

**COPY**

**IN THE COURT OF APPEALS OF MISSISSIPPI**

**ANDRE DESHON MIDDLETON**

**APPELLANT**

**V.**

**DOCKET NO.: 2007-KA-01023-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**FILED**

**SEP 30 2007**

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

**APPELLANT'S BRIEF**

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## **I. CERTIFICATE OF INTERESTED PERSONS**

I, David L. Walker, counsel for the Appellant, hereby certify that the following persons have an interest in the outcome of this case. This representation is made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Andre Middleton, Batesville, Ms.
2. Jasmine Wren, Batesville, Ms.
3. David L. Walker, Batesville, Ms.
4. Robert J. Kelly, Batesville, Ms.

Respectfully submitted,

This the 30 day of September 2007.



David L. Walker  
Counsel for Appellant

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#### **IV. STATEMENT OF THE ISSUES**

**WHETHER THE TRIAL COURT ERRED IN PERMITTING  
DR. THOMAS BOULDEN TO TESTIFY THAT THE  
MECHANISM OF THE INJURY TO IRVIN WREN WAS  
MOST LIKELY DUE TO SHAKING**

**WHETHER THE TRIAL COURT ERRED IN PERMITTING  
DR. GREGORY STIDHAM TO TESTIFY THAT THE  
INJURIES SUSTAINED BY IRVIN WREN WERE  
CHARACTERISTIC OF A SHAKEN BABY**

**WHETHER THE TRIAL COURT ERRED IN ACCEPTING  
DR. KAREN LARKIN AS AN EXPERT IN THE FIELD  
OF PEDIATRICS WITH A SUBSPECIALTY IN CHILD  
ABUSE AND NEGLECT.**

**WHETHER THE TRIAL ERRED IN DENYING THE  
APPELLANT'S MOTION FOR A NEW TRIAL AND  
IN THE ALTERNATIVE FOR A JUDGMENT  
NOTWITHSTANDING THE VERDICT.**

## **V. STATEMENT OF THE CASE**

### **A. SUMMARY**

The Appellant, Andre Middleton, was indicted by a Panola County, Ms. Second Judicial District grand jury on August 9<sup>th</sup>, 2006 for intentionally abusing Irvin Wren, a child with a birth date of May 1, 2005, in such a manner as to cause serious bodily harm in direct violation of Section 97-5-39 (2) MCA. Clerk's Record at 6. He waived arraignment on January 5<sup>th</sup>, 2007 and proceeded to trial before a petit jury on May 7<sup>th</sup>, 2007. Clerk's record at 2.

This returned a verdict of guilty. Id. at 4. The Appellant filed a motion for new trial and in the alternative for a judgment notwithstanding the verdict. Clerk's record at 25. The trial court denied the aforesaid motion. Id. at 32. The Appellant then filed a notice of appeal. Clerk's record at 33-34.

### **B. APPELLEE'S TRIAL WITNESS**

**ROBERT WILLIAMS**

At the time of the trial Robert Williams lived at 150 Martin Luther King, apartment B1 (Meadowview Apartments). R. at 12. in October 2005 he knew Mattie Wren, Jennifer Wren and knew of the Appellant. R. at 13. He remembered a baby crying for about an hour. He heard something to across the floor of the apartment above his apartment that sounded like a baby's walker, and it hit something and the baby stopped crying. R. at 15. About five minutes later he saw the Appellant coming down the steps with the baby in his arms. Id. The baby was taken to an apartment next door. Id.

On cross examination Mr. Williams testified that he lived in the apartment below Jennifer Wren. R. at 17. He admitted that he did not see Ms. Wren leave her apartment on the day in question and did not know who was in the apartment upstairs. R. at 18. The Appellant never admitted to him that he did anything wrong. R. at 19.

### **REGINA MIDDLETON**

Regina Middleton testified that she was the aunt of the

Appellant and lived in Meadowview Apartments in October 2005. R. at 21. On a particular morning on October 2005 the Appellant came to her home with a baby. Something was wrong was with the baby. R. at 22. The name of the baby was Irving Wren. Id. The baby was not breathing the way it was should have been breathing and she then called 911. Id. The baby's eyes were rolled back. R. at 24. The Appellant just told her that something was wrong with the baby. R. at 25.

