CERTIFICATE OF INTERESTED PERSONS

DANIEL JOE MARTIN — APPELLANT

v. — NO. 2006-TS-00145-SCT

STATE OF MISSISSIPPI — APPELLEE

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 judges of this Court may evaluate possible disqualification or recusal.

1. State of Mississippi;
2. Daniel Joe Martin, Defendant-Appellant;
3. Brad McCulloch, Esq.
   Assistant District Attorney, Fourth Judicial District;
4. David L. Brewer, Esq.
   Appellant Attorney for Daniel Joe Martin,

David L. Brewer, MSB # [redacted]
Neyland & Brewer, PLLC
P.O. Box 3373
Ridgeland, MS 39158
(601) 605-28897

Appellant's Brief

SUMMARY OF THE ARGUMENT

I. Whether the Leflore County Circuit Court was clearly erroneous and erred when it failed to render a directed verdict of acquittal in favor of Daniel Joe Martin, since Martin was the only eye witness to the events surrounding Taci's burns, his version of events were reasonable and not substantially contradicted by the State's witness, by the physical evidence or by the facts of common knowledge and as such Martin's's version of how Taci became burned, on August 22, 2003, must be accepted as true?

II. Whether the Leflore County Circuit erred and was clearly erroneous in allowing the State to admit into evidence testimony that the Leflore County Youth Court had entered an adjudication finding that Taci had been abused and testimony that Martin had caused an automobile accident while he was operating a motor vehicle under the influence of alcohol as such testimony was irrelevant to the crime charged, was misleading to the jury and highly prejudicial to Martin?

III. Whether the Leflore County Circuit Court was clearly erroneous and erred when it failed to overturn the jury's verdict finding Daniel Joe Martin guilty of felony child abuse since the same was rendered against the overwhelming weight of the evidence produced at trial?

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STATEMENT OF THE CASE

On December 16, 2004, Daniel Joe Martin in a one count indictment, by the Leflore County Grand Jury as follows: That Daniel Joe Martin, on or about the 22nd day of August, 2003, in Leflore County, did willfully, unlawfully, intentionally and feloniously burn or torture or whip, strike, or otherwise abuse or mutilate Taci Glidden, a child, causing serious bodily harm to said child. The trial on the allegation contained in the indictment commenced on November 29, 2005, with the Honorable Ashley Hines, Circuit Court Judge, presiding. On November 29, the jury returned a guilty verdict finding Daniel Joe Martin guilty of the crime of felony child abuse. On December 12, 2005, Martin was sentenced to serve a term of twenty, 20, years in the custody of the Mississippi Department of Corrections, as a consequence of his felony child abuse conviction. On December 13, 2005,Daniel Joe Martin filed a Motion for New Trial or Judgment Notwithstanding Verdict which Motion was denied on January 4, 2006. Thereafter, on January 9, 2006, Daniel Joe Martin filed the within appeal presenting this Court with the following issues, to-wit:

I. THE LEFLORE COUNTY CIRCUIT COURT WAS CLEARLY ERRONEOUS AND ERRED WHEN IT FAILED TO RENDER A DIRECTED VERDICT OF ACQUITTAL IN FAVOR OF DANIEL JOE MARTIN, SINCE SINCE MARTIN WAS THE ONLY EYE WITNESS TO THE EVENTS SURROUNDING TACI'S BURNS, HIS VERSION OF EVENTS WERE REASONABLE AND NOT SUBSTANTIALLY CONTRADICTED BY THE STATE'S WITNESSES, BY THE PHYSICAL EVIDENCE OR BY FACTS OF COMMON KNOWLEDGE AND AS SUCH MARTIN'S VERSION OF HOW TACI BECAME BURNED, ON AUGUST 22, 2003, MUST BE ACCEPTED AS TRUE.

II. THE LEFLORE COUNTY CIRCUIT COURT ERRED AND WAS CLEARLY ERRONEOUS IN ALLOWING INTO EVIDENCE TESTIMONY THAT THE LEFLORE COUNTY YOUTH COURT HAD ENTERED AN ADJUDICATION FINDING THAT TACI HAD BEEN ABUSED AND TESTIMONY THAT MARTIN HAD CAUSED AN

AUTOMOBILE ACCIDENT WHILE HE WAS OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF ALCOHOL AS SUCH TESTIMONY WAS IRRELEVANT TO THE CRIME CHARGES, MISLEADING TO THE JURY AND HIGHLY PREJUDICIAL TO MARTIN.

