IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GREGORY VINCENT BAKER — APPELLANT

V. — NO. 2007-KA-1583-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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GREGORY VINCENT BAKER **APPELLANT**

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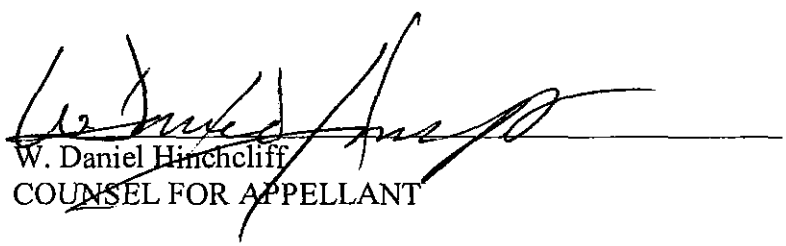
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Gregory Vincent Baker, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Charles E. Webster, Circuit Court Judge

This the 18th day of December, 2007.

Respectfully Submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 
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STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE WHERE LAW ENFORCEMENT ENTERED THE PROPERTY AND CURTILAGE OF DEFENDANT BASED UPON AN ANONYMOUS TIP?

ISSUE NO. 2: WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR IN ALLOWING THE PROSECUTOR TO COMMENT ON THE DEFENDANT'S NOT HAVING TESTIFIED AND ON THE DEFENDANT'S EXERCISE OF HIS RIGHT TO A TRIAL DURING THE STATE'S CLOSING ARGUMENT ?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Coahoma County, Mississippi, and a judgement of conviction for the crimes of manufacture of methamphetamine, possession of precursors and conspiracy, as a second subsequent offender, against Gregory Vincent Baker, Jr. ["Baker"] and a resulting sentence of ten years[1] following a jury trial July 12, 2007 through July 13,

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[1]Baker was sentenced to ten years in count one, ten years in count two and three years in count three, counts two and three are to run concurrently with count one, for a total of ten years.

2007, the Honorable Charles E. Webster, Circuit Judge, presiding. Baker is currently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

Prior to trial, on February 15, 2006, Baker's motion to suppress evidence was held before Albert B. Smith, Circuit Court Judge. (T. 2-34, C.P. 9-13) Baker, through his counsel, argued that as the deputies came upon his property, investigating an anonymous telephone tip that Baker was "cooking methamphetamine" in his trailer constituted an illegal search. The person calling in the tip provided little, if any additional information, upon which reliability could be ascertained. It was the contention of Baker, that the initial intrusion was unlawful and thus the subsequent search, even if additional events may have provided probable cause, were "fruit of the poisonous tree" and should have been suppressed. Judge Albert B. Smith denied the motion.(T. 32-34)

At a rehearing on February 22, 2006, Baker argued that no "fresh" information was on the record to support the anonymous tip, leaving it unreliable. (T. 34-42) The motion was again denied. (T. 42)

Baker then brought on a motion to dismiss counts one and two of the indictment as duplicitous and a violation of the Constitutional prohibition of double jeopardy. A hearing before the Honorable Kenneth Thomas, Circuit Court Judge, citing both federal and state case law found that the charges were not multiplicitous and denied the motion.(T. 45-59, C.P. 22-32)

A hearing on Baker's subpoena duces tecum immediately before the scheduled trial date of May 11, 2006, held before the Honorable Charles E. Webster, Circuit Judge, resulted in a continuation of the trial. The court ordered that documentation on the procedures, protocols, professional qualifications of all personnel performing tests, and multiple other request for documentation on the equipment and chemicals used by the Mississippi Crime Lab at Batesville

were produced, in camera. (T. 61-74, C.P. 32-46)

Trial commenced on July 12, 2007. After voir dire and the selection of a jury panel, without objection, Baker renewed his motion to suppress all the evidence seized. The trial judge allowed that the previous motion was preserved for the record. The jury was then empaneled and administered the oath on the record.

