IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KING YOUNG BROWN, JR. APPELLANT

VS. CASE NUMBER 2006 - KA - 00315 - COA

STATE OF MISSISSIPPI APPELLEE

BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT OF
WASHINGTON COUNTY, MISSISSIPPI
CAUSE NUMBER CR - 2002 - 329

PREPARED BY:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant, namely King Young Brown, Jr., hereby certify that the following list of parties have an interest in the outcome of the instant criminal action. These representations are made in order that the Judges of this Honorable Court may evaluate the possible disqualification(s) and/or recusal pursuant to Rule 28.1.1 of the Mississippi Rules Of Appellate Procedure, to wit:

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6. Honorable Richard A. Smith
CIRCUIT COURT JUDGE - DISTRICT # 4
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Respectfully submitted,

KING YOUNG BROWN, JR., APPELLANT

BY: _____
BRANDON I. DORSEY, MSB #[redacted]
ATTORNEY FOR APPELLANT

STATEMENT REGARDING ORAL ARGUMENTS

Appellant, namely King Young Brown, Jr., by and through his undersigned attorney of record, namely Brandon I. Dorsey, BRANDON I. DORSEY, PLLC, Post Office Box 13427, Jackson, Mississippi 39236 - 3427, respectfully request that this Honorable Court grant oral argument in these premises.

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

The instant case is submitted to this Honorable Court to determine: (1) whether the lower court erred in granting the State's manslaughter instruction marked and identified as S - 6; (2) whether the lower court erred in allowing the State to solicit testimony identifying King Young Brown, Jr. and Robernisha Webster through microscopic hair comparisons; (3) whether the lower court violated King Young Brown, Jr.'s 6th amendment right to confront his accusers when the lower court allowed testimony from a DNA analyst other than the analyst that actually conducted the DNA analysis; (4) whether the verdict finding King Young Brown, Jr. guilty of manslaughter is against and/or inconsistent with the overwhelming weight of the evidence; (5) whether the lower court erred in overruling King Young Brown, Jr.'s objection to the state's photographs marked and identified as S - 78, S - 74, S - 77, S - 76 and S - 79 on the basis that such photographs probative value was outweighed by its prejudicial effect; (6) whether the lower court erred in allowing the illegal seizure of King Young Brown, Jr.'s hair, blood and saliva samples thus violating the due process clause of the 4th, 5th, 6th and 14th of the Amendments of the United States Constitution and the Constitution Of The State Of Mississippi; (7) whether the lower court erred in overruling Appellant, King Young Brown, Jr.'s motion for directed verdict; (8) whether the lower court erred

in denying King Young Brown, Jr.'s motion for mistrial; (9) whether the lower court erred in limiting Appellant, King Young Brown, Jr.'s ability to cross examine and/or impeach the state's fingerprint expert; (10) whether the lower court erred in dismissing an African American juror from the jury and (11) whether the lower court verdict finding King Young Brown, Jr. guilty of forcible rape was against the overwhelming weight of the evidence.

Appellant, King Young Brown, Jr., by and through his attorney, argue, contend and submits to this Honorable Court the lower court has committed reversible error and as a result, the verdicts should be overturned and/or reversed and remanded.

B. THE COURSE OF THE PROCEEDINGS IN THE LOWER COURT

That Appellant, King Young Brown, Jr., on or about August 2, 2002, was indicted by the grand jurors of Washington County, Mississippi on the charge of murder and forcible rape. (RE 9 - 11). Subsequent thereto, King Young Brown was arraigned and the matter was set for trial.

That on or about May 2, 2002, the State moved the lower court for blood, hair and saliva samples. (RE 12 - 13) In response thereto, the lower court, by and through, Honorable Ashley Hines executed an Order granting the State's request for relief. (RE 14) Subsequent thereto, King Young Brown, Jr. moved the lower court to reduce his present bond and set a reasonable bond. (RE 15 - 16). In response thereto,

however, the Court denied the relief requested in those premises. (RE 17)

That on or about October 25, 2002, King Young Brown, Jr. moved the lower court to allow him an opportunity to request an independent analysis of the hair sample that had been obtained from him. On or about October 25, 2002, King Young Brown, Jr. moved the lower to transfer the proceeding to Youth Court. (RE 18 - 19) In response thereto, on or about December 19, 2002, the lower court denied King Young Brown, Jr.'s request for relief. (RE 20 - 21)

That on or about November 6, 2003, King Young Brown, Jr., filed his Notice Of Intent To Establish Albi. (RE 22 - 24)

That the first trial commenced on or about February 2004, and that trial ended with a "mistrial. The matter was set again on or about November 2004, and that trial also ended with a mistrial. Subsequent thereto, King Young Brown, Jr. moved the court, yet again, to reduce the present bond and for a reasonable bond. However, the lower court did not find the Motion well taken and denied the relief requested therein. The matter, was finally set, yet again, in November 2005, and that trial resulted in the verdicts that are at issue in the instant brief. (RE 25 - 27)

C. THE DISPOSITION OF THE LOWER COURT

That as a result of the trial that commenced on or about November 2005, King Young Brown, Jr. was found guilty of manslaughter and rape. (TR 2500 See RE 25 - 27,

TR 2501 See RE 89 - 90) As a direct and proximate result thereof, King Young Brown, Jr., by and through his attorneys[1] of record, moved the lower court for a motion for judgment notwithstanding jury verdict or in the alternative a new trial and for reasonable bail pending appeal. Subsequent to King Young Brown, Jr.'s foregoing Motion, the Court denied the relief requested. (RE 28 - 38) As a result of the jury verdict, King Young Brown, Jr. was sentenced by the lower court judge on or about December 19, 2005, wherein he was ordered to be remanded to the custody of the Mississippi Department Of Corrections for a term of twenty (20) years on the charge of manslaughter and thirty (30) years on the charge of rape, with both sentences slated to run consecutively with each other. (RE 39 - 40)

That subsequent thereto, King Young Brown, Jr. moved the lower court to allow him to appeal as a "pauper." (RE 41 - 45) In response thereto, the lower court found the Motion well taken and appointed the undersigned. (RE 46 - 47) Subsequent thereto, King Young Brown, Jr. filed his designation of the record (RE 48 - 53) and the appropriate certificate of compliance. (RE 54 - 55)

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[1]At the time that King Young Brown, Jr.'s Motion For Judgment Notwithstanding Jury Verdict Or In The Alternative A New Trial And For Reasonable Bail Pending Trial, he was actually represented by three (3) attorneys of record, namely Johnnie E. Walls, Jr., Mitchell Creel and Brandon I. Dorsey.

