> A defendant has a constitutional right not to take the witness stand. This right becomes meaningless if comment or insinuation can be made reflecting upon his failure to testify." *Livingston v. State*, 525 So.2d 1300, 1306 (Miss.1988) (citations omitted). A prosecutor is prohibited, either by direct comment, insinuation or innuendo, from commenting on the defendant's failure to testify.

Carr, Id. at 845. Once a comment is deemed to be a reference to the exercise by the defendant of one of his fundamental Constitutional rights, the sin becomes unpardonable:

> The right not to testify against one's self is secured by the Fifth Amendment to the United States Constitution as well as in Article 3, section 26 of the Mississippi Constitution. This includes the right not to have the State comment on the exercise of this right. *Whigham v. State*, 611 So.2d 988, 995 (Miss.1992). "The right would be eviscerated if the government were free to make invidious reference when an accused chose not to testify." Id. The prosecutor is prohibited from making both direct comments and those "which could be reasonably construed by a jury as a comment on the defendant's failure to testify." *Griffin v. State*, 557 So.2d 542, 556

> (Miss.1990). "[O]nce such improper comments are made the defendant is entitled to a mistrial. The error is incurable." *Livingston v. State*, 525 So.2d 1300, 1307 (Miss.1988). This is regardless of the overwhelming weight of the evidence.

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This comment of "Ain't no evidence he's not guilty" is a direct comment on the defendant Marshall's not having taken the stand. It is without remedy. It is recurrent[3] throughout the State's case, in the multiple questions concerning what Marshall did not say after he was in custody and not free to leave. It is compounded error so fundamental, so detrimental to Marshall's constitutional rights, as to require a plain error analysis. *United States v. Olano*, 507 U. S. 725, 113 S.Ct. 1770 (1993)

Accordingly, it is incumbent upon this Court to reverse the conviction herein.

ISSUE NO. 2: WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR IN ALLOWING THE STATE'S ATTORNEY TO MAKE COMMENTS ATTACKING THE TRUTHFULNESS OF DEFENSE COUNSEL SUGGESTING COUNSEL WAS NOT BEING TRUTHFUL WITH THE JURY ?

"The court has held it is reversible error to make unwarranted personal comments on defense counsel in closing argument as to his veracity and believability." *Edwards v. State*, 737 So.2d 275, 300-01 (Miss.1999)

The second portion of the State's closing argument began as follows:

> If it please the Court. Ladies and gentlemen of the jury, you know what this trial--I may talk a little fast because I've got to get this off of my chest. **I just got a little outraged at some of the excuses that some of these lawyers can come up with.** You know this is supposed to be about a search. But what is the truth? Ain't that all we need to worry about today? What is the truth about this today? That's all we need to be concerned about.

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[3] In *Walker v. State*, 913 So. 2d 198, 242 (Miss. 2005) a less egregious errant prosecutor's comment was held to be harmless when made in isolation. However, it would seem to logically follow that multitudinous error would likewise demand reversal.

> You know, I've heard this gentleman get up here that's a lawyer, this gentleman from Jackson come up here with Stacy Marshall, and say to you this morning, you know, I try to– you know, **you've got a right to be told the truth by the lawyers too.** (T. 174-175)

Twice in the span a few seconds, counsel for the State, impugned the honesty of the counsel for the defense. As made apparent in *Edwards, Id.* Comments concerning the veracity of opposing counsel are improper and do affect a defendant's right to a fair trial.

As no objection to these comments was interposed by the defense, it was incumbent upon the trial judge to correct such wrongful conduct sua sponte. The Uniform Rules of Circuit and County Court, Rule 3.02 provides in part, that where opposing counsel is attacked in closing argument "[I] is the duty of the court to enforce this rule of its own motion and without objection being made, but the court's failure to do so, where no objection is made, will not constitute a ground for exception."

While generally failure to object acts, as set forth above, as a procedural bar, it should not do so where the comments on veracity of counsel are also negative comments on a defendant's right to counsel. As the improper comments contained a improper negative inference on Marshall's choice of counsel as "this gentleman from Jackson", the effect, in toto, should raise to the level of error of constitutional proportion. "Comments that penalize a defendant for the exercise of his right to counsel and that also strike at the core of his defense cannot be considered harmless error. The **right to counsel is so basic to all other rights that it must be accorded very careful treatment. Obvious and insidious attacks on the exercise of this constitutional right are antithetical to the concept of a fair trial and are reversible error.**" *U.S. v. McDonald*, 620 F.2d 559, 564 (C.A.Ala., 1980) In this brief closing argument, counsel for the defense has been essentially accused of concocting an untruthful defense; slander which is augmented with the improper reference to "the

gentleman from Jackson" who "come up here with Stacy Marshall"; as if Marshall's choice of out of town counsel was somehow inappropriate. The State's comment on the "gentleman" from "Jackson" was transparent in its intent to prejudice Marshall and his choice of counsel in the eyes of the jury. "A defendant is entitled to a fair and impartial trial before a jury not exposed to abusive arguments appealing to their passions and prejudices." *Dunaway v. State*, 551 So.2d 162, 163 (Miss.1989)