Deputy Neal Mitchell, ["Mitchell"], was the first witness called by the State. (T. 167) He testified that he was called by the dispatcher to respond to an anonymous tip that Vince Baker was cooking meth at his trailer on New Africa road. (T. 168) Baker's trailer was 30 to 40 feet back from the primary residence on the property, which was located well back from the road. (T. 169, C.P. Exhibits D-1(a), D-1(g), D-1(i)) Mitchell and Deputy Christopher Doss, ["Doss"], stopped at the primary residence, occupied by Baker's mother Vicki Baker ["Vicki"] , as well as his father and grandparents. The officers explained their presence and Vicki began to take them to the trailer. As they approached, Vicki changed her mind And said; "No I'm not gonna do that because I didn't want my son to get into anymore trouble." (T. 170)

The party stopped, and a small girl ran up to the trailer and knocked on the door. (T. 170-171) A loud commotion inside the trailer followed. Then the back door slammed. Mitchell and Doss ran around the side. They saw two males and two females running away. Mitchell caught the two males and Doss apprehended the two females. They were detained and help was summoned. Meanwhile Mitchell noticed smoke coming from the trailer. (T. 172) The smoke was coming out a window and the fire department was notified. (T. 173)

Subsequently, the fire department, Sheriff Andrew Thompson, and agents Billy Baker, James Jones, ["Jones"], and Eric Lentz, ["Lentz"], of the Mississippi Bureau of Narcotics arrived. (T. 173)

Baker was not among those seen running from the trailer, but was later found hiding in the

closet of his parents house.

On cross examination Mitchell agreed he had not written a report on the events. He identified photos of the scene (T. 175-178, C.P. Exhibits D-1 (a)-(p)) Mitchell did not agree he would have probably seen Baker run out, had he been in the trailer. (T. 185-186) Mitchell then located the various structures and locales in the pictures. He did not recall a boarded window on the trailer. (T. 186-190)

On redirect, Mitchell stated he had not started the chase immediately upon the slamming of the door. The State attempted to demonstrate through testimony and use of pictures that Baker would not necessarily have been observed leaving the trailer. (T. 190-196)

Billy Baker, then with the Clarksdale police, testified next. He responded to the scene. He observed the fire department checking the trailer for a fire and awaited a search warrant, with agents James and Lentz (T. 201-203)

Billy Baker was there as the warrant was executed. He identified photographs, Exhibits S-1(A) thru S-1(Q), as accurate representations of various items used in the manufacture of methamphetamine and methamphetamine which were found in the trailer.(T. 204-211) Baker received training in the manufacture of methamphetamine and then explained the use of the items in the manufacture of the controlled substance. (T. 211-216)

Evidence from the trailer which concerned not manufacture but instead use of methamphetamine were received into evidence over defense objection as irrelevant. (T. 217-218) The trial judge sustained the objection to Billy Baker's opinion that the trailer was used to produce meth. However, testimony that Billy Baker knew how to make methamphetamine, and that the seized items could be used to manufacture meth was admitted without objection. (T. 219-221)

Billy Baker conceded on cross examination that no-one dusted for fingerprints, explaining

it was not procedure to dust contaminated items. Dusting would be dangerous and the hazardous chemicals would turn the fingerprint dust to mud. He also conceded that all the precursors had been used. (T. 223-226)

Eric Lentz with MBN next took the stand. (T. 226). He testified to the "House Rule Book", a handwritten document found in the trailer, that explained the rules and how to's about using drugs on the premises. (T. 230-231, C.P. Exhibit S-2 inclusive) Lentz also testified to a "to do" list found in the trailer that included "getting pills" and "find[ing] a tank to fix." (T. 232, C.P. Exhibit S-3) Three pipes for smoking meth and hypodermic needles were also found and introduced into evidence. (T. 233-234) An objection to relevance was overruled, the court finding it was relevant. Lentz stated a pistol magazine was recovered without objection. But when a question was asked about how meth labs might be protected, an objection was entered claiming prejudice and overruled. (T. 235) A card translating police codes was admitted without objection. (T. 238-239) He also offered testimony as to HCL generators, used to make meth and found on the premises. Lentz was also familiar with the process to make meth, and agreed the seized items could be used in the process. (T. 241)