STATEMENT OF THE FACTS

The instant matter arose out of an incident that occurred on or about April 20, 2002. The minor victim, namely Robernisha Webster, along with her mother visited her (i.e. Cynthia Webster) mother's home located at 1112 Legion Drive. (TR 920 See RE 57)). According to Cynthia Webster, they were caused to visit her mother's home for the purpose of taking care of her grandmother, Rose Holmes. (TR 920 See RE 57). At the time of the incident that serves as the basis for the instant action, the minor victim, Robernisha Webster was six (6) years old (TR 919 See RE 58) and she attended Ella Darling Elementary School as a kindergarten student. (TR 920 See RE 57, TR 921 See RE 58).

Cynthia Webster recalled that she and Robernisha arrived at her parents' home (i.e. Oscar Merrill, Sr. and Bernice Merrill) after 4:00 p.m. (TR 921 See RE 58). When they arrived, Cynthia Webster's father, Oscar Merrill, Sr. was present as well as her brothers Oscar Merrill, Jr. and Gerald Merrill and her grandmother Rose Holmes. (TR 921 See RE 58). Robernisha, however, wanted to go to the park across the street, but Cynthia recalled that she instructed her (i.e. Robernisha) to speak to everyone at the house first. (TR 922 See RE 59). In response to those instructions, Robernisha complied and spoke to everyone. In fact, as Robernisha was leaving the house headed towards the park, Cynthia's brother, Gerald Merrill, called Robernisha back to give him

a hug. (TR 922 See RE 59).

Cynthia Webster recalled that when she saw Robernisha go over to the park, no other children were present. (TR 922 See RE 59). Shortly, Cynthia stated that she took Robernisha to Sonics. After they returned, Robernisha wanted to go back to the park. (TR 929 See RE 60, TR 930 See RE 61, TR 931 See RE 62). After Robernisha went back to the park, Cynthia recalled that she went inside the house (i.e. her parents' home) to the storage and got the laundry basket and went inside and got the clothes off the line. (TR 931 See RE 62). Cynthia said that after checking on Robernisha to see whether she was still at the park, she (i.e. Cynthia) sat back down, resumed folding clothes, but then dozed off. (TR 931 See RE 62, TR 932 See RE 63). Cynthia said that when she woke up, her father Oscar Merrill, Sr., as well as her brothers, Oscar Merrill, Jr. and Gerald Merrill had all left the house. (TR 932 See RE 63). Cynthia recalled that she went outside of the house in an effort to see Robernisha, but when she went outside, she no longer saw Robernisha. (TR 932 See RE 63). Cynthia stated that she ran into Oscar Merrill, Jr. coming up Legion Drive and asked him whether he had seen Robernisha, and he indicated that he had not seen her. (TR 933 See RE 64).

In response thereto, Cynthia stated that she went to Tangee's (i.e. Tangee lives on Dublin Street) to see whether she had seen Robernisha and Tangee told her that she saw Robernisha going behind the church yard. (TR 933 See RE 64). In response,

Cynthia stated that she too went behind the church yard, went around Bellfast and the adjacent alley, but still was not able to find Robernisha. (TR 933 See RE 64).

Cynthia stated that while she had gone by the church and towards Bellfast, she encountered a lady that had some small children. Cynthia stated that she described Robernisha to the lady. She also informed the lady that Robernisha was wearing red overalls, a white tee shirt, red ruffled socks and white tennis shoes with light blue trim with a "Powder Puff" girl on them. (TR 935 See RE 65).

Cythia sought the aid of law enforcement. As a result of her request for assistance, she was contacted by Officer Laverne Simpson, who requested that Cynthia provide her with some of Robernisha's clothing, so that she could in turn, give those items to the dog handlers. (TR 946 See RE 66). The next day, Robernisha was found in a garbage can located at 1104 Legion Drive, which is next door to her parents' home. (TR 948 See RE 67).

According to Leon Spencer, step - father of Appellant, King Young Brown, Jr., he was caused to come in contact with his garbage can on the day in question at the request of his wife, Gloria Spencer, mother of King Young Brown, Jr.. Mr. Spencer stated that he saw a large white plastic bag in his trash can after looking inside at his wife's request. (TR 2200 See RE 83). Mr. Spencer indicated that he attempted to pick it up, but it was heavy, so he asked his wife to retrieve a knife. (TR 2200 See RE 83).

Mr. Spencer stated that he cut the bag, and after doing so, he saw that there was another bag inside that bag. In response thereto, he in turn got the attention of law enforcement. (TR 2200 See RE 83). After law enforcement arrived, namely Officer James Whitehead, it was confirmed that Robernisha's body had in fact been located. (TR 2202 See RE 84).

Subsequent thereto, Officer Ricky Spratlin was contacted and he arrived at 1104 Legion Drive where the body was found. He testified that upon his arrival in the yard, he came in contact with Officer Whitehead and Officer Crockett. (TR 1664 See RE 74). He indicated that when he looked in the garbage can, that he noticed that the bags had been torn or had cuts in them. (TR 1664 See RE 74). After responding to the scene, Officer Spratlin contacted the Mississippi Crime Lab, requesting their assistance in processing the scene and area. In response to the request, David Zeliff and his assistant, Greg Nester were dispatched to Greenville. Mr. Zeliff testified that he arrived in Greenville later that evening. Mr. Zeliff testified that when he arrived at 1104 Legion Drive, he noticed that there was a large crowd of people gathered around. (TR 1350 See RE 68). Based upon the fact that it was dark and the condition of the area, Mr. Zeliff thought that they should find a more sterile environment in order to process the garbage can. (TR 1350 See RE 68, TR 1354 See RE 69). Emphasis added.

