IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01626-COA

JAEL FRAISE *Appellant*

v.

STATE OF MISSISSIPPI *Appellee*

**BRIEF OF APPELLANT**

**ORAL ARGUMENT NOT REQUESTED**

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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 disqualification or recusal.

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TABLE OF AUTHORITIES

CASES:

STATE

FEDERAL

*Bryant v. Scott*, 28 F.3d 1411, 1418 (5thCir.1994), the

*Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972)

*Manson v. Braithwaite*, 432 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972);

*Silverton Lumber Company v. United States*, 251 U.S. 385, 392 (1920)

*Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 764 (1984)

*United States v. Molina*, 934 F.2f 1440, 1447 (9th.Cir.1991)

*Tomlin v. Myers*, 30 F.3d 1235, 1238 (9thCir.1994)

*Freeman v. Class*, 95 F.3d 639 (8th Cir.1996)

*Wyman v. James*, 400 U.S. 309, 325, 27 L.Ed. 29 408, 91 S.Ct. 381 (1971)

*Latta v. Fitzharris*, 521 F.2d 246, 249 (9thCir.)

*United States v. Richardson*, 849 F.2d 439, 441 (9thCir.1988)

*United States v. Harper*, 928 F.2d 894, 897) (9thCir.1991)

PROCEDURAL LAW

Mississippi Rules of Evidence 401, 402, 403

Mississippi Rule of Evidence 613

Mississippi Rule of Evidence 901(a)

Mississippi Uniform Circuit Court Rule 9.04

Mississippi Uniform Circuit Court Rule 9.04(A)(1)

## STATEMENT OF THE ISSUES

I. WHETHER PROSECUTORIAL COMMENTS AND EFFORTS TO IMPEACH WITNESSES DURING TRIAL CONSTITUTE PROSECUTORIAL MISCONDUCT.

II. WHETHER THE FACT THAT THE STATE FAILED TO PROVIDE THE DEFENSE WITH THE SUBSTANCE OF ORAL STATEMENTS MADE BY TWO STATE WITNESSES CONSTITUTED A VIOLATION OF RULE 9.04 AND THEREBY DENIED THE APPELLANT A FAIR TRIAL.

III. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE PHOTO LINEUP AND ALLOWING TESTIMONY FROM STATE WITNESS JEANETTE QUINTANA.

IV. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF STATE WITNESS HOLLY KRANTZ.

V. WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE PHOTOGRAPH OF THE APPELLANT SEIZED FROM HIS APARTMENT.

VI. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN FAILING TO GRANT A CIRCUMSTANTIAL EVIDENCE INSTRUCTION.

VII. WHETHER TRIAL COUNSEL'S LEGAL REPRESENTATION CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

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NO. 2007-KA-01626-COA

JAEL FRAISE *Appellant*

v.

STATE OF MISSISSIPPI *Appellee*

## STATEMENT OF THE CASE

### A. Course of Proceedings and Disposition in the Trial Court

The Appellant, Jael Fraise, (hereinafter referred to as Appellant) was indicted on March 15, 2007, Cause Number K-2007-089P, in the Pearl River County Circuit Court for armed robbery and possession of a weapon by a convicted felon as stated in Mississippi Code Annotated 97-3-79 and 97-37-5, respectively. (R.E.1) Acknowledgement by the Appellant of his right to be arraigned was entered on April 16, 2007. (R.E.2) During trial, the Appellant waived arraignment on both charges and entered pleas of not guilty.