Cross examination revealed that the "House Rules" pamphlet had not been subjected to handwriting analysis. (T. 242) The police codes were printed. Redirect showed the codes could have been printed off the internet. (T. 243-245)

Teresa Hickman, a forensic scientist with the Mississippi Crime Lab, testified to her test results on the State's exhibits. S-1 was pill dough, a by product of ephedrine/pseudoephedrine extraction, S-10 (a)(b) both contained methamphetamine and pseudoephedrine. S-11 was "devil lye" (sodium hydroxide). S-13 was a highly acidic salt that would be used in a HCL generator. S-14 contained ammonium nitrate. Thus identifying three precursors. Her work followed accepted

scientific methods and principles, and was reviewed by her supervisor, J. C. Smiley. (T. 249-259)

She was cross examined on the pill dough, that her report did not include that ephedrine/pseudoephedrine was extracted from the pill dough. The defense then objected to the testimony on pill dough based upon a discovery violation and the court agreed, instructing the jury to disregard the testimony. A motion for mistrial was denied. (T. 262-266)

James Jones with MBN also testified as to the evidence recovered under the search warrant and to the fire department having been called to the scene due to the smoke.(T. 270-278) The defense attempted to introduce the statement Jones took from the defendant Baker as a present sense impression exception to the hearsay rule and was denied (T. 279)

Carl Burleson, a co-indictee, testified that he and three others had gone to Baker's trailer that day. They brought Red Devil Lye, pseudoephedrine pills and lithium batteries, to be utilized in the manufacture of meth. He explained they (including Baker) were users and needed to manufacture for their use. (T. 289-291) They had only been there with Baker 15-20 minutes when the deputies arrived. He was first to hit the door. (T. 292-293) He had plead guilty without recommendation to the charges. (T. 293-294) Burleson identified empty pseudoephedrine pill packages, starter fluid and the aluminum foil. He related how Baker had admitted to him that an earlier batch had been cooked that morning. (T. 297)

The defense brought out that he also had another charge that he plead to for which he had only received one year. (T. 30-305) He seemed confused as to the maximum sentence he could have received. He admitted knowing how to produce methamphetamine. (T. 306) He also was confused as to when he went to the Texaco station to get Dr. Pepper, since Baker had nothing to drink, but was not too messed up to recall the events of that day. (T. 307-309) Burleson had only entered the trailer via the door, when unlocked, and not through the broken window. After re-direct of Burleson,

the State rested. (T. 317)

Baker's defense then raised the multiplicity/double jeopardy issue and was again denied. (T. 320-322) Similarly, Baker's motion for a directed verdict was denied. (T. 323)

The defense then presented its case, calling first Deputy Christopher Doss to the stand. (T. 325) It was still daylight when he arrived at Baker's trailer. There was a dark colored Mazda and a Ford SUV present. They stopped first at Vicki Baker's. They were walking towards the trailer, when a small child ran to the trailer and knocked. A "commotion" broke out inside the trailer. He heard the back door slam. He and Mitchell ran around the same side of the trailer. He chased down two females and Mitchell chased down two males. Doss did not see Baker then, but did see him as he hid in the closet at Vicki Baker's house. He saw one of the females throw something down as she ran. (T. 326-333)

Doss had slept little in the last few days and could not be sure whether he had run around the same side of the trailer as Mitchell. He was involved in documenting evidence, including red gas cans and rock salt in bottles in the yard. He saw the cloud of vapor or smoke coming from the trailer and feared a fire. He ran to the patrol car and called the fire department.

After these facts were adduced on cross examination, Doss concurred on re-direct that if Mitchell said they each ran to different sides of the trailer he would not disagree with him. (T. 333-338)

Marie Baker, Baker's grandmother, lived in the house with Baker's parents near the trailer. She saw four people arrive at Baker's trailer with a "big... ole barrel." They went behind the trailer. She did not see Baker. (T. 342-346). Her husband, J.C. Baker didn't see his grandson near the trailer. (T. 350-353) Baker's father also testified. He was called home by his wife Vicki due to a fire at the trailer. He didn't see his son. He claimed ownership of the pistol magazine, stating that he had previously inhabited the trailer, and owned a nine millimeter pistol, which he kept separate from the

clip. (T. 356-360) Baker's mother Vicki confirmed she and her husband had lived in the trailer and had yet to finish moving out. She had been in the trailer and never seen any of the elements of the lab. She basically confirmed the testimony of Mitchell and Doss as to the initial events. She claimed the deputies went the around the same side of the trailer. She had not seen her son since earlier that day. (T. 364-380)

After the trial court explained his right to testify or not to Baker, he declined to testify.