As a result of these conditions, Mr. Zeliff, his assistant, and other law enforcement officials of the Greenville Police Department retired to the Harris Funeral Home in an effort to began collecting potential evidence. Subsequent thereto, the child's body was transported to Jackson for an autopsy. Following the autopsy and efforts by Mr. Zeliff to collect potential evidence, several submissions were sent to the Mississippi Crime Lab and Reliagene in New Orleans, Louisiana.

SUMMARY OF THE ARGUMENT

King Young Brown, Jr. contends that the lower court committed reversible error in granting a "manslaughter instruction" in these premises. Mr. Brown contends that there was no evidence presented at the trial of the instant mater by the State Of Mississippi which supported the giving of a manslaughter instructions by the lower court. Mr. Brown further contends that when the court granted a "manslaughter instruction", that the jury was essentially allowed to compromise its verdict.

King Young Brown, Jr., contends that the lower court erred by allowing the State Of Mississippi to present misleading testimony and arguments to the jury regarding microscopic hair comparisons for the purpose of: (1) identifying King Young Brown, Jr. and the minor victim, Robernisha Webster and (2) showing that King Young Brown, Jr. and the minor victim, Robernisha Webster shared the same environment, which was not consistent with well settled Mississippi jurisprudence. King Young Brown, Jr.,

further contends that the lower court further erred when it allowed the State Of Mississippi to claim that Robernisha Webster had been inside his (i.e. King Young Brown, Jr.) home when the State Of Mississippi had direct knowledge through subsequent Mitochondrial DNA analysis, that excluded Robernisha Webster as being the "donor" of the hair samples allegedly found and collected in King Young Brown, Jr.'s home and on his clothing. King Young Brown, Jr., contends, in addition, that the State Of Mississippi presented evidence which it knew, and or should have known was not true, thus deliberately and erroneously misled the jury that Robernisha's hair was found in Mr. Brown's home.

King Young Brown, Jr. contends that the lower court erred in allowing another DNA analyst, other than the actual analyst that tested the hairs, testify at the trial of the instant matter. Mr. Brown contends that he was unable to confront and cross examine his accusers, and thus his 6th amendment right to confront was essentially violated.

King Young Brown, Jr. contends that the verdict of manslaughter was against the overwhelming weight of the evidence. Mr. Brown contends that he did not testify, and that through witnesses for the State Of Mississippi as well as witnesses for Mr. Brown, no one testified that he (i.e. Mr. Brown) was seen anywhere near Robernisha.

King Young Brown, Jr. also contends that the lower court erred in allowing the admission of certain autopsy photographs of Robernisha Webster. Mr. Brown contends that the photographs were "gruesome" in nature and lacked any probative value. Mr. Brown contends that such photographs were offered by the State Of Mississippi solely for the purpose of inflaming the jury.

King Young Brown, Jr. contends that the lower court erred in failing to grant his motion for directed verdict. Mr. Brown asserts that the State Of Mississippi failed to meet its burden of proof for either manslaughter or rape.

King Young Brown, Jr. also contends that the lower court erred in not granting his Motion for mistrial. Mr. Brown moved for mistrial at approximately 2:30 p.m. on the second (2nd) day of deliberations, which was after the jury had been deliberating in excess of thirteen (13) hours. Mr. Brown contends that the jury, at that time was apparently "dead - locked" and pressured by having to reach a verdict prior to the "Thanksgiving Holiday."

King Young Brown, Jr. contends that the lower court erred in failing to allow him an opportunity to impeach the State Of Mississippi's finger print analyst, even in light of well settled jurisprudence that demonstrated that the process by which fingerprint comparisons are completed, are subject to human error.

King Young Brown, Jr. contends that the lower court also committed reversible error when excused a black juror after the trial had commenced over his objections. Especially considering that there was no showing or objective finding from the lower court that the juror would not and could not deliberate and reach a verdict in fairness and based upon the evidence and the law in accordance with the lower court's instructions.

King Young Brown, Jr. contends that the conviction of forcible rape is inconsistent with the overwhelming weight of the evidence. Again, there was no testimony, nor was there any physical evidence, whatsoever, presented by the State Of Mississippi that places him (i.e. King Young Brown, Jr.) in the area of Robernisha at the time that she was allegedly raped.

ARGUMENT

I. WHETHER THE LOWER COURT ERRED IN GRANTING INSTRUCTION THE STATE'S MANSLAUGHTER INSTRUCTION MARKED AND IDENTIFIED AS S - 6.

The standard of review for challenges to jury instructions is as follows:

> Jury instructions are to be read together and taken as a whole with no one restriction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions or is without foundation in the evidence.

Humphrey v. State, 759 So.2d 368 (Miss. 2000)(Citing Heidel v. State, 587 So.2d 835, 42 (Miss. 1991)).

> Even though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction of the court. Where a defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error.

The standard for determining whether an evidentiary basis exists is as follows:

> Lessor included offense instruction should be granted unless the trial judge – and ultimately this court – can say, taking the evidence in the light most favorable to the accused, and considering all reasonable inferences which may be drawn in

> favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one element of the principal charge).

In Humphrey, the lower court refused that defendant's manslaughter instruction submission. The reason asserted by the trial court was ".. there was no basis in evidence that permitted such an instruction in light of the defense of alibi chosen by defendant Humphrey." Emphasis added. The lower court went further and stated that to grant an instruction on the lesser included offense and alibi would be inconsistent and confusing to the jurors because it would necessarily require him (i.e. defendant Humphrey) to be on the scene and make some admission that he was there. Emphasis added. Id. (Citing Hester v. State, 602 So.2d 869, 872 (Miss. 1992)).

Jury instructions will not be given unless there is an evidentiary basis for them. Burns v. State, 729 So.2d 203 (Miss. 1998); Blue v. State, 674 So.2d 1184 (Miss. 1996). In Humphrey, that defendant testified that he was not present during the burglary, did not commit the burglary and did not kill the victim. Based upon that testimony, the lower court concluded that there was no basis in the record to support such lesser included offense instructions.