III. THE LEFLORE COUNTY CIRCUIT COURT WAS CLEARLY ERRONEOUS AND ERRED WHEN IT FAILED TO OVERTURN THE JURY'S VERDICT FINDING DANIEL JOE MARTIN GUILTY OF FELONY CHILD ABUSE THE SAME WAS RENDERED AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE PRODUCED AT TRIAL.

STATEMENT OF THE FACTS

In August of 2003, Daniel Joe Martin was living in the home of his mother, Brenda Ray, in Itta Bena, Mississippi. Also residing in the home was Amy Preston Martin's girl friend and her two Children, Taci Gliddon and Daniel Joe Martin Jr.. Taci Gliddon was approximately two years and nine months old and Daniel Joe Martin, Jr. was approximately four months old. T. Vol. 1, Pg. 102. Daniel Joe Martin Jr., was the natural child of Daniel Joe Martin and Amy Preston while Taci Gliddon was Amy Preston's child from a previous relationship.

In the early afternoon of August 22, 2003, Amy Preston and Brenda Ray left the family home together to go to work. On that day, both Amy and Brenda worked a 2:00 p.m. to 7:00 p.m. shift at the local Dollar General Store. Brenda was employed as the manager of the store and Amy served as her assistant manager. T. Vol. 1, Pg. 96. On that day Daniel Joe Martin stayed home with the children, Taci Gliddon and Daniel Joe Martin Jr.. At the time Daniel Joe Martin was staying home recuperating from injuries he had recently received in an automobile accident. In fact, Martin had fractured his pelvis, fractured four of his ribs, fractured his collar bone and injured his knee in the automobile accident that occurred in June of 2003. T. Vol. 1, Pg. 107.

On August 22, 2006, between 5:30 and 6:00 p.m., Martin and his two children, Taci Gliddon and Daniel Joe Martin Jr., were watching television, when Martin discovered that Taci had soiled herself. T. Vol. 2, Pg. 164-65. Taci had been having trouble with soiling herself, T. Vol. 1, Pg. 109, and on that day she was wearing a potty training jumper, which Martin noticed was leaking feces.

Martin told Taci to go to the bathroom so he could clean her up. T. Vol. 2, Pg. 165. Taci was embarrassed become upset and started crying. *Id.* Martin joined her in the bathroom and began to run Taci a bath. Martin removed Taci's jumper and cleaned her off as best he could. Approximately three to four inches of water were in the tub. *Id.* Martin's son Daniel began to cry. Taci, who at the time was almost three years old would normally get in and out of the tub herself. T. Vol. 1, Pg. 108-109. Martin instructed Taci to get in the tub and start cleaning herself off. T. Vol. 2, Pg. 165. Martin then went to check on Daniel. T. Vol. 2, Pg. 166.

When Martin left the bathroom he was only about eight feet away with young Daniel. T. Vol. 1, Pg. 107. While Martin could not see Taci in the tub, he did hear the water running and Taci's continued sobs. *Id.* About a minute after Martin left Taci, Taci came out of the bathroom and Martin noticed that she had scalding burns on her feet and legs. T. Vol. 2, Pg. 167. Martin immediately went in the kitchen and got a bowl of cool water for Taci to put her feet in. *Id.* Martin sat on the love seat with Taci until she nodded off, at which time he laid Taci down in the bedroom. *Id.*