On cross examination Ms. Middleton testified that Mattie Wren moved out of this apartment before October 2005. R. at 26.

### **SADIE WILLEY**

On October 24<sup>th</sup>, 2005 Sadie Willey was the dispatcher for the City of Batesville police department. R. at 27. On that day she received a call from Regina Middleton. Id. Ms. Middleton reported that a child at her apartment was not breathing right. R. at 29. Ms. Middleton was then connected to Tri-Lakes. R. at 30.

On cross examination Ms. Willey testified that the time of this call was 0918. Id.



## **DR. ROBERT SMITH, JR.**

Dr. Robert Smith, Jr. was the emergency room physician on call at the Tri-Lakes emergency room on October 24<sup>th</sup>, 2005.

R. at 32. He treated Irving Wren there on that day. Id. The child was in respiratory distress. R. at 33. He was lethargic with one of pupils dialated. Id. He transferred the child to Le Bonheur. R. at 34.

On cross examination Dr. Smith testified that there were no obvious external signs of injury. R. at 35. The child was stabilized at the emergency room. Id.

## **MATTIE WREN**

Mattie Wren is the mother of Jennifer Wren. R. at 36.

Jennifer is the mother of Irving, who was born on May 1, 2005.

R. at 37. She lived with Jennifer and the child at Meadowview Apartments. Id. She received a telephone call from Regina Middleton concerning the child and went to her apartment. R. at 38. She talked to the Appellant and he advised her that the child was laying on the couch and quit breathing. Id. She picked

the child up and his head went all the way back. He was just limber. R. at 10. Since the child was taken to Le Bonheur, the Appellant never told her what happened to the child. The Appellant was the only person with the child when he was hurt. R. at 43.

On cross examination Ms. Wren admitted that she left her home in Como, Ms. at 5:30 a.m. for work on October 24th, 2005. Id. She was not even at her daughter's Meadowview apartment on that day. R. at 44. The child was in a walker in October 2005. R. at 45. He could move about in the walker. Id.

### **JASMINE WREN**

Jasmine Wren is the daughter of Mattie Wren. R. at 52. In June or July of 2005 the Appellant started coming around the Meadowview Apartments. R. at 55. He would laugh and talk with some of the children at the apartment, but he stayed into it a lot with Jakira. R. at 56. He would fuss at the little children. Id. The only thing that she ever saw the Appellant do to Irving was fuss at him. R. at 57. She later testified that she saw the Appellant

gently shake the child when he was crying and fussing. R. at 58.

On cross examination, Ms. Wren testified that she did not remember when the Appellant shook the child, except that this occurred before the child was hurt. R. at 59. The Appellant did not hold the child up in the air and shake him. R. at 59-60. The baby acted like normal after this. R. at 60. The apartment that her sister lived in had a hard floor. Id. Ms. Wren claimed that she advised Detective George Willford of this incident, but she admitted that it was not in the statement that gave to the police. R. at 64-65.

### **ANNIE WREN**

Annie Wren is the grandmother of Jennifer Wren. R. at 68. During the summer of 2005 the Appellant came to her house while he was staying around with Jennifer Wren. R. at 69. Irving Wren was fine the day before he was injured. R. at 71. The child's mother came to visit her after her child was released from the hospital in Memphis, R. at 71. The Appellant called her house to speak to Jennifer Wren. Id. Jennifer told him that

because he hurt her son. He then said that "I hurt your son and I will hurt you." R. at 72.

On cross examination Ms. Wren testified that she did not tell the police about this telephone call until May 4<sup>th</sup>, 2007 when they came to her house. Id. This information was important for the individuals involved in this case. R. at 73. She did not reveal this information because no one had questioned her. Id. The telephone used by Jennifer was an old fashioned telephone. R. at 74. This telephone call occurred in May 2005. Id. On redirect examination, Ms. Wren claimed that the telephone conversation occurred after the child was released from the hospital. R. at 79.