Jury instructions are reviewed by reading them as a whole. McCain v. State, 2005 - KA - 01892 (Citing Russhing v. State, 911 So.2d 526 (Miss. 2005)). However, in order for a manslaughter instruction to be granted, the facts must demonstrate that

there was a sufficient basis to support a manslaughter instruction. Id. Phillips v. State, 794 So.2d 1034, 1037 (Miss 2001) (stating the high standard required for a manslaughter instruction); Turner v. State, 773 So.2d 952, 954 (Miss. Ct. App. 2000) (stating angry or reproachful words and shoving were an insufficient basis to support a manslaughter instruction absent testimony that violent uncontrollable rage appeared to exist; Gaddis v. State, 42 So.2d 724 (1949) (an early holding that words of reproach, criticism or anger are insufficient to reduce murder to manslaughter).

This Court defined manslaughter by culpable negligence as "such gross negligence ... as to evince a wanton or reckless disregard for the safety of human life, or such an indifference to the consequences of an act under the surrounding circumstances as to render such conduct tantamount to willfulness. Shumpert v. State, 935 So.2d 962 (Miss. 2006). In Shumpert, the Court opined that the "manslaughter instruction" was not supported by the evidence and was therefore, improper. In Chandler v. State, 2005 - KA - 01321 - SCT (Miss. 2006), the Court opined that the facts and testimony presented did not support the grant of a culpable negligence manslaughter instruction. In Chandler, that defendant admitted that on the night of the victim's death, that he told an investigator that he pulled the gun out and aimed it and shot.

In Chandler, none of the witnesses stated that there was an argument or that defendant Chandler and the victim struggled. All witnesses testified that the defendant

and the victim were facing each other in the woods. The witnesses also testified that they saw Chandler pull a gun and point it towards the victim. The witnesses further testified that they saw Chandler rub the gun against the victim's head. However, subsequent thereto, they turned to leave. It was at this point (i.e. when they turned to leave) that the heard gunshots and fled through the woods.

In Moody v. State, 841 So.2d 1067 (Miss. 2003), the court reiterated that the main distinction between murder and manslaughter is that malice is present in murder and absent in manslaughter. The Court went opined that a lesser included offense instruction should only be granted if an evidentiary basis is present and that such instructions should not be granted indiscriminately. Id. (Emphasis Added).

In every case cited herein above, the recurring theme is that the defendant was present. Moreover, even the defendants themselves assert their presence at the scene of the alleged incident. In the instant case, however, Appellant King Young Brown, Jr., while he did not testify, but through his witnesses, assert that he was not present when the minor decedent met her untimely demise. Even the state's witnesses can not proclaim that they saw the minor decedent and the Appellant together at anytime. Nor can any witness articulate where Robernisha Webster met her untimely demise.

In fact, the minor decedent's mother testified that she was advised that the minor decedent was last seen on another street.[2] (TR 933 See RE 64). Willie Spencer, testified that Appellant Brown was with him when the minor decedent was across the street at the park.[3] (TR 2295 See RE 85). In as much as Appellant maintains that he was not present when the minor decedent met her demise, coupled with no objective testimony that he and said minor decedent were seen with one another, demonstrates that there was no evidentiary basis whatsoever to support the trial judge's decision to grant a manslaughter instruction. When the trial court granted the manslaughter instruction, the jury, in essence, was caused to "compromise" their verdict. Emphasis added. Therefore, such an instruction was a "manifest error" and this Court should reverse since the trial judge failed to articulate the evidentiary basis for such an instruction in these premises.

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[2]Answer: Tangee on Legion Drive, Dublin Street. I went and asked her, and she told me yes, she had just saw her going around behind the church yard, so I went behind – to the side of the church yard and went around by Belfast and the alley and asked the lady with the two children have they seen her, this little girl with the red overalls and white shirt, and they told me yes, they saw her going up at Belfast Street and went on back to the house.

[3] Answer: He sat down beside of me.
Question: All right. What happened after that?
Answer: And I told him, I said go in there and see whether a ballgame is going on, so he got up and went back to see about a ballgame, so he come back to the door. He never come back outside. He come back to the door and told us you better come on, the game's going on, so I gets up and goes in and sits down. He sat down over there and never come back outdoors no more until his mother come. We never went back out there. His mother and father come, and so after the ballgame was over, we went looking at wrestling, and so he never left the house the whole time his mama left. He never left the house.

II. WHETHER THE LOWER COURT ERRED IN ALLOWING THE STATE OF MISSISSIPPI TO SOLICIT TESTIMONY IDENTIFYING KING YOUNG BROWN, JR. AND ROBERNISHA WEBSTER THROUGH MICROSCOPIC HAIR COMPARISONS

Microscopic hair and fiber comparisons are not the probative evidence they were once esteemed to be. McGowen v. State, 2002 - KA - 00676 - SCT (Miss. 2003). That Daubert v. Merrell Dow Pharmacueticals, Inc., 509 U.S. 579 (1993) has placed trial judges in the role of "gate - kepers" by bestowing upon them the duty to keep dubious scientific testimony out of the courtroom. Appellant, contends that in a "post - Daubert world", that the lower court should have called for a hearing on the admissibility of hair comparisons especially when DNA testing was available. In McFee v. State, 511 So.2d 130 (Miss. 1987), the analyst, namely Joe Andrews admitted that " .. he could not make a positive identification from a hair comparison. Id. Emphasis added.

In the instant case, the state, according to its witness, Emil Lyon states that you can not identify a person with microscopic hair comparisons. In pertinent part, his testimony is as follows:

> Question: Body area that the hair originated from. I didn't hear you go further. Can you determine the identity of a particular person with a hair comparison analysis?
>
> Answer: Not a visual microscopic exam. I can't identify one individual as being the source of that hair.
>
> Question: Okay. So you can identify a racial group.

Answer: Well, I can characterize an individual's hair and then compare it to questioned hairs.

Question: All right. So when you find a questioned hair, you can determine that this hair came from a particular racial group; is that right?

Answer: Yes, sir.

Question: And you can't go any further than that, can you?