Martin's father, Alvin, arrived at the house around 7:15 that evening. *Id.* At that time Taci was laying on the love seat. Taci had woken up approximately twenty minutes prior to his arrival and walked to the love seat. T. Vol. 2, Pg. 168. Shortly after Alvin's arrival, Amy and Brenda returned home. When Amy and Brenda first arrived home, Martin advised them that Taci had burned herself in the tub. Amy went to Taci, who was sitting on the love seat and was not crying, and examined her feet. T. Vol. 1, Pg. 110. Amy became concerned and took Taci to the emergency

room at the Greenville - Leflore Hospital. *Id.* While at the hospital Taci was treated by doctor Jeffery Lee Hardin, M.D., a pediatric emergency medicine doctor. T. Vol. 1, Pg. 123, 126. Doctor Hardin then referred Taci to the Firefighter Burn Center in Grenville where she was seen by a burn specialist, Dr. Robert T. Love, III, M.D.. T. Vol. 1, Pg. 127. Dr. Love examined Taci and observed that while Taci's burns made him suspicious that child abuse could be a factor, that it was impossible from him to say how she became burned. *See*, Letter opinion of Dr. Love., Trial Exhibit "D-1", attached hereto as Exhibit "A"to Appellant's Brief.

At trial testimony was introduced that the Leflore County Youth Court had initially prohibited Martin from living with Amy and the children. Amy testified after Taci was released from the hospital that she and the children went and stayed with Martin's father, Alvin, for a month and half and then again moved into the home with Martin's mother in Itta Bena, Mississippi. In 2004, the family eventually moved to Yazoo City Mississippi. T. Vol. 1, Pg. 96, 103. When Amy learned that the Mississippi Department of Human Services closed the case on the children, Martin moved back into the family home with her and the children. T. Vol. 1, Pg. 127, T. Vol. 2, Pg. 163-64.

At trial Amy testified that Martin never told her that he held Taci in the tub and that she never told the Doctor Hardin or the Mississippi Department of Human Services that Martin abused Taci. T. Vol. 1, Pg. 107. At trial Martin vehemently denied abusing Taci and with particularity denied holding Taci in the tub on August 22, 2003. T. Vol. 2, Pg. 178. Martin also denied ever confiding in Amy that he had abused Taci. *Id.* Prior to the trial, Martin and Amy, who had lived together with

Taci and the other children for quite some time were married. T. Vol. 1, Pg. 95-96.

ARGUMENT

I. THE LEFLORE COUNTY CIRCUIT COURT WAS CLEARLY ERRONEOUS AND ERRED WHEN IT FAILED TO RENDER A DIRECTED VERDICT OF ACQUITTAL IN FAVOR OF DANIEL JOE MARTIN, SINCE MARTIN WAS THE ONLY EYE WITNESS TO THE EVENTS SURROUNDING TACI'S BURNS, HIS VERSION OF EVENTS WERE REASONABLE AND NOT SUBSTANTIALLY CONTRADICTED BY THE STATE'S WITNESSES, BY THE PHYSICAL EVIDENCE OR BY FACTS OF COMMON KNOWLEDGE AND AS SUCH MARTIN'S VERSION OF HOW TACI BECAME BURNED, ON AUGUST 22, 2003, MUST BE ACCEPTED AS TRUE.

The Leflore County Circuit Court erred in failing grant Martin's motion for a directed verdict of acquittal under the Weathersby Rule. In considering a defendant's motion for directed verdict the trial judge must accept as true all evidence favorable to the State and all reasonable inferences flowing therefrom. *Lynch v. State*, 2004 WL 1173451,19 (Miss. 2004). Evidence favorable to the defendant must be disregarded. *Walters v. State*, 720 So.2d 856, 866 (Miss.1998) (quoting *Ellis v. State*, 667 So.2d 599, 612 (Miss.1995)). However, in *Weathersby v. State*, 165 Miss. 207, 209, 147 So. 481, 481 (1933), the Mississippi Supreme Court concluded that if "the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge." *Id.* Thus, "[a] defendant who met the Weathersby Rule would be entitled to a directed verdict of acquittal." *Walters*, 720 So.2d at 866 (quoting *Blanks v. State*, 547 So.2d 29, 33 (Miss.1989)).

The Weathersby Rule is nothing more than a restatement of the standard of review, that if the defendant and his witnesses are the only eyewitnesses to the homicide and if their version of what happened is both reasonable and consistent with innocence and if, further, there is no contradiction of that version in the physical facts, facts of common knowledge or other credible evidence, then surely it follows that no reasonable juror could find the defendant guilty beyond a reasonable doubt. Under such circumstances the Supreme Court has always mandated that peremptory instructions be granted whether under the label Weathersby or otherwise. *Green v. State*, 614 So.2d 926, 931 (Miss.1992); *Harveston v. State*, 493 So.2d 365, 370 (Miss.1986); *Pritchett v. State*, 560 So.2d 1017, 1019 (Miss.1990).