On July 5, 2007, the State of Mississippi submitted a Motion to Amend the Indictment to designate the Appellant a Habitual Offender. (R.E.3) Said motion was granted by the Court on July 12, 2007. (R.E.4)

A two day, bifurcated trial was held on July 12th and 13th, 2007 before a jury of twelve and one alternate. At the close of the first part of the trial, said jury found the Appellant

guilty of armed robbery and possession of a firearm as a convicted felon, on July 13, 2007. (R.E.5). However, said jury was unable to unanimously agree on a sentence of life imprisonment on the armed robbery charge. (R.E.5)

Immediately thereafter, the second half of the bifurcated trial was held regarding the Appellant's habitual status, and the Court found beyond a reasonable doubt that the Appellant had been convicted of prior felonies. (T.374-377) The Appellant was subsequently sentenced as a habitual offender by Circuit Court Judge R.I. Prichard III to serve terms of life imprisonment without the possibility of parole on both charges in the custody of the Mississippi Department of Corrections. (R.E.6)

Defense counsel filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, For a New Trial on July 26, 2007 and such was denied by the Pearl River County Circuit Court on August 15, 2007. (R.E.7, R.E.8)

Notice of Appeal was timely filed on September 13, 2007 (R.E.9) and the Appellant now prosecutes the instant appeal to the Mississippi Supreme Court. Said appeal has been assigned to the Mississippi Court of Appeals.

The Appellant is presently incarcerated at the Mississippi State Penitentiary in Parchman, Mississippi.

## B. Statement of Facts

At approximately 9:00 p.m.(T.185), on September 25, 2006, (T.185, 186) a male went into *The Pit Stop*, a store located at 508 Highway 11 North, Picayune, Mississippi. The male robbed the store, took four hundred and twenty five dollars ($425.00), and left the scene of the store in a certain vehicle. One store employee ran out of the store to chase the male, but was unable to catch the vehicle. (T.192)

Specifically, three individuals were in the store at the time of the robbery, two employees and a regular customer. (T.185) The two employees present were Grant Stevens and Jeanette Quintana, and the customer was Stephanie Childs. Mr. Stevens was employed as a stockboy being cross trained as a cashier, and Ms. Quintana was employed as a cashier. (T.202)

While holding a gun, the male approached two individuals directly, namely Ms. Childs and Mr. Stevens. He grabbed Ms. Childs' arm as she was standing in the front of the store and pushed her against the counter. (T.188, 205) Mr. Stevens was standing behind the register in the front of the store (T.189, 203) and the male told Mr. Stevens to put the register money in a bag. (T.188, 189) He grabbed the bag, released the arm of Ms. Childs and ran out of the store. (T.191) During the robbery, Ms. Quintana was sitting in a booth, at the side of the store in the back. (T.203) and was told by the male to remain where she was

sitting. (T.191,205) She was approximately sixteen feet away from the front counter. (T.203).

The Picayune Police Department took statements from the three individuals at the store and thereafter conducted a limited investigation. Various descriptions of the robber were obtained from the three, two persons being unable to identify the robber and the remaining person giving three different versions of her description of the robber. A vehicle description was also obtained from one employee and the vehicle was allegedly found in the parking lot of the Appellant's apartment complex.

After illegally entering the Appellant's apartment, a pair of black gloves, a rag worn on the head, cash and a photograph of the Appellant holding a weapon were seized from his apartment. The weapon used in the robbery was not found.

From arrest until trial, the Appellant maintained his innocence and never confessed to committing these crimes. During trial, he had an alibi witness, namely Astrid Hernandez, who indicated that the Appellant was present with her at his apartment at time of the robbery. (T.309) The Appellant did not testify at trial. He now appeals his convictions and sentences.

## C. SUMMARY OF THE ARGUMENT

The center of the Appellant's arguments before this Honorable Court focus systematically on prosecutorial

misconduct, improper admittance of certain photo lineups (R.E.10), photographs (R.E.11) and trial testimony, eyewitness misidentifications and statements into evidence, discovery violations and ineffective assistance of trial counsel at the circuit court. The Appellant asserts that it is largely due to the ineffective assistance of counsel which leads to all the other remaining designations of error.