The defense rested, and a motion for directed verdict was denied. Baker argued that Teresa Hickman had not specifically identified methamphetamine as a schedule II controlled substance. The court withheld ruling while working on jury instructions. The one objection to the State's instructions resulted in the trial court drafting a suitable instruction. After the instructions were agreed upon, the trial court ruled against the motion to dismiss for failure to specify methamphetamine as a schedule II, based on *Lawrence v. State,* 928 So. 2d 894 (Miss. App. 2004).

During the State's closing argument, the following statements were made:

> Defense counsel would love to have you believe that carl Burleson is to blame for everything. That's because Carl Burleson is here. He's an easy target. He's in striped pants and that white shirt with MDOC on his back. When he got caught, he stood up, he told the truth to the police, **and he told the truth to you here today**. He told the truth everywhere along the line. He took responsibility for what he did, and he asked for help with his addiction. **The defendant Vince Baker has never done that. He doesn't have the fortitude to stand up here and take responsibility for what he did, like Carl Burleson took responsibility.** Instead he hid. He hid in that trailer until he could sneak out. He hid in that house until he got pulled out by police officers. He is now hiding behind his family [who did testify] in hopes you will believe that his family wouldn't lie for him. (T. 430)

The jury deliberated and returned verdicts of guilty on all counts.

SUMMARY OF THE ARGUMENT

Baker's expectation of privacy and right to be free of unreasonable searches and seizures was

violated when the deputies went onto the curtilage of his residence premised upon an anonymous tip.

The prosecutor made entirely impermissible comments on Baker's constitutional right to not testify compounded by the comment on his exercising his constitutional right to a jury trial, rather than entering a plea. Even without objection, Baker's fundamental rights were violated.

ARGUMENT

ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE WHERE LAW ENFORCEMENT ENTERED THE PROPERTY AND CURTILAGE OF DEFENDANT BASED UPON AN ANONYMOUS TIP?

Counsel for the defendant raised a unique argument that was perhaps not given enough consideration at the hearing. Relying on *Florida v. J. L.*, 529 U.S. 266, 120 S.Ct. 1375 (2000), the argument was made that entry by law enforcement onto the property of a citizen, premised on nothing more than an anonymous and therefore unreliable tip, constitutes an impermissible search, founded on no probable cause. Defense counsel then argued that any evidence subsequently uncovered would be fruit of the poisonous tree and should accordingly be suppressed.

Defendant's motion to Suppress was denied in an analysis that would seem to be more pertinent to an investigatory stop (See *Dies v. State*, 926 So. 2d 910 (Miss. 2006)), rather than an invasion of the curtilage. The trial court's holding was as follows:

> **THE COURT:** No. They went over there. He's saying they had a duty, and I would think they do, too. And we're not going to say in this jurisdiction if somebody calls and there's something going on and Otha there knows there's a bad house over there, 'cause he knows the guy living there, that he's going to sit hisself up in the Sheriff's department and say "do I have a duty–or I don't think I do, Sheriff. I think I'll just sit here."
>
> When they get there–now we'll fast forward to your argument now. Actually, you fast-forwarded to when he was running. But when they gave a consent, that's all allowable, good, proper evidence. And they were leaving and they saw someone else in the back yard and all

> of that. That's also allowable. That's the way the Court is going to rule. (T. 40-41)

This holding relies on a totality of the circumstances breakdown used to support the investigatory stop of an individual, where in the case at bar, we have an entrance onto the property, far back from the road. As counsel for Baker argued, it was an intrusion into the curtilage. (T. 42)