In *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933), the Supreme Court was faced with a situation where the only eyewitnesses to a homicide were the defendant and his wife. According to their testimony, a case of self-defense was sufficiently made out, but the State argued that the physical facts contradicted the story. The *Weathersby* Court found that pertinent circumstances corroborated the defendant's story as well as the uncontradicted reputation of the deceased in the community for violence. The *Weathersby* Court noted that the physical evidence presented at trial may have contradicted the defendant's version of the killing because the State put on evidence that the shot went through some growing corn in such a manner as to have shown that the defendant could not have been standing where he said he was standing. The Supreme Court nevertheless reversed the defendant's conviction anyway and explained that "[a]s we see it, under this particular record, these differences are in detail and not in controlling substance. The appellant and his wife ... appeared to have been considerably frightened as the deceased ... approached.... Thus,

as would be expected, there there [sic] are some minor discrepancies in the testimony ... which rather strengthens their testimony than weakens it, because this evidences the absence of a previously prepared and agreed story" *Weathersby*, 147 So. at 482.

The Weathersby Rule is still applicable today. *Pritchett v. State*, 560 So.2d 1017, 1019 (Miss.1990); *Blanks v. State*, 547 So.2d 29, 33 (Miss.1989); *Lanier v. State*, 533 So.2d 473, 490 (Miss.1988). A Weathersby analysis by an appellate court amounts to a de novo review. *Green*, 614 So.2d at 931. The Weathersby Rule, however, is only applicable where the defendant's version is reasonable, unopposed by other testimony, and is uncontradicted by the physical evidence. *Turner v. State*, 796 So.2d 998, 1002 (Miss.2001).

In the case *sub judice*, Daniel Joe Martin was the only person who was with Taci at the time she suffered her burns and the only person who testified at the trial who had any first hand knowledge on how Taci received those burns. His version of how Taci burned herself is plausible and reasonable. Martin testified that on August 22, 2006, between 5:30 and 6:00 p.m., that he and his two children, Taci Gliddon and Daniel Joe Martin Jr., were watching television, when Martin discovered that Taci had soiled herself. Martin explained that Taci had been having trouble with soiling herself, and on that day she was wearing a potty training jumper, which Martin noticed was leaking feces. Martin testified that he told Taci to go to the bathroom so he could clean her up. T. Vol. 2, Pg. 165. Taci was embarrassed become upset and started crying. *Id.* Martin stated that he then joined Taci in the bathroom and began running her a bath. Martin testified that he removed Taci's jumper and cleaned her off as best he could. Martin stated that only three to four inches of

water were in the tub at the time Martin's son Daniel began to cry. *Id.* Both Martin and Amy testified that it was not unusual for Taci to normally get in and out of the tub herself. T. Vol. 1, Pg. 108-109. Martin stated that he instructed Taci to get in the tub and start cleaning herself off. T. Vol. 2, Pg. 165. Martin then went to check on Daniel. T. Vol. 2, Pg. 166. Martin testified that when he left the bathroom he was only about eight feet away with young Daniel and that while he could not see Taci in the tub, he did hear the water running. Martin testified that approximately one minute after he left the bathroom that Taci came into the living room and he noticed that she had scalding burns on her feet and legs and that he Martin immediately went in the kitchen and got a bowl of cool water for Taci to heel her burns.

Martin's description of the events that occurred on August 22, 2003, were reasonable and plausible. At trial the State attempted to elicit testimony from Amy that either Martin told her that he held Taci in the tub of hot water or that Taci told her that Martin had caused her burns. At trial Martin vehemently denied abusing Taci and with particularity denied holding Taci in the tub on August 22, 2003. T. Vol. 2, Pg. 178. Martin also denied ever confiding in Amy that he had abused Taci. *Id.* Amy also denied that she ever told the Doctor Hardin or the Mississippi Department of Human Services that Martin abused Taci. T. Vol. 1, Pg. 107.