Answer: I can say whether or not it's a head hair or a pubic hair, and I can also compare it to knowns for known individuals.

Question: Known individuals, but when you compare it to known individuals, all you can say is that it has similar characteristics of that racial group that that known individual may be in; isn't that right?

Answer: No, sir, that's not correct.

Question: You cannot identify that individual, can you?

Answer: I can say whether or not that hair has the same characteristics as the hair that I'm using as my standard.

Question: But my question was, can you determine that the known hair you have, or the unknown hair that you have comes from a particular person?

Answer: No, sir. I can't identify an individual based solely on hair characteristics.

(TR 1870 See RE 80, TR 1871 See RE 81). Despite the testimony of the state's witness, namely Emil Lyon, that "you could not identify a person using microscopic comparison", the court erred when it overruled Appellant Brown's numerous objections to the state's witnesses testifying that hairs belonged to Appellant Brown and the minor decedent Robernisha Webster. In fact, the only hair samples sent for microscopic testing were those that belonged to Appellant. However, the state's witnesses testified that at least three (3) other men came into contact with the minor decedent prior to her demise. Those men were her grandfather Oscar Merrill, Sr. and her uncles, Gerald Merrill (i.e. head) and Oscar Merrill, Jr. In as much as these three (3) men (i.e. namely Oscar Merrill, Sr. Gerald Merrill and Oscar Merrill, Jr.) came in contact with the minor decedent, hair samples should have also been obtained from these persons as well so that the experts could have properly "excluded" individuals, which is all that can be done through the technique of microscopic hair analysis. In light of the foregoing, King Young Brown, Jr. submits this issue as an error committed by the trial court in these premises and that the convictions of rape and manslaughter should be reversed.

III. WHETHER THE LOWER COURT VIOLATED KING YOUNG BROWN, JR.'S 6TH AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS WHEN THE LOWER COURT ALLOWED THE STATE OF MISSISSIPPI TO SOLICIT TESTIMONY FROM A DNA ANALYST OTHER THAN THE ANALYST THAT ACTUALLY CONDUCTED THE DNA ANALYSIS

The 6th Amendment to the United States Constitution and Article 3, Sections 14 and 26 of the Mississippi Constitution provide the accused with the right to confront those who testify against him. McGowen v. State, 2002 - KA - 00676 - SCT (Miss. 2003). It is a violation of a criminal defendant's 6th Amendment confrontation right to allow someone other that the analyst who performed the examination to testify. Barnette v. State, 481 So.2d 788 (Miss. 1985). As in McGowen, Appellant Brown did not acquiesce to the substitution of Amrita Lal - Paterson. Appellant Brown contends that Chris Larson, who actually performed the analysis, was available to testify, if the State Of Mississippi would have subpoenaed them.

In Barnette v. State, 481 So.2d 788 (Miss. 1985), that defendant was arrested for selling cocaine. At trial, the State introduced into evidence a certificate of analysis, certifying that the substance Barnette was selling was indeed cocaine. Because the analyst who tested the substance did not testify, defendant Barnette objected and was overruled. Id. The state insisted that it was acting pursuant to Section 13 - 1 - 114 (i.e. now repealed), which then authorized such unaccompanied admission of records into evidence. On appeal, this Court agreed that the trial court committed error in

admitting the certificate without the accompanying testimony of the analyst. Id. at 791. The Court went further, requiring an analyst's testimony in narcotics cases when such a certificate is introduced unless the defendant provides pretrial consent, does not object at trial and thereby waives his right under the confrontation clause. Id. at 792. However, if the defendant makes the motion during trial, it must be granted and the analyst shall be required to testify. Id.

To further demonstrate the problems that exist with not being able to confront an accuser, in the instant matter, the state's witness, namely Amrita Lal - Paterson, testified that she did not even know where the hairs (i.e. the ones that were tested) actually came from.[4] (TR 1973 See RE 82). In addition, two (2) hairs, according to Amy Winters, were actually sent to Reliagene, but Ms. Lal - Paterson testified that four (4) hairs were received. Thus, the trial court's failure to prohibit Armita Lal - Patterson from testifying in these premises was reversible error in that Appellant Brown's confrontation privilege, as articulated in the 6th Amendment to the United States Constitution, were violated. Based on the testimony of Armita Lal - Paterson, and in as much as she had no explanation as to why she received four (4) hairs and Any Winters only sent two (2) hairs invokes an additional concern as it relates to the issue of "chain

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[4] Question: All right. Can you again tell me where that came from?
Answer: At the time of testing, we had no knowledge - - Reliagene did not have knowledge of where that sample came from.
Question: You received that from who?
Answer: From the Mississippi Crime Lab from Amy Winters.

of custody." In Gibson v. State, 503 So.2d 230, 234 (Miss. 1987), this Court opined that:

> The test for the continuous possession [i.e. "chain of custody"] of evidence is whether or not there is any indication or reasonable inference of probable tampering with the evidence or substitution of the evidence. See also Ellis v. State, 2005 - KA - 01460 - SCT (Miss. 2006)).

IV. WHETHER THE VERDICT FINDING KING YOUNG BROWN, JR. GUILTY OF MANSLAUGHTER IS AGAINST AND/OR INCONSISTENT WITH THE OVERWHELMING WEIGHT OF THE EVIDENCE

A new trial should be granted if the jury's verdict "so contradicts the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice. Hawthorne v. State, 883 So.2d 86 (Miss. 2004)(Citing Frost v. State 453 So.2d 695 (Miss. 1984)). If the verdict is against the overwhelming weight of the evidence, a new trial should be ordered. Holloway v. State, 312 So.2d 700, 701 (Miss. 1975).

In Hawthorne, the Court opined that the evidence introduced by the state was "too weak" to prove sanity. The Court went further, and opined that the state did not prove beyond a reasonable doubt that defendant Hawthorne was sane. Consider in the instant case, there was absolutely no evidence whatsoever, presented by any witness, that Appellant Brown and the victim, Robernisha Webster were ever seen with one another. To allow the jury verdict to stand on the charge of manslaughter, when the state failed to introduce any evidence to meet its burden of proof for a charge of

manslaughter, has resulted in an unconscionable injustice.