### **DR. GREGORY STIDHAM**

Gregory Stidham is a pediatric intensive care physician. R. at 81. He practices at Le Bonheur Children's Medical Center, Memphis, Tn. Id. He specializes in critical care medicine for children suffering from life-threatening illnesses or trauma. R. at 82. He is a member of the American Board of Pediatrics. R. at 83. He is a full professor of pediatrics at the University of

Tennessee. R. at 84. He had published approximately 30 articles concerning critical and trauma care. R. at 85. The assistant district attorney tendered Dr. Stidham as an expert witness in the field of child trauma. R. at 86.

On cross examination Dr. Stidham testified that he was not licensed to practice medicine in Mississippi. Id. He was familiar with the term shaken baby syndrome, but had not written any articles on this subject. Id. However, he had lectured on this subject approximately six times in Memphis, Tn. Id. He had never testified in a state nor federal court in Mississippi. R. at

87. There is some controversy in the medical community with respect to the theory of shaken baby syndrome. Id. But it was pretty widely accepted as an entity that exists. Id. There are a respected physicians who differ as to the shaken baby theory. Id. his work concerning Irving Wren was not peer reviewed. Id. He did not know of the error rate as to any opinions that he might give in this case. Id.

The trial court accepted Dr. Stidham was qualified to testify

as a medical expert. R. at 90.

Dr. Stidham treated Irving Wren at Le Bonheur Hospital during October and November 2005. R. at 92. The child was treated for a brain injury. Id. There were no external marks or evidence of bruises or anything of that sort. Id. He had a subdural hemotoma (a blood clot over the surface of the brain) and brain swelling. R. at 93. He suffered neurological damage. R. at 94. A hematoma is caused by an injury that causes bleeding. R. at 95.

Dr. Stidham characterized the cause of the injury to the child as a shaken baby. R. at 96. He has had retinal hemorrhage which could be caused by a massive crush injury or shaken baby. His opinion was that the child sustained serious bodily harm. R. at 97. He could not comment on the issue of whether the injuries inflicted on the child were intentional. However, the injuries were not accidental. R. at 98.

On cross examination Dr. Stidham testified that his history reflected that the mother of the child was ironing in the next room when the Appellant came and told her that the child was not

breathing well. R. at 100. The mother of the child was present when the symptoms first demonstrated themselves. Id. He relies a great deal on medical history. Id. He had not reviewed the radiology report in this case. R. at 103. He had not seen the child since he left the intensive care unit in 2005. R. at 104.

On redirect examination Dr. Stidham noted that the mother's story of what occurred was inconsistent with the injuries that he discovered. R. at 106.

#### **DR. THOMAS BOULDEN**

Dr. Thomas Boulden is a pediatric radiologist at Le Bonheur Children's Medical Center. R. at 107. He is a professor of radiology at the University of Tennessee. R. at 108.

On cross examination Dr. Boulden testified that he was not licensed in the State of Mississippi. R. at 109. He had never testified in circuit nor federal court in Mississippi. Id. He does not treat patients. R. at 110. A CT was performed upon the head of Irvin Wren. R. at 112. This revealed blood between the two hemispheres, the two halves of the brain, and in the area

in front of the brain just next to the skull on the left. R. at 112.

He believed the mechanism of the injury sustained by the child was likely due to shaking. R. at 113. The injuries occurred within hours of the initial CT scan. R. at 115.

On cross examination Dr. Boulden testified that the older injuries that he found on the child were probably more than 72 hours old. There was no way to segregate or say this particular injury caused these symptoms, that particular injury caused those symptoms based upon a reasonable degree of medical certainty.

On redirect examination Dr. Boulden testified that all of the injuries reflected in his report occurred on or after October 24<sup>TH</sup>, 2005. R. at 118.

#### **DR. KAREN LAKIN**

Dr. Karen Lakin is a pediatrician and assistant professor of pediatrics at the University of Tennessee. She is also the medical director for the child protection team at Le Bonheur.

R. at 119. The child protection team evaluates children that have unexplained injuries. Id. She claimed to be an expert witness



in child abuse and neglect. R. at 121. The Appellee offered Dr. Lakin as an expert witness in the field of pediatrics with a subspecialty in child abuse and neglect. R. at 122.

On cross examination Dr. Lakin admitted that there is no board certification available in child abuse and neglect. R. at 121. She did not examine Irvin Wren. R. at 123. Her work in this case had not been peer reviewed. R. at 124. The trial court permitted Dr. Larkin to testify as an expert witness. R. at 125.