## D. ARGUMENT

I. WHETHER PROSECUTORIAL COMMENTS AND EFFORTS TO IMPEACH WITNESSES DURING TRIAL CONSTITUTED PROSECUTORIAL MISCONDUCT

A. Statement by the Prosecutor regarding "Everybody at Parchman, Mississippi is presumed innocent".

1. Relevant Facts to Issue I, subsection A

During voir dire, Prosecutor Manya Creel stated directly to the jury that the "[Appellant] is presumed innocent until proven guilty". (T.29)"But I want to remind you that everybody at Parchman, Mississippi is presumed innocent." (T.29)

2. Statement of the Law Relevant to Issue I, subsection A

In *Taylor v. Kentucky*, 436 U.S. 478; 98 S.Ct. 1930, 59 L.Ed 2d 468 (1978), the United States Supreme Court addressed prosecutorial comments like Prosecutor Creel's. Specifically, the prosecutor in *Taylor*, stated that "Like every other defendant who's ever been tried who's in the penitentiary or in the reformatory today, he has this presumption of innocence until proven guilty beyond a reasonable doubt". The Court held

that this type statement linked a petitioner to every defendant who turned out to be guilty and sentenced to imprisonment. *Taylor, 436 at 485.* The Court further viewed this as an invitation to the jury to consider the petitioner's status as a defendant as evidence tending to prove his guilt. *Id.*

3. Argument Relevant to Issue I, subsection A

Like the prosecutor's statements in *Taylor,* Prosecutor Creel's statements also linked the Appellant's status as a defendant with every other defendant found guilty of a crime. The very essence of the statement itself insinuated a certain tone of guilt and diminished the standard that the Defendant is innocent until proven guilty. The statement was an invitation to consider that the Defendant was indeed a defendant, and as such should be rendered guilty. It is the Appellant's assertion that this statement considered in conjunction with additional remarks by the prosecution constitutes prosecutorial misconduct and the Appellant should be afforded another trial wherein he can present a defense in the absence of prosecutorial ill considerations.

B. Statements by the Prosecutor regarding the Appellant being incarcerated

1. Relevant Facts to Issue I, subsection B

During trial, the prosecution questioned defense witnesses Joe Blank and Astrid Hernandez about the Appellant being in jail

in Pearl River County. Specifically to Mr. Blank, Prosecutor Creel asked, "And isn't it a fact that you have visited Jael Fraise in the jail?" (T.305). She further asked Mr. Blank, "Mr. Blank, you've spoken with Jael Fraise a couple of times by phone since he's been back in Pearl River County haven't you?" (T.306)

To Ms. Hernandez, Prosecutor questioned the following: "Because he got picked up in March in California" (T.321) and also [Jael Fraise] got picked up. All right. But since he's been here, you've talked to him quite a bit haven't you (T.322) and "You visit him quite often." (T.322)

2. Statement of the Law Relevant to Issue I, subsection B

In *Estelle v. Williams*, 425 U.S. 518, 96 S.Ct., 169, 48 L.Ed 2d 126 (1976), the Court held that "Jurors may speculate that the accused's pretrial incarceration, although often the result of inability to raise bail, is explained by the fact that he poses a danger to the community or has a prior criminal record; a significant danger is thus created of corruption of the fact finding process through mere suspicion. The prejudice may only be subtle and jurors may not even be conscious of its deadly impact, but in a system where every person presumed innocent until proven guilty beyond a reasonable doubt, the Due Process Clause forbids toleration of the risk. A defendant has a fundamental right in the presumption of innocence. (*Hickson c. State*, 472 So.2d 379 (Miss 1985)

In *Wood v. State*, 257 So.2d 379, 383 (Miss.1985), these type questions [regarding flight] were prejudicial, requiring prejudicial answers, and being repeatedly pressed upon the jury, deprived the defendant of due process of law, necessitating a reversal of the case."

3. Argument Relevant to Issue I, subsection B

It was quite clear that the goal of the prosecution was to establish before the jury that the Appellant had been incarcerated and had obvious committed these crimes. The desire to continuously address his incarceration was without any doubt prejudicial and undoubtedly remained in the minds of the jurors throughout the trial and during their deliberations.