V. WHETHER THE LOWER COURT ERRED IN OVERRULING KING YOUNG BROWN, JR.'S OBJECTION TO THE ADMISSION OF THE STATE OF MISSISSIPPI'S PHOTOGRAPHS MARKED AS S - 78, S - 74, S - 77, S - 76 AND S - 79 ON THE BASIS THAT SUCH PHOTOGRAPHS' PROBATIVE VALUE WAS OUTWEIGHED BY ITS PREJUDICIAL EFFECT

Photographs which are gruesome or inflammatory and lack evidentiary purpose are always inadmissible evidence. McFee v. State, 511 So.2d 130 (Miss. 1987) (Citing Cabello v. State, 471 So.2d 332, 341 (Miss. 1985); Billiot v. State, 454 So.2d 445, 459 - 460 (Miss. 1984)). Lower court judges are charged with the non - delegable duty of considering carefully, all the facts and circumstances surrounding the admission of any photograph. Mackbee v. State, 575 So.2d 16, 32 (Miss. 1990); Welch v. State, 566 So.2d 860 (Miss. 1990); McNeal v. State, 551 So.2d 151 (Miss. 1989); Stringer v. State, 500 So.2d 928 (Miss. 1986).

The evidentiary value of photographs was considered in Spann v. State, 771 So.2d 895. In Spann, the Court held that photographs are considered to have evidentiary value in the following instances: (1) aid in describing the circumstances of the killing; (2) describe the location of the body and cause of death and supplement or clarify witness testimony. Id. (Citing Westbrook v. State, 658 So.2d 847 (1995)).

In the instant case, Appellant Brown objected to S - 78, S - 74, S - 77, S - 76 and S - 79 on the basis that there prejudicial effect outweighed any probative value.

Appellant Brown maintains that the introduction of such photographs were solely meant for the purpose of inflaming the jury.

VI. WHETHER THE LOWER COURT ERRED IN ALLOWING THE ILLEGAL SEIZURE OF KING YOUNG BROWN, JR.'S HAIR, BLOOD AND SALIVA SAMPLES THUS VIOLATING THE DUE PROCESS CLAUSE OF THE 4TH, 5TH, 6TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF MISSISSIPPI

If the police require an accused to submit a blood sample, probable cause must exist to prove that the accused committed a crime. McDuff v. State, 763 So.2d 850, 854 (Miss. 2000). In order for the police to be granted a search warrant they must demonstrate to the judge evidence of underlying facts and circumstances necessary to provide a substantial basis for finding probable cause. Culp v. State, 2002 - KA - 01966 - SCT). In determining whether the issuance of a search warrant is proper, an appellant court will review the trial judge's decision to determine whether there was a substantial basis for concluding that probable cause existed. Culp v. State, 2002 - KA - 01966 - SCT (Miss. 2005)(Citing Illinois v. Gates, 462 U.S. 213 (1983)). The reviewing court will overturn the trial court if there is an absence of substantial credible evidence to support the issuance of the search warrant. Id. (Citing Magee v. State, 542 So.2d 228, 231 (Miss. 1989)).

In the instant case, personnel associated with the Greenville Police Department collected hair, blood and saliva samples from Appellant Brown on two (2) separate occasions. It is the second such occasion, for which Appellant Brown assigns as error in these premises. On direct examination, Ricky Spratlin testified as follows:

> Question: To your knowledge, was that order later rescinded.
>
> Answer: Yes, it was.
>
> Question: What did you do then?
>
> Answer: I had received a phone call from judge – she didn't call me directly. It was transferred to me, but, anyway, I received a phone call from Judge McCray, who signed the order. She said after she though about it, she said that the order was no good. She said you don't need to execute this order.

(TR 1687 See RE 75). Following Judge McCray's orders to rescind the first search warrant, due to a lack of probable cause, Ricky Spratlin, nor any other member of the Greenville Police Department articulated any additional basis for purposes of establishing probable cause to have a search warrant issued. In fact, Ricky Spratlin testified in pertinent part as follows:

> Answer: I contacted an assistant district attorney at that time for Washington County, Ms. Stacey Golman, and I explained to her what had happened and that there had been a problem, and I needed another order. I did not contact Mr. Evans at that time.

> I chose to contact Ms. Golman. I had worked beside her. I was wanting to make sure that I could get ahold of her.
>
> Question: Okay. And Ms. Golman did what?
>
> Answer: Ms. Golman got the basic information that she needed and she prepared the order.
>
> Question: Okay. And where did you go then?
>
> Answer: At that time, the only available judge that we could find that could do it at that time was Judge Hines, Ashley Hines, and he's a circuit judge, and Ms. Golman said that he's in court in Indianola.

(TR 1689 See RE 76). At no time, did Ricky Spratlin mention to Judge Hines that Judge McCray, who is also a circuit judge, had rescinded a prior search warrant because of a lack of probable cause. At no time, did Ricky Spratlin articulate what was done differently, subsequent to Judge McCray rescinding the first search warrant and the second search warrant that he had prepared by another attorney, which demonstrated probable cause. Instead of presenting the search warrant for Judge McCray's consideration and review, Ricky Spratlin decides to drive all the way to Sunflower County and have Judge Hines sign the search warrant instead. There was nothing presented in the form of testimony as to what prohibited Ricky Spratlin from presenting the second search warrant to Judge McCray again. It appears that Ricky Spratlin participated in " judge shopping" as it was quite clear that in as much as the first search

warrant was "no good" due to a lack of probable cause, then the second search warrant should have also been supressed for lack of probable cause. Thus, the trial court erred in these premises for failing to supress the hair, blood and saliva samples obtained from Appellant, which necessitates that the conviction herein should be reversed.