While these errors were not objected to at trial, that should not operate as a bar to this Court's consideration of Marshall's various complaints. "In cases where an appellant cites numerous instances of improper and prejudicial conduct by the prosecutor, this Court has not been constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no objections were made." *Smith v. State,* 457 So.2d 327, 333 -334 (Miss.1984) Given the constitutional proportion of the complained of wrongs, and the manifest miscarriage of justice that would occur if allowed to stand, the errors must be addressed, if need be, as plain error. *Dobbins v. State*, 766 So. 2d 29 (Miss. App. 2000)

Such behavior is patently improper, and where it is part of multiple affronts to Marshall's fundamental right to a fair trial, should not be condoned. Again, it is respectfully urged that this Court reverse the judgement below.

ISSUE NO. 3: WHETHER THE CUMULATIVE EFFECT OF MULTIPLE ERRORS REQUIRES REVERSAL OF THIS MATTER ?

In addition to the above argued errors, there were other prejudicial occurrences during closing argument. First were the repeated references to the jury's town, its city and county; for example : "It's one of the biggest drug seizures ever in this county." (T. 176), "One of the biggest drug seizures in this county." (T. 177) "That's what is going on here in your town in your county." (T. 179) And "he's done it in your town, in your county, in your city. And you ought to let him know

how you feel about it. But that's up to you." (T. 179) All these repeated references to the community of the jury sound dangerously close to the forbidden "send a message" argument. Why else remind the jurors of the geographical location, but to inflame passions and at least hint at a "send a message " argument. See *Brown v. State*, ___So. 2d ___, 2006 WL 3593199 (Miss. App. Dec 12, 2006) where repeated comments regarding the county and city were strongly condemned.

Further such arguments create in the mind of the juror an extra-legal burden to not just decide the case at bar, but that it must protect it's community. *Sheppard v. State*, 777 So. 2d 659 Miss. 2001)

Closing argument also included a reference to witnesses, available equally to either party, who did not testify. "The general rule is that it is 'improper for the prosecution to comment on the failure of the defendant to call a witness equally available to both parties.'" *Fox v. State*, 756 So.2d 753, 761 (Miss.2000). While mention of the witnesses may have been invited by the defense closing argument, what followed was not. The prosecution made the following statement to the jury:

> That's where it was at, his relatives. You can draw a reasonable inference he come up over here to his relatives with his drugs and put it in their house. And they ain't up here because, you know, maybe they're ticked off at him. Maybe his relatives here in Laurel, Mississippi are sick of it. Didn't appreciate him bringing it over here. (T. 178)

There is obviously no evidence in this record to say what these potential witnesses thought, because they did not testify. Hence, it was wholly inappropriate to suggest to the jury that they did not testify on Marshall's behalf because they were "ticked off" at him for bringing his drugs there. Such an argument is outside the proofs, calls for speculation, is the personal beliefs of the prosecutor and only made for the purpose of inflaming the jury. "A defendant is entitled to a fair and impartial trial before a jury not exposed to abusive arguments appealing to their passions and prejudices." *Dunaway v. State*, 551 So.2d 162, 163 (Miss.1989) (*citing Keyes v. State*, 312 So.2d 7, 10

(Miss.1975)). "[A] prosecutor may not use tactics that are 'inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury.'" *Sheppard v. State*, 777 So.2d 659, 661(Miss.2000) (citing *Hiter v. State*, 660 So.2d 961, 966 (Miss.1995)). "The inquiry regarding attorney misconduct during closing arguments is 'whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created.'" *Jefferson v. State,* 964 So.2d 615, 619 (Miss. App.2007) (citing *Ormond v. State*, 599 So.2d 951, 961 (Miss.1992)).

These additional errors, combined with ISSUES No 1 and 2 (adopted herein in their entirety) created a torrent of prejudicial arguments and statements which, in conjunction with one another, wholly deprived Marshall of a fair trial as afforded under the Constitutions of both this State and the United States. When misconduct is recurring, reversal is obligatory. *Flowers v. State,* 457 So. 2d 327 (Miss. 2000) While not conceding that each of the errors herein is insufficient, when standing alone, to require reversal, the torrential effect of all the error mandates reversal. *Russell v. State*, 185 Miss. 464, 469, 189 So. 90,91 (Miss. 1939)

CONCLUSION

It is respectfully submitted that the judgement and sentence of the lower court should be reversed for the reasons set forth above and that this cause be remanded for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Stacy Marshall, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing BRIEF OF THE APPELLANT to the following:

Honorable Billy Joe Landrum
Circuit Court Judge
P.O. Box 6462
Laurel, MS 39441

Honorable Anthony J. Buckley
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This the 8th day of May, 2008.

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