Dr. Larkin testified that based upon her review of the medical records of Irvin Wren from Le Bonheur Hospital that he sustained a subdural hematoma and retinal hemorrhage. R. at 126-127. The child suffered from seizures. R. at 128. The injuries that the child sustained were not consistent with the history that was recorded in the chart. R. at 129. She ruled out accident as the cause of the injuries. Id. She concluded that the injuries were the result of abuse. R. at 129.

On cross examination Dr. Lakin testified that the initial emergency room records from the local hospital indicated that

the child stopped breathing after eating. R. at 131. The history given to Dr. Stidham indicated that the mother was in another room and that the child was with the father and she heard something and the father brought the child to the mother and said that the child had stopped breathing. R. at 132. Dr. Lakin could not testify as to which parent abused the child. Id. One cannot go back and date when an injury occurred from a CT scan. R. at 134. She would have preferred to have had a clinical examination of the child. R. at 135.

On redirect examination Dr. Larkin testified that the medical history given at Tri-Lakes and Le Bonheur were not consistent with the injuries sustained by the child. R. at 136.

The Appellant advised the trial court that he did not desire to testify at the trial. R. at 144.

## **VI. SUMMARY OF ARGUMENT**

The trial court erred in permitting Dr. Thomas Boulden, a pediatric radiologist, to testify that the mechanism of the injury to Irvin Wren was most likely due to shaking. Dr. Boulden was a reader of diagnostic tests, not physician to render an opinion on causation of an injury.

The trial court erred in permitting Dr. Gregory Stidham to testify that the injuries sustained by Irvin Wren were the result of a shaken baby syndrome because of the lack of consensus in the medical community on this issue.

The trial court erred in permitting Dr. Karen Larkin to testify in a field in which no board certification exists.

The trial court erred in denying the Appellant's motion for a new trial and in the alternative for a JNOV.

## **VII. ARGUMENT**

### **THE TRIAL COURT ERRED IN PERMITTING DR. THOMAS BOULDEN TO TESTIFY THAT THE MECHANISM OF THE INJURY TO IRVIN WREN WAS MOST LIKELY DUE TO SHAKING**

The trial court permitted the assistant district attorney assigned to prosecute this case to secure from Dr. Thomas Boulden testimony that the mechanism of the injury sustained by Irvin Wren was most likely due to shaking. R. at 113. The Appellant objected to this testimony and argued to the trial court that this testimony was beyond the scope of what Dr. Boulden was tendered as an expert. Id. He testified that he reads X-ray reports, MRI reports and CT scans. Id. This was opinion testimony. R. at 114. The assistant district attorney admitted that Dr. Boulden was tendered as an expert in the field of radiology dealing with children. Id. The trial court overruled the objection. Id.

The Appellant included this alleged error by the trial court in his motion for a new trial and in the alternative for a JNOV and

therefore preserved this issue for consideration by a reviewing court. Fears v. State, 779 So. 1125, 1127 (Miss. 2000). Clerk's Record at 26 and R. at 161.

The Appellant would argue that the trial court abused its discretion in admitting this testimony and in overruling the Appellant's objection. Burton v. State, 875 S o. 2d 1120, (Miss. Ct. App. 2004). A decision of the trial court may be reversed on an evidentiary issue when it is clearly wrong. *Id.* An abuse of discretion can be found when the defendant shows clear prejudice resulting from an undue lack of constraint on the prosecution. *Id.* The reading of X-rays, CT scans and MRI scans is distinct from stating an opinion as to the cause of the injury demonstrated by the tests. R. at 113. This admission of this testimony affected a substantial right of the Appellant, that being a due process of law. Article III, Section 14 Mississippi Constitution of 1890. Any error in the admission of evidence which affects a substantial right of a party is grounds for reversal. Lynch v. State 877 So. 2d. 1254, 1281 (Miss. 2004).

The cause of the injury was not in Dr. Boulden's demonstrated area of expertise and therefore the trial court should not have permitted the assistant district attorney to secure this testimony from him. Cowart v. State, 910 So. 2d 726 (Miss. Ct. App. 2005).