VII. WHETHER THE LOWER COURT ERRED IN OVERRULING KING YOUNG BROWN, JR.'S MOTION FOR DIRECTED VERDICT

The standard of review for the denial of a motion for directed verdict and judgment notwithstanding the verdict is the same. Humphrey v. State, 883 So.2d 86 (Miss. 2004) (Citing Shelton v. State, 853 So.2d 1171, 1186 (Miss. 2003.)). A directed verdict challenges the sufficiency of the evidence presented at trial. Id. This Court demands that the lower court reverse and render if the facts, viewed in the light most favorable to the State, point in favor of the defendant that reasonable men could not have arrived at a guilty verdict. Id. (Citing Seeling v. State, 844 So.2d 439 (Miss. 2003).

In the instant case, even when looking at the evidence in the light most favorable to the state, the evidence was not sufficient for either rape nor manslaughter. As for rape, medical examinations failed to reveal the presence of semen in or around the minor decedent's vaginal area. In addition, examination of the minor decedent's body failed to reveal the presence of pubic hair. Moreover, the state, through its witnesses failed to articulate that Appellant and said minor decedent ever shared the same environment. All eye witness accounts places King Young Brown, Jr. inside his home

and Robernisha Webster either: (1) at the park; (2) around near Belfast; (3) behind the church and (4) going towards the radio station. All directions, interestingly, are in the opposite direction of where King Young Brown, Jr. lived.

VIII. WHETHER THE LOWER COURT ERRED IN DENYING KING YOUNG BROWN, JR.'S MOTION FOR MISTRIAL

The standard of review for motions for mistrial is whether there was an abuse of discretion. Sipp v. State, 2004 - KP - 02287 - SCT (Miss. 2006)(Citing Tate v. Tate, 912 So.2d 919, 932 (Miss. 2005)). The trial court must declare a mistrial when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case. Id.

In Sipp, after six (6) hours of deliberation, the circuit judge called the jury back into the courtroom to check on their progress in reaching a verdict. The jury's foreman indicated that strides were being made toward a unanimous vote, but was not sure a verdict would could be reached that night. He was hopeful, however, that a unanimous decision would be reached soon. Defendant Sipp objected to allowing the jury to deliberate any longer and moved to declare a hung jury. The circuit judge refused, recessed the court and instructed the jury to return the next morning to continue deliberations.

This Court has acknowledged that it is within the sound discretion of the trial judge as to how long he will keep the jury in deliberation and this discretion will not be reviewed on appeal unless there has been a clear abuse of discretion. Id. (Citing Greenlee v. State, 725 So.2d 816, 824 (Miss. 1998)(quoting Dixon v. State, 306 So.2d 302, 304 (Miss. 1975)). Additionally, there is no "bright - line" rule as to when a judge should grant a continuance or a recess, and this Court's analysis must focus on the unique facts of the case. Id. (Citing Hooker v. State, 716 So.2d 1104, 1113 - 1114 (Miss. 1998)). Emphasis added.

During the jury deliberations of Williams v. State, 868 So.2d 346 (Miss. 2003), the jury sent a note asking the judge if the victim had said "stop" or "no" prior to the alleged rape. The trial judge responded by instructing the jury to rely on their own recollection of the testimony. A few hours later, the jury reported that it was deadlocked on both charges. The defense, in response, moved for a mistrial and objected to further instructions being given to the jury. The court denied the motion and brought the jury out to determine the extent of the deadlock, which was discovered to be 11 to 1. The trial court asked the jury foreman whether further deliberations would help, and the foreman responded that he did not "believe that 6 months would help." Id. In response, the court gave an additional instruction, over the defendant's objection. The court also verbally admonished the jury that ".. we've tried this case for

two days. You've only been deliberating now less that three hours. I'm going to have you return to the jury room..."

In the instant case, the jury retired to began its deliberations at approximately 7:05 p.m., Monday, November 21, 2005. At approximately 11:45 p.m., that same evening, the trial court recessed the jury to resume their deliberations the following morning. (TR 2493 See RE 86, TR 2494 See RE 87). On Tuesday, November 22nd, at approximately 2:25 p.m., one of Appellant Brown's attorneys moved the trial court for mistrial on the basis that the jury had been deliberating approximately nine (9) hours and still had not reached a verdict. (TR 2496 See RE 88). In addition, said attorney requested that the trial court call the jury to see whether they reached a verdict. To the extent that the jury reported that no such verdict had been reached, said counsel advised that a request for mistrial would be asserted. (Id.) Despite the request, the trial court refused to grant mistrial as well as refused to even call the jury to see whether they were making any progress towards rendering a verdict.

Appellant Brown contends that the trial court's failure to grant mistrial in these premises was an abuse of discretion. Appellant contends that the jury had been sequestered for more than a week. The trial court convened court during the weekend and the jury received the case two (2) days prior to the start of the Thanksgiving holiday season. Appellant Brown contends that the jury was essentially forced to

render a "compromise" manslaughter verdict, as there was absolutely no evidence presented whatsoever to substantiate such a verdict. Emphasis added.

IX. WHETHER THE LOWER COURT ERRED IN LIMITING KING YOUNG BROWN, JR.'S ABILITY TO CROSS EXAMINE AND/OR IMPEACH THE STATE OF MISSISSIPPI'S FINGERPRINT EXPERT

This Court has held that under Rule 611 (b) of the Mississippi Rules Of Evidence, that counsel conducting cross examination is entitled to broad discretion in the subject matter of the questioning. Culp v. State, 2002 - KA - 01966 - SCT (Miss. 2005)(Citing Craft v. State, 656 So.2d 1156 (Miss. 1995)). The trial court has discretion to restrict that latitude when the subject matter of questioning has no relevance. Id. (Citing Mixon v. State, 794 So.2d 1007, 1013 (Miss. 2001)). However, lack of relevance will be found only when the information that counsel is attempting to elicit is wholly extraneous and unprovoked by direct examination. Id. (Citing Black v. State, 506 So.2d 264 (Miss. 1987)). One is deprived of the right to cross - examine when the trial court fundamentally and substantially restricts it. Id. (Citing Murphy v. State, 453 So.2d 1290 (Miss. 1984)). This Court has interpreted this to mean that the party is deprived of the opportunity without fault on their part. Id.