The only testimony provided by the State that support the position that Martin had intentionally scalded Taci was introduced by Dr. Hardin. At the commencement of his testimony, Dr, Martin admitted he was not an expert in burns and he was only accepted by the Court as an expert in pediatric emergency medicine with special knowledge of child abuse. T. Vol. 1, Pg. 123.

On cross examination Dr. Hardin that Taci could have received her burns in as little as three to four seconds. T. Vol. 1, Pg. 136. Dr Hardin's opinion that Taci's burns were intentionally inflicted as opposed to accidental appears to be solely based on two observations: one that Taci had burns on both feet; and, two that he did not observe any splash burns which he believed would be present in an accidental burning. T. Vol. 1, Pg. 137-38. Dr Hardin admitted that Taci's burns could have been accidental but in his opinion such a scenario would be hard to imagine. *Id.* Doctor Hardin testified that he referred Taci to a burn specialist at the Firefighter Burn Center in Grenville, Dr. Robert T. Love, III, M.D.. T. Vol. 1, Pg. 127. During his testimony Dr. Hardin recognized that Dr. Love, after examining Taci's burns, stated in a letter opinion that it was impossible from him to determine how Taci became burned. *See*, Letter opinion of Dr. Love., Trial Exhibit "D-1", attached hereto as Exhibit "A"to Appellant's Brief.

Q. . . . Does or does not the letter from Dr. Love that [Taci's burns] were not necessarily from intent to burn?

A. Say that again now.

Q. That it was not necessarily done intentionally.

A. I think the letter says it's impossible to say what happened the way the family described it or not. I take [Dr. Love] at his word.

T. Vol. 1, Pg. 127. Moreover, never in his testimony ever states that Taci, the only other person present at the time of the burns ever told him that Martin inflicted those burns on her.

Martin's description of the events that occurred on August 22, 2003, were reasonable, plausible and supported by the testimony of Amy. The only evidence produced by the State that Martin abused Taci was Dr. Hardin's opinion the he believed that he can tell from Taci's injuries that someone had to have held Taci in hot water four three or four seconds. Hardin does admit however that Dr. Love's, the burn specialist's, opinion is that while the type of burns suffered by Taci are suggestive of child abuse that they are in no way conclusive of child abuse. The Leflore County Circuit Court was clearly erroneous and erred when it failed to render a directed verdict of acquittal in favor of Daniel Joe Martin, since Martin was the only eye witness to the events surrounding Taci's burns, his version of events were reasonable and not substantially contradicted by the State's witness, by the physical evidence or by the facts of common knowledge and as such Martin's's version of how Taci became burned, on August 22, 2003, must be accepted as true

II. THE LEFLORE COUNTY CIRCUIT COURT ERRED AND WAS CLEARLY ERRONEOUS IN ALLOWING INTO EVIDENCE TESTIMONY THAT THE LEFLORE COUNTY YOUTH COURT HAD ENTERED AN ADJUDICATION FINDING THAT TACI HAD BEEN ABUSED AND TESTIMONY THAT MARTIN HAD CAUSED AN AUTOMOBILE ACCIDENT WHILE HE WAS OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF ALCOHOL AS SUCH TESTIMONY WAS IRRELEVANT TO THE CRIME CHARGES, MISLEADING TO THE JURY AND HIGHLY PREJUDICIAL TO MARTIN.

In the Case at bar the Leflore County Circuit Court erred in allowing the State to admit into evidence testimony that the Leflore County Youth Court had entered an adjudication finding that Taci had been abused and testimony that Martin had caused an automobile accident while he was operating a motor vehicle under the influence of alcohol. T. Vol 2., Pg. 170. A considerable portion of the State's case in chief involved testimony concerning the youth court's adjudication of Taci as

abused and its related no contact orders. These adjudication orders and no contact orders were subsequent to the August 22, 2003 incident, were completely irrelevant as to whether Martin abused Taci and testimony was only elicited by the State concerning these orders to suggest to the jury that a previous Court had examined the allegations of abuse and found some fault with Martin.