**THE TRIAL COURT ERRED IN PERMITTING  
DR. GREGORY STIDHAM TO TESTIFY THAT THE  
INJURIES SUSTAINED BY IRVIN WREN WERE  
CHARACTERISTIC OF A SHAKEN BABY**

Prior to the testimony of Dr. Gregory Stidham the Appellant argued to the trial court that any testimony from Dr. Stidham concerning Shaken Baby Syndrome should be excluded pursuant to Mississippi Rule of Evidence 702. The basis for this objection was that Dr. Stidham conceded that there were differing opinions in the medical community about Shaken Baby Syndrome. R. at 88. Therefore, the Appellant argued that there was no level of acceptance in the scientific and medical community that would meet the requirements of MRE 702 on this matter. Id. The assistant district attorney responded that he had not yet offered Dr. Stidham as an expert in the field of shaken babies. Id. He cited the trial court to Edmonds v. State as the most recent Mississippi Supreme Court case on experts and the interpretation of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (U.S.). R. at 89. The trial court held that at this point in the

trial it was required to determine if Dr. Stidham was qualified as a medical expert and it so found. R. at 90. The trial court permitted the Appellant to reserve his argument for the appropriate time because it was difficult for the trial court to make a determination without the testimony before it. R. at 91

The assistant district attorney then elicited testimony from Dr. Stidham that the injuries sustained by the child were characteristic of a shaken baby. R. at 96. The Appellant then objected to this testimony based upon the argument previously made. Id. The objection was overruled. Id.

The Appellant also included this alleged error in his motion for a new trial and in the alternative for a JNOV and thus has preserved it for review. Clerk's record at 26. At the hearing on this motion the Appellant argued to the trial court that the assistant district attorney's argument on this issue was convoluted at the start. R. at 160. He made some comments that kind of camouflaged what was coming (The State offered this witness as an expert in the field of pediatric trauma. That's



what I wish to question this witness about, as to what he found with Irvin Wren.... I have not yet offered him as an expert in the field of shaken babies. ) R. at 88 and 160.

The Appellee has the burden of proof to show the trial court that the expert witness will base his or her testimony on scientific methods and procedures, not speculation. Webb v. Braswell, 930 So. 387 (Miss. 2006). The Appellee failed to do so.

Dr. Stidham admitted that he had not written any articles on The subject of shaken baby syndrome. R. at 86. He admitted that he had never testified in state or federal court in Mississippi and that he was not licensed to practice medicine in Mississippi. Id. His work in this case was not peer reviewed. Id. He did not know the error rate as to any opinions that he might have in this case. Id. He conceded that some controversy existed in the medical community with respect to the theory of shaken baby syndrome. R. at 87. There are respected physicians who differ as to the shaken baby theory. Id.

Moreover, the assistant district attorney did not cite the trial court to any case authority from the State of Mississippi that recognized shaken baby syndrome as a field or area in which one may be qualified as an expert witness since the amendment of MRE 702.

Thus, the trial court abused its discretion in admitting this testimony and overruling the Appellant's objection thereto. When a trial court abuses its discretion in the admission of Evidence, then reversal is a proper remedy. Again, this evidentiary ruling by the trial court affected the Appellant's right to due process of law. See Lynch, supra.

**THE TRIAL COURT ERRED IN ACCEPTING DR.  
KAREN LARKIN AS AN EXPERT IN THE FIELD  
OF PEDIATRICS WITH A SUBSPECIALTY IN  
CHILD ABUSE AND NEGLECT**

The Appellee tendered Dr. Karen Larkin as an expert witness in the field of pediatrics with a subspecialty in child abuse and neglect. R. at 122. The Appellant objected to Dr. Larkin being accepted as an expert in this field because she never physically examined the patient (Irvin Wren); her work was not peer-reviewed and lacked board certification in the field tendered by the Appellee. R. at 124. The trial court found Dr. Larkin to be a qualified expert. R. at 125. Again, the Appellant included this alleged error in his motion for a new trial and in the alternative for a JNOV. R. at 27. Thus, it is also preserved for review.

Dr. Larkin admitted that she was not board certified in the field of child abuse. R. at 123. At the time of the trial there was no board certification available in child abuse and neglect. Id. She did not even examine the child and did not generate a report.