C. Statements by the Prosecutor regarding flight by the Defendant

1. Relevant Facts to Issue I, subsection C

During trial, the Court determined that the State would be allowed just to introduce when the warrant was issued for the Appellant and when it was served, because there was no direct proof of an escape from the scene of the armed robbery and the length of time between when the Defendant was found. (T.49, 50)

The State was then allowed as a matter of fact to state where the warrant was served, with objection from Defense counsel. (T.50)

While clearly circumventing the Court's rulings, the prosecution vigorously questioned Defense witnesses regarding the location of the Appellant in an effort to demonstrate flight. (T. 320, 321) See also *Wood v. State*, 257 SO.2d 193, 200 (Miss.1972) which stands for the assertion that these questions constitute reversible error. Specifically, Prosecutor Creel continuously asked Astrid Hernandez the Appellant's whereabouts after September 2006, October 2006, November 2006, December 2006, January 2007, and February 2007. (T.320, 321). She asked Defense Witness Joe Blank "[The Appellant] never came back to work after September 25, did he?" (T.301) and further made comments during her closing argument that the Appellant was gone from the apartment the next day after the armed robbery. (T.354, 365, 367)

2. Statement of the Law Relevant to Issue I, subsection C

First and foremost, the trial Court set the parameters regarding questioning of all trial witnesses regarding flight.

Secondly, the Mississippi Supreme Court has held that "Evidence of flight is probative of things other than guilt or guilty knowledge of the crime charged." *Fuselier v. State*, 702 So.2d 388 at 390 (Miss.1997). "If a prosecutor cannot give a jury instruction on flight because evidence of flight is probative of things other than the defendant's guilt or guilty knowledge, if follows that the prosecutor should not be allowed

to place the evidence before the jury." *Mack v. State*, 650 So.2d 1289 (Miss.1994)

3. Argument Relevant to Issue I, subsection C

The Court abused its discretion in both allowing the State to elicit testimony regarding flight beyond its ruling on the matter as well as allowing any testimony regarding arrest dates, place of arrest and warrant dates. The probative value of all prosecutorial statements regarding flight was substantially outweighed by the prejudicial effect of the statements and testimony (Mississippi Rules of Evidence 401, 402, 403) which were ultimately not relevant to establishing the guilt of the Appellant. *Flowers v. State*, 842 So.2d at 550 (Miss.2003) The State improperly tried to establish that the Appellant was on the run from the law.

D. Statements by the Prosecutor easily characterized as insinuations and intimations

1. Relevant Facts to Issue I, subsection D

During cross examination of Defense Witness Astrid Hernandez, the prosecution asked her "Because you were hiding him out down there, weren't you?" and "You were keeping him from coming up here, you were hiding him, because you didn't want him to get arrested." (T.320)

2. Statement of the Law Relevant to Issue I, subsection D

In *Flowers v State*, 842 So.2d 531, 553 (Miss.2003), the Mississippi Supreme Court held that "it is prejudicial error for questions on cross examination to contain insinuations and intimations of such conduct when there is no basis in fact". "Whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Id., Mickell v. State, 735 So.2d 103 (Miss.1999)*

3. Argument Relevant to Issue I, subsection D

The insinuations and intimations of the prosecution amounted to continued violations of the court's ruling regarding flight.

The Appellant would like to note that although the aforementioned instances of prosecutorial misconduct were not objected to by Defense counsel, the Mississippi Supreme Court has determined that in cases of prosecutorial misconduct, the Court is not constrained from considering the merits of the alleged prejudice. *Mickell* 735 So.2d at 1035.

II. WHETHER THE FACT THAT THE STATE FAILED TO PROVIDE THE DEFENSE WITH THE SUBSTANCE OF ORAL STATEMENTS MADE BY TWO STATE WITNESSES CONSTITUTED A VIOLATION OF UNIFORM CIRCUIT AND COUNTY RULE 9.04 AND THEREBY DENIED THE APPELLANT A FAIR TRIAL

A. Relevant Facts to Issue II

State witness Rhonda Poche testified that on the day of the armed robbery, she witnessed the Appellant retrieve some items from a red oldsmobile (T.108), the alleged "get away" vehicle.