The admissibility of evidence rests within the discretion of the trial court, and reversal will be appropriate only when an abuse of discretion resulting in prejudice to the accused occurs. *Clemons v. State*,732 So. 2d 883, 887 (Miss. 1999). The general rule is that evidence of a crime, other than the one for which the accused is being tried, is not admissible. *Ballenger v. State,* 667 So. 2d 1242, 1256 (Miss. 1995) (citing *Duplantis v. State*, 644 So. 2d 1235, 1246 (Miss. 1994)). This Court has consistently held the admission of evidence of unrelated crimes for the purpose of showing the accused acted in conformity therewith is reversible error, but admission for the above reasons is permissible. *Ballenger,* 667 So.2d at 1256. This state has long adhered to the rule that the issue on a criminal trial should be single and that the evidence should be limited to what is relevant to the "single" issue. Evidence of a prior criminal activity on the part of one criminally accused is inadmissible where the prior offense has not resulted in a conviction. *Tobias v. State,* 472 So. 2d 398, 400 (Miss. 1985); *Donald v. State,472 So. 2d 370,* (Miss.1985). "Mississippi follows the general rule that proof of a crime distinct from that alleged in the indictment should not be admitted in evidence against the accused." *Eubanks v. State*, 419 So., 2d 1330, 1331 (Miss. 1982).

> The reason and justice of the rule is apparent, and its observance is necessary to prevent injustice and oppression in criminal prosecutions. Such evidence tends to divert the minds of the jury from the true issue, and to prejudice and mislead them, and, while the accused may not be able to meet a specific charge, he cannot be prepared to defend against all other charges that may be brought against him. "To permit such evidence," says Bishop, "would

be to put a man's whole life in issue on a charge of a single wrongful act, and crush him by irrelevant matter, which he could not be prepared to meet."

Id. (citing 1 Bish. Crim. Proc. §§1124; *Floyd v. State*, 166 Miss. 15, 35,148 So. 266, 230 (1933)). Rule 404(b) of the Mississippi Rules of Evidence states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Rule 404(b) also instructs that such evidence "may . . . be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See, *Carter v. State*, 450 So. 2d 67, 69 (Miss. 1984).

Determining whether to admit evidence under Rule 404(b) requires a two part analysis. "The evidence offered must (1) be relevant to prove a material issue other than the defendant's character; and (2) the probative value of the evidence must outweigh the prejudicial effect." *Crawford v. State*, 754 So. 2d 1211 (Miss. 2000). Part two is necessary because M.R.E. 403 is the ultimate filter through which all otherwise admissible evidence must pass. *Id.* Pursuant to M.R.E. 403, evidence although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Evidence of uncharged misconduct or other offenses is inadmissible where the only purpose for the evidence is to raise the `forbidden inferential sequence,' i.e., to suggest that because the defendant engaged in other misconduct or committed another offense, he probably committed the offense for which he is then on trial." *King v. State*, 857 So. 2d 702 (Miss 2003).

In the case *sub judice* testimony was presented to the jury by the State the Leflore County Youth Court had made a finding with regard to Martin's involvement with Taci's burns and that Martin had caused a motor vehicle accident while under the influence of alcohol. This testimony was irrelevant to the jury in determining whether Martin had abused Taci on August 22, 2003, and was extremely prejudicial. The Leflore County Circuit erred and was clearly erroneous in allowing the State to admit into evidence testimony that the Leflore County Youth Court had entered an adjudication finding that Taci had been abused and testimony that Martin had caused an automobile accident while he was operating a motor vehicle under the influence of alcohol as such testimony was irrelevant to the crime charged, was misleading to the jury and highly prejudicial to Martin.

III. THE LEFLORE COUNTY CIRCUIT COURT WAS CLEARLY ERRONEOUS AND ERRED WHEN IT FAILED TO OVERTURN THE JURY'S VERDICT FINDING DANIEL JOE MARTIN GUILTY OF FELONY CHILD ABUSE THE SAME WAS RENDERED AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE PRODUCED AT TRIAL.