Again, the Appellant would argue that the Appellee failed to meet its burden of proof that Dr. Larkin was qualified to testify as an expert witness pursuant to MRE 702 in the field of pediatrics with a subspecialty in child abuse and neglect. See Webb, supra. The assistant district attorney did not cite the trial court to any established precedent as set out by the Mississippi Supreme Court on the issue of a medical doctor having A subspecialty in child abuse and neglect. See Kennedy v. State 766 So. 2d 64 (Miss. Ct. App. 2000).

The trial court abused its discretion in accepting Dr. Larkin in a field that had not a certification process at the time of the trial. She did not even prepare a report of her findings that could be peer-reviewed for accuracy. Again, the trial court affected a substantial right of the Appellant that being due process of law by admitting the testimony of Dr. Larkin.

**THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL AND IN THE ALTERNATIVE FOR JUDGMENT NOT WITHSTANDING THE VERDICT**

The trial court denied the Appellant's motion for a new Trial and in the alternative for a judgment notwithstanding the verdict. Clerk's R. at 32.

Issues based upon a denial of a motion for a JNOV challenge the sufficiency of the evidence. Boose v. State , 851 So. 2d 391, 394 (Miss. Ct. App. 2003). An appellate court reviewing an assignment of error that the evidence presented at trial was insufficient to support the verdict is to accept as true all evidence tending to support the verdict, including the inferences derived there from, and consider 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. Dilworth v. State, 909 So. 2d 731, 736 (Miss. 2005).

When a criminal defendant challenges the trial court's denial

of a motion for a new trial, the weight, not the sufficiency of the evidence is before the reviewing court. A new trial will not be ordered unless the reviewing court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice. **Bradley v. State** 921 So. 2d 385, 389 (Miss. Ct. App. 2005).

The Appellant would concede that the existence of conflicting testimony makes the petit jury the judge of the credibility of the witnesses. **Besset v. State**, 808 So. 2d 979 (Miss. Ct. App. 2001). However, in this case the Appellee did not present any evidence from any witness that the Appellant was observed shaking Irvin Wren. The Appellee did not present any written nor tape-recorded from the Appellant as to his guilty in this case. The testimony by Annie Wren concerning an admission by the Appellant that he hurt the child in question occurred before the date of the injury alleged in the indictment. R. at 73.

The Appellant would argue that the Appellee presented insufficient evidence to prove beyond a reasonable doubt that the Appellant committed the charge for which he was indicted. There must be sufficient evidence to support the verdict of guilty in order for a reviewing court to affirm the trial court's denial of a motion for JNOV. Wooten v. State, 811 So. 2d 355 (Miss. App. 2001). The Appellant urges the Court to find that the trial court abused its discretion in denying the Appellant's motion for a JNOV.

Moreover, the Court should vacate the judgment of the trial court and grant the Appellant a new trial at which the testimony concerning the shaken baby syndrome should be excluded.

The weight of the testimony as noted herein was in favor of the Appellant and the trial court abused its discretion in overruling motion for a new trial. Smith v. State, 868 So. 2d 1048 (Miss. Ct. App. 2004).

## VIII. CONCLUSION

Based upon the foregoing case authorities and argument the Appellant urges the Court to reverse the trial court's decision to admit testimony from the physicians who testified concerning the shaken baby syndrome and to grant him a new trial. In the alternative, the Appellant urges the Court to determine that the evidence is insufficient to support the petit jury's verdict of guilty.

Respectfully submitted,

This the 30<sup>th</sup> day of September 2007.



David L. Walker MBN [REDACTED]  
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#### **IX. CERTIFICATE OF SERVICE**

I, David L. Walker, counsel for the Appellant, hereby

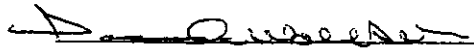
Certify that I have this day either mailed or hand-delivered a

Copy of the Appellant's Brief to Hon. Jim Hood, attorney general,



Hon. Andrew C. Baker, circuit judge and Robert Kelly, assistant  
District attorney, at their usual business addresses.

This the 30<sup>th</sup> day of September 2007.

  
David L. Walker