Mississippi has long acknowledged the curtilage as having the same degree of sanctity as the home, and protected it from unreasonable searches and seizures. It can be yard or garden, even when some distance from the house. *Arnett v. State*, 532 So. 2d 1003 (Miss. 1988) If entry of the police deep into the property is viewed as a search, and we urge it should be so considered, then it was warrant-less and based solely upon an anonymous tipster, buttressed by stale knowledge of Baker's past. None of the exceptions found in the exception to a warrant-less search set out in *Graves v. State,* 708 So. 2d 858, 862 (Miss. 1998) is present here. Stale information (see *Barker v. State,* 241 So. 2d 355 (Miss. 1970)) cannot sustain the necessary probable cause for a search and should not add anything to the anonymous tip.

The question then becomes, is the property surrounding Baker's trailer curtilage. At the outset of this inquiry, the photographs introduced by the defendant at trial should be viewed. (C.P. Exhibits D-1 (a)-(p). As those photographs indicate, Baker's trailer is far removed from the road, and away from the main house. He should have a reasonable expectation of privacy both in and around the trailer; the curtilage. The test for curtilage is formulated as follows:

> The lower court relied on a four part test previously used by this Court in determining whether an area surrounding a structure is considered curtilage. Arnett v. State, 532 So.2d 1003, 1008-09 (Miss.1988)(citing the test set out in United States v. Dunn, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)). The four factors are as follows:
>
> 1. Proximity of the area claimed to be curtilaged to the home.

2. Whether the area is included within an enclosure surrounding the home.

3. The nature of the uses to which the area is put.

4. The steps taken by the resident to protect the area from observation by people passing by.

Jordan v. State, 728 So.2d 1088, 1095 (Miss.,1998) Doss and Mitchell walked up to within a short distance to the door of the trailer. (T. 170-171) Thus there was proximity. The area was well back from the road, and while not fenced, the photographs reveal bushes, sheds and the primary residence as all providing screening; which should fulfill the second test. The nature or use was obviously strictly domestic under part three. And as set forth above, the area was outside the visual scope of the casual passerby. The yard surrounding a trailer can be treated as curtilage. *Walker v. United States*, 225 F.2d 447 (5th Cir.1955).

When the officers went onto the property, they were therefore conducting a warrant-less search, one which "flushed" the occupants of the trailer, as surely as a poacher can flush doves, and led to the evidence ultimately used against Baker. As such it was "fruit of the poisonous tree" and tainted by the original warrant-less intrusion. "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun v. U.S.*, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (U.S.Cal. 1963)

It is therefore urged that the trail court erred in not suppressing the evidence seized from Baker's trailer, as argued by Baker's trail counsel.

ISSUE NO. 2: WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR IN ALLOWING THE PROSECUTOR TO COMMENT ON THE DEFENDANT'S NOT

HAVING TESTIFIED AND ON THE DEFENDANT'S EXERCISE OF HIS RIGHT TO A TRIAL DURING THE STATE'S CLOSING ARGUMENT ?

As set forth in the facts, the attorney for the State made direct allusions to Baker's exercising his constitutional rights to have a trial and to not testify. The synergistic effect of both improper arguments can hardly be seen as harmless as it undermines the defendant's constitutional protections and undermines the public's confidence in a fair judicial system. It matters not, in such a serious situation, that objection was not made at the trial level. "A trial error... involving violation of a Constitutional right may reach such serious dimension, however, that this Court is required to address it, though first raised on appeal." *Brooks v. State,* 209 Miss. 150, 46 So.2d 94, 97 (1950).