In order to preserve the issue that a defendant's conviction was against the overwhelming weight of the evidence for consideration on appeal, the defendant must raise the issue in a motion for new trial. *Howard v. State*, 507 So.2d 58, 63 (Miss.1987). "The decision to grant or deny a motion for new trial is discretionary with the trial court. *McClain v. State*, 625 So.2d 774, 781 (Miss.1993)." *Murray v. State,* 2001 WL 1468924 (Miss. Nov 20, 2001). In determining whether a verdict is against the overwhelming weight of the evidence, the reviewing court must accept as true the evidence presented as supportive of the verdict, and we will only disturb the verdict when

convinced that the circuit court has abused its discretion in failing to grant a new trial or if the final result will result in an unconscionable injustice. *Ford v. State*, 753 So.2d 489, 490 (Miss . 1999); *Danner v. State*, 748 So.2d 844, 846 (Miss.1999). See also *Turner v. State*, 726 So.2d 117, 125 (Miss.1998); *Herring v. State*, 691 So.2d 948, 957 (Miss.1997); *Groseclose v. State*, 440 So.2d 297, 300 (Miss.1983). The Mississippi Supreme Court in *Brooks v. State*, 695 So.2d 593, 594 (Miss.1997) set forth the standard of review to be applied when the assignment of error turns on the sufficiency of evidence. In *Brooks* the Court held that when on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, the reviewing court's authority to interfere with a verdict is quite limited. Evidence is considered in the light most consistent with the verdict, however if the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. *Id.* at 594. This standard of review permits this Court to reverse the Leflore County Circuit Court's judgment of Daniel Joe Martin's guilt of Felony child abuser only if it can say that the facts and inferences so considered point in favor of Martin with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty. See *Porter v. State*, 749 So.2d 250, 257 (Miss. 1999).

In the case at bar, based upon the evidence produced, at trial reasonable men could not have found beyond a reasonable doubt that Martin was guilty of felony child abuse. Daniel Joe Martin was the only person who was with Taci at the time she suffered her burns and the only person who testified at the trial who had any first hand knowledge on how Taci received those burns. His version of how Taci burned herself is plausible and reasonable. Martin testified that on the date in

question that he and his two children, Taci Gliddon and Daniel Joe Martin Jr., were watching television, when Martin discovered that Taci had soiled herself. Martin explained that Taci had been having trouble with soiling herself, and on that day she was wearing a potty training jumper, which Martin noticed was leaking feces. Martin testified that he told Taci to go to the bathroom so he could clean her up. Martin stated that he then joined Taci in the bathroom and began running her a bath. Martin testified that he removed Taci's jumper and cleaned her off as best he could. Both Martin and Amy testified that it was not unusual for Taci to normally get in and out of the tub herself. Martin stated that he instructed Taci to get in the tub and start cleaning herself off. Martin then only left the bathroom for a moment and then Taci came into the living room and he noticed that she had scalding burns on her feet and legs and that he Martin immediately went in the kitchen and got a bowl of cool water for Taci to heel her burns.

Martin's description of the events that occurred on August 22, 2003, were reasonable and plausible. At trial the State attempted to elicit testimony from Amy that either Martin told her that he held Taci in the tub of hot water or that Taci told her that Martin had caused her burns. At trial Martin vehemently denied abusing Taci and with particularity denied holding Taci in the tub on August 22, 2003. T. Vol. 2, Pg. 178. Martin also denied ever confiding in Amy that he had abused Taci. *Id.* Amy also denied that she ever told the Doctor Hardin or the Mississippi Department of Human Services that Martin abused Taci. T. Vol. 1, Pg. 107.

The only testimony provided by the State that support the position that Martin had intentionally scalded Taci was introduced by Dr. Hardin. At the commencement of his testimony,

Dr, Martin admitted he was not an expert in burns and he was only accepted by the Court as an expert in pediatric emergency medicine with special knowledge of child abuse. Dr. Hardin that Taci could have received her burns in as little as three to four seconds. Dr Hardin's opinion that Taci's burns were intentionally inflicted as opposed to accidental appears to be solely based on two observations: one that Taci had burns on both feet; and, two that he did not observe any splash burns which he believed would be present in an accidental burning. Dr Hardin admitted that Taci's burns could have been accidental but in his opinion such a scenario would be hard to imagine. Doctor Hardin testified that he referred Taci to a burn specialist at the Firefighter Burn Center in Grenville, Dr. Robert T. Love, III, M.D.. Dr. Hardin admitted that Dr. Love's, the burn specialist's, opinion is that while the type of burns suffered by Taci are suggestive of child abuse that they are in no way conclusive of child abuse.