In the instant case, the trial court limited Appellant's ability to attack the testimony solicited by the state's fingerprint expert John Byrd. During cross examination, Mr. Byrd agreed that fingerprint analysis had come under scrutiny as not

being as "reliable" as you may tend to think. During that cross examination, Appellant attempted to demonstrate that a "standard" had been since adopted by the FBI which suggest that in order to identify the "owner" of a set of prints, that a twelve - point standard should be employed. Despite Appellant's attempts, the trial court prohibited Appellant's attempts in this regard, thus, limiting his ability to properly cross examine Mr. Byrd. Thus, Appeallant assigns this issue as reversible error committed by the trial court in these premises.

X. WHETHER THE COURT ERRED IN DISMISSING AN AFRICAN AMERICAN JUROR FROM THE JURY

The 6th Amendment of the United States Constitution guarantees a criminal defendant the right to a fair trial before an impartial jury Earley v. State, 595 So.2d 430 (Miss. 1992). Appellant Brown presents for error, the trial court's dismissal of an African American male juror. In the instant case, the subject juror was dismissed for being out of his hotel room and allegedly not following directions by talking with other people. (TR 1642 See RE 70, TR 1643 See RE 71, TR 1644 See RE 72, TR 1645 See RE 73). The jury baliff, however, testified that the he did not witness the subject juror talking with anyone. Therefore, Appellant contends that he was denied the right to a fair trial before an impartial jury. Thus, the verdicts in these premises should be reversed.

XI. WHETHER THE VERDICT FINDING KING YOUNG BROWN, JR. GUILTY OF FORCIBLE RAPE WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

When inquiring whether sufficient evidence exists to support a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Goodin v. State, 2006 - KA - 00756 - COA (Miss. 2007) (Citing Bush v. State, 895 So.2d 836, 843 (Miss. 2005)). This Court must reverse and render if the facts and inferences "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty. Id. (Citing Edwards v. State, 469 So.2d 68, 70 (Miss. 1985)). Emphasis added.

Rape is defined as "forcible sexual intercourse with any person. Goodin v. State, 2006 - KA - 00756 - COA (Miss. 2007)(Citing Section 97 - 3 - 65 (4) (a) of the Mississippi Code Annotated, 2006 Revised.)). "Sexual intercourse" is limited to penis - vagina penetration. Id. (Citing Section 97 - 3 - 65 (6) of the Mississippi Code Annotated, 2006 Revised)). Force is also an essential element of rape. Id.

Appellant contends that no rational jury could have found him guilty of rape because the State did not present any evidence that first of all, that he was even with Robernisha Webster. In addition, Appellant further contends that no rational jury could

have found him guilty of rape because the State failed to present any evidence at the trial of the instant matter that "force" was used against Robernisha Webster.

The state's own witness could not confirm that anyone engaged in sexual intercourse with the decedent, Robernisha Webster. Consider the testimony of Amy Winters, where she states in pertinent part, as follows:

> Question: Okay. And you performed a semen test on swabs that were taken – vaginal swabs taken from Robernisha Webster; right?
>
> Answer: That's correct.
>
> Question: And your test came up negative; right?
>
> Answer: Yes, sir.
> Question: You performed semen tests on swabs from the rectum; right?
>
> Answer: Yes.
>
> Question: Came up negative; right?
>
> Answer: Yes, sir.

(TR 1807 See RE 91, TR 1808 See RE 92). In addition, testimony solicited from Ms. Winters further stated in pertinent part, as follows:

> Question: And the question was did it actually mean that no sexual activity occurred, and you stated no; right?
>
> Answer: That's correct.

Question: It's also a pretty good indication, also, that none occurred; right?

Answer: Not necessarily. The absence of semen does not indicate that sexual activity did not occur. It just might mean that no ejaculation or no deposit of semen occurred during the act.

Question: Or, maybe, it just didn't occur at all, would you agree?

Answer: That is possible, yes.

(TR 1811 See RE 79). In addition, the state's witness, namely Dr. Stephen Hayne admitted that he was uncertain, as to whether the decedent, Robernisha Webster had engaged in penal - vaginal intercourse. In pertinent part, Dr. Hayne states as follows:

Answer: Only that a nonsharp edged instrument produced the penetration. It could be a penis. It could be a finger. It could be some other object, counsel.

Question: Okay. But it's consistent with more that one item other than a male penis; is that correct?

Answer: Yes, counsel.

(TR 1775 See RE 77).

In addition, the State failed to produce any evidence that the decedent's body revealed any signs that she had attempted to defend against her attacker. In fact, Dr. Haynes testified that when conducting his examination, he did not find anything remarkable about the child's fingernails. In pertinent part, he states as follows:

> Question: Yes, sir. Thank you. Doctor, could you describe Robernisha's fingernails.
>
> Answer: I did, counsel.
>
> Question: Okay. And can you describe them.
>
> Answer: They were intact. I saw no tears of them and I really didn't see any significant foreign material under them, counsel.
>
> Question: Okay. Now, tell us, doctor, what's the purpose of collecting fingernail scrapings?
>
> Answer: Several reasons, counsel. There may be some foreign material under there of significance. There may not be any significant material under there, so both of those questions would have to be answered, and, also, it's a national standard one do that collection.

(TR 1777 See RE 78). In as much as Dr. Hayne failed to collect any matter beneath the decedent's fingernails suggest that perhaps the minor child may have even known her assailant. There was testimony solicited that the minor child was taught not to talk with strangers. There was testimony solicited from the decedent's mother, Cynthia Webster, that the minor decedent had never been inside Appellant Brown's home. Thus, the minor decedent did not know the Appellant.

Based on the state's failure to produce any evidence satisfying the essential elements for rape, Appellant contends that the verdict is against the overwhelming weight of the evidence.

CONCLUSION

For the foregoing reasons, Appellant asserts the lower court has erred and should therefore, be reversed and same shall be rendered and/or in the alternative remanded to the lower court.

Respectfully submitted,

KING YOUNG BROWN, JR., APPELLANT

BY: _____

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CERTIFICATE OF SERVICE

I, Brandon I. Dorsey, the undersigned attorney and counselor in these premises, hereby certify that I have on this day caused to be served, via United States mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief to the following:

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SO CERTIFIED, this the 5th day of November of 2007.

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