State witness Grant Stevens testified during trial that the red oldsmobile found in the parking lot of the Appellant's apartment was the same vehicle used in the armed robbery and that the police took him to the vehicle the night of the crime and he identified it as being the same vehicle. (T.260)

B. Statement of the Law Relevant to Issue II

Mississippi Uniform Circuit Court Rule 9.04 governs the supplying of discovery from one party to another requiring that statements, documents and other materials in the possession of the parties be rightfully transferred or communicated to the other. Specifically, Rule 9.04(A)(1) provides that the prosecution must disclose to each defendant or defendant's attorney "the substance of any oral statement made by any such witness."

Regarding unfair surprise, in *Byrom v. State*, 863 So.2d at 870 (Miss.2003), the Mississippi Supreme Court commented that "The days of trial by ambush are over in Mississippi trial courts." Likewise, in *Box v. State*, 437 So.2d 19, 21 (Miss.1983), the Court addressed the interest of the defendant in "knowing reasonably well in advance of trial what the

prosecution will try to prove and how it will attempt to make its proof."

C. Argument Relevant to Issue II

The aforementioned testimony of Ms. Poche and Mr. Stevens came as unfair surprise to the Appellant during trial. Neither of these substantive statements were provided to the defense, either in the form of law enforcement reports, or in any other discovery provided to the Defense. Most importantly, though the State may have provided a list of potential witnesses to the Defense(R.E.22), it did not provide the substance of any additional material witness statements along with that same listing. Certain statements were revealed for the first time during the declarant's testimony. The Supreme Court has held that "this is a violation of the discovery rules and if the District attorney does not provide the evidence to the opposing counsel during discovery, then it should not be introduced as evidence in the trial."

Ms. Poche and Mr. Stevens gave truly substantive and material testimony and more likely than not, weighed heavily on the minds of the jurors. Said statements, oral or written, should have been disclosed to the Defense in fairness to allow proper preparation. (*Kolberg v. State*, 704 So.2d 1317, 1318 (Miss.1997) The State gained an unfair advantage by eliciting this testimony with any rebuttal or testing of its truthfulness.

Because the Appellant was not aware of said substantive statements, he was not able to properly present a defense which would have included testimony from his father, Robert Fraise, that he had worked in Gulfport, Mississippi all day on the day of the armed robbery until shortly after 5:00 p.m. (R.E.12) It's important to note that Ms. Poche's testimony is the only testimony that linked the Appellant in any manner to the red oldsmobile in question.

III. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE PHOTO LINEUP AND ALLOWING TESTIMONY FROM JEANETTE QUINTANA AND DETECTIVE CLARK ON ITS OWN MOTION.

A. Relevant Facts to Issue III

Detective Clark gathered photographs from a database at the Picayune Police Department. He developed a photo lineup containing thirteen photographs from that database. (R.E.10) of which thirteen photographs were similar, leaving the Appellant's photograph to stand out in a distinct manner. Both Detective Clark and Jeanette Quintana testified during the trial regarding the photo lineup.

B. Statement of the Law Relevant to Issue III

When conducting a photo-lineup, the United States Supreme Court has set out certain factors to be considered in determining the reliability of photographic identification and evaluating the likelihood of misidentification. *Neil v. Biggers*,

409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972) and *Manson v. Braithwaite*, 432 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972); Jones v. State, 504 So.2d 1196 (Miss.1987)

Said factors are:

(1) Opportunity to view the accused at the time of the crime

(2) Witness's degree of attention

(3) Accuracy of the witness' prior description of the criminal,

(4) Level of certainty demonstrated by the Witness at the time of the confrontation and

(5) Length of time between the crime and the confrontation

C. Argument Relevant to Issue III

The photo lineup was fully presented to the Court and it was clear that it was impermissibly suggestive because (1) Ms. Quintana's out of court and in court identification failed the *Biggers* test and (2) the Appellant's photograph was completely unlike other photographs in the lineup.