In reviewing all of the evidence at trial, the only evidence of Martin's guilt was Dr. Hardin's opinion that Taci's injuries appeared to heave been caused by abuse. Martin and Amy denied that such abuse had occurred and Dr. Hardin did admit that the other treating physician, Dr. Love the burn specialist, was of the opinion that the cause of Taci's injuries could not be determined solely by the examination of her burns. The Leflore County Circuit Court was clearly erroneous and erred when it failed to overturn the jury's verdict finding Daniel Joe Martin guilty of felony child abuse since the same was rendered against the overwhelming weight of the evidence produced at trial.

CONCLUSION

The Leflore County Circuit Court was clearly erroneous and erred when it failed to render a directed verdict of acquittal in favor of Daniel Joe Martin, since Martin was the only eye witness to the events surrounding Taci's burns, his version of events were reasonable and not substantially contradicted by the State's witness, by the physical evidence or by the facts of common knowledge and as such Martin's's version of how Taci became burned, on August 22, 2003, must be accepted as true; in allowing the State to admit into evidence testimony that the Leflore County Youth Court had entered an adjudication finding that Taci had been abused and testimony that Martin had caused an automobile accident while he was operating a motor vehicle under the influence of alcohol as such testimony was irrelevant to the crime charged, was misleading to the jury and highly prejudicial to Martin; and, when it failed to overturn the jury's verdict finding Daniel Joe Martin guilty of felony child abuse since the same was rendered against the overwhelming weight of the evidence produced at trial

WHEREFORE, the Defendant-Appellant, Daniel Joe Martin, prays that this Honorable Court over turn Martin's Leflore County Circuit Court conviction for of the crime of felony child abuse and for such other general and specific relief as this Court deems appropriate.

Respectfully submitted,

David L. Brewer, MSB #[redacted]
Neyland & Brewer, PLLC
P.O. Box 3373
Ridgeland, MS 39158
(601) 605-28897

PLASTIC SURGERY CONSULTANTS, P.A.

FAXED

Member
AMERICAN SOCIETY OF PLASTIC AND RECONSTRUCTIVE SURGEONS, INC.
1705 HOSPITAL STREET
P.O. BOX 5217
GREENVILLE, MISSISSIPPI 38704-5217
Telephone 662-378-3662
Fax 662-332-6844

ROBERT T. LOVE, JR., M.D., F.A.C.S. ROBERT T. LOVE III, M.D.

August 27, 2003

To: Social Services for Taci Lynn Glidden

To whom it may concern:

Taci Lynn Glidden was presented to the emergency room with burns to both feet. The family claimed they were from hot water. These are suspicious for an emerged burn potentially the child was forced in the water because they are both circumferential around both ankles in a stocking glove fashion. But it is impossible to say they happened the way the family described or not. Just suspicious for potential forced burning of the feet.

If there are any further questions, please feel free to call me.

Sincerely,

Robert T Love III MD

APPELLANT EXHIBIT "A"

EXHIBIT
NO: D-1
Date: 11/29/05
CR: CAWTHON

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CERTIFICATE OF SERVICE

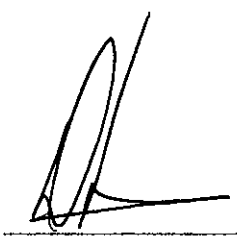
I, David L. Brewer, attorney for Daniel Joe Martin, do hereby certify that I have this day mailed, by United States Mail, a true and correct copy of the above and foregoing Appellant's Brief to the Following:

Honorable Ashley Hines
Circuit Court Judge, Fourth Judicial District
Post Office Box 1315
Greenwood, MS 38702-1315

Honorable Brad McCulloch, Esq.
Assistant District Attorney, Fourth Judicial District
P.O. Box 254
Greenwood, MS 38935

Attorney Jim Hood, Attorney General
Mississippi Attorney General's Office
Carroll Gartin Justice Building
450 High Street
Jackson, MS 39201

SO CERTIFIED this the 7th day of March, 2006



David L. Brewer