The prosecutor in this instance has pitted the testimony of the accomplice, Carl Burleson, against the defendant baker, saying Burleson "stood up" in the courtroom that day and testified truthfully, while Baker did not "have the fortitude to stand up and take responsibility"... instead he hid behind his witnesses, his family. Clearly, the prosecutor commented on the defendants having not taken the stand. Such comment is unquestionably inappropriate. "An axiomatic principle of criminal law teaches that criminal defendants need not offer personal testimony or other evidence regarding their innocence, and prosecutors, while given broad latitude in closing arguments, cannot comment in any manner on a defendant's failure to testify or offer evidence." *Trull v. State,* 811 So.2d 243, 245 (Miss. App. 2000). The State simply cannot, as stated in *Trull, Id.* argue guilt to the jury based on the exercise of a constitutional right. This axiom is again iterated as follows:

> when the defendant is the only person who can rebut the testimony of a State witness, the prosecuting attorney is not free in his argument to also inform the jury that if what the State's witness said was not true, the defendant would, or could have taken the stand and denied it. Because for obvious reason the prosecution cannot make such statement directly, it follows that the prosecution is equally prohibited from doing so indirectly or by implication.

Whigham v. State, 611 So.2d 988, 995 (Miss. 1992).

This error is compounded by the argument of the prosecutor who berates Baker for not standing up and entering a plea, as did Burleson and instead hiding. The comments were a two edged sword, cutting at two of Baker's constitutional rights in one swipe. It has been held that such a negative comment on the defendant exerting his right to trial is not "per se improper" but that it is not appropriate. Judge Irving, dissenting in that opinion, urges that such error should not be deemed harmless.

> If an accused has a constitutional right to a trial by jury, it must necessarily follow that he also has a right not to plead guilty, and any suggestion by the State that the accused should plead guilty surely must be improper. Of course, the majority concedes as much but, as previously observed, finds that the comments constitute harmless error. This finding of the majority is based on the fact that a co-defendant pleaded guilty and testified against Hampton. The State relied substantially on the testimony of the accomplice to make its case. I cannot agree that the testimony of an accomplice implicating an accused, who makes a deal to save his own skin, or at least to lighten his sentence, constitutes overwhelming evidence against the accused.
>
> The accused always has a constitutional right to put the State to the task of proving him guilty beyond a reasonable doubt. The State should not be allowed to comment, with impunity, concerning the accused's exercise of that constitutional right.

Hampton v. State, 815 So.2d 429, 434 (Miss. App. 2002) It is accordingly, strongly urged that an assault on two constitutional rights should not be swept under the carpet. The Constitution is more important than one trail.

The paramount importance of constitutional rights and the consequences of abrogating these critical precepts has been analyzed by Justice Dickinson. In the recent case of *McGee v. State*, 953 So. 2d 211 (Miss. 2007) Justice Dickinson, in a concurring opinion joined by the remainder of the Court, articulates that violations of constitutional magnitude are too important to ignore. Certain errors should never be considered harmless. Violation of a fundamental right under the constitution

undermines the validity of the trial itself and thus prejudice is inherent and thus the defendant should not have to demonstrate specific prejudice, that the trial verdict would have been different. The gravity of the Constitution is too great and should not be undermined:

> There must be clear and certain consequences to the blatant violation of a fundamental constitutional right. To hold otherwise is to free the State to commit those violations so long as the case against the defendant is strong. This Court must refuse to emasculate fundamental rights by expanding exceptions to create a disincentive for the protection of those rights. The erosion of constitutional rights inevitably leads to ignorance by some that those rights even exist.

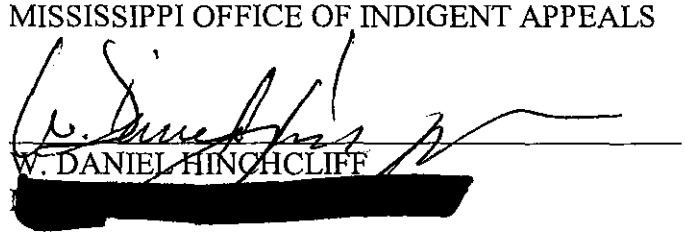
McGee, Id., at 219 -220.

Accordingly, while the remarks were not objected to, and may well have been inadvertent, such comments nullify certain fundamental rights and should never be permitted. Therefore this case must be reverse to protect the Constitution and the sanctity of our judicial system.

CONCLUSION

For the reasons set forth in argument, it is respectfully submitted that this case should be reversed and rendered, or, in the alternative, reversed and remanded for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 
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CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Gregory Vincent Baker, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class

postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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