Under the *Biggers'* factors, Ms. Quintana's opportunity to view the robber was limited according to her own testimony. She testified that she only viewed him for five seconds and was at least 16 feet away from him. His face was covered, but she provided no description of his facial features. Mr. Stevens was

directly in his face, but could not identify the robber after viewing a photo lineup. Ms. Quintana gave several descriptions of the skin color of the robber to police officials, each description in stark contrast to the other. She said black male and dark skinned, then white male with a dark complexion, then a mixed male while testifying in court. (R.E.16, 17, 18)

Ms. Quintana compared the robber's height with that of Mr. Stevens, but Stevens was much taller than the Appellant. She agreed that Mr. Stevens would have a better look at the robber than she did. (T.220). *Northrop v. Trippett*, 265 F.3d 372, 383 (6th Cir.)

There are discrepancies as to when the photo lineup was presented to Ms. Quintana. According to Detective Clark's sworn affidavit dated 9-26-06 (R.E.13) which was used to charge the Appellant, but was completed after the search of the Appellant's apartment. There was no mention of Ms. Quintana's photo lineup. However, the search of the Appellant's apartment is mentioned. But according to Detective Clark's police report written on 9-29-06 (R.E.14) Ms. Quintana was shown a photo lineup before charges were filed, and before the search of the Appellant's apartment.

It is clear that there was prior suggestive identification because the Appellant was the only person light skinned person who obviously stood out to Ms. Quintana and there was a span of

a few days between when she gave her first identification and when she gave the last one, therefore her certainty at confrontation goes out the window. *See Cossel v. Miller*, 229 F.3d 649, 656 (7th Cir.2000)

The Appellant recognizes that Defense counsel did not object to use of the lineup or file any motions in this regard, however considering the factors as set out by the High Court, this issue has standing for review under the Plain Error Rule without hesitation. *Porter v. State*, 732 So.2d 899, 902 (Miss.1999)

IV. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF HOLLY KRANTZ.

A. Relevant Facts to Issue IV

Holly Krantz's rebuttal testimony was allowed by the Court over objection by Defense counsel. She testified that her testimony was based on a conversation she had with Astrid Hernandez, the Appellant's alibi witness. It is the Appellant's assertion that Ms. Krantz illegally obtained his phone records of which she obtained Ms. Hernandez's phone number. Ms. Krantz testified that she had no warrant to obtain the Appellant's phone records.

B. Statement of the Law Relevant to Issue IV

In *Carney v. State*, 325 So.2d 776, 786(Miss.1988), the Mississippi Supreme Court held that "no amount of probable cause

can justify a warrantless search of seizure absent exigent circumstances." Further, in *Canning v. State*, 226 So.2d 747, 753 (Miss.1969), the High Court held that "there is no presumption of a lawful search and seizure where it appears that the officers acted without a search warrant." "The burden is upon the State of Mississippi to show that search and seizure of property were done in a lawful manner, otherwise the evidence obtained is not admissible against those who have standings to object to the search, and where objection is made at the proper time. *Id.* at 752.

Mississippi Rule of Evidence 613 addresses prior statements of witnesses. Section (b) states that when dealing with prior inconsistent statements by witnesses, said statement is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. (R.E.15)

With regard to Rule 613, a stricter standard should be followed, in that, the questions put to a witness about a particular inconsistent statement should include whether or not on a specific date, at a specific place, and in the presence of specific persons, the witness made a particular statement. *Flowers v. State*, Id.

C. Argument Relevant to Issue IV

In addition, Ms. Krantz' testimony was admitted in violation of Rule 613. Ms. Hernandez was never afforded the opportunity to explain or deny Ms. Krantz' testimony and the Court has ruled that a witness must be afforded an opportunity to explain or deny an inconsistent statement offered by an opposing party. If afforded the opportunity to rebut Ms. Krantz' testimony, Ms. Hernandez would have denied such statements or that such a conversation with Ms. Krantz ever took place. (R.E.15) Ms. Hernandez testified to having a conversation with a male officer (R.313). She was never asked about who she had spoken to specifically. General terms were used by the prosecution like "Picayune Police Department " and "they" during the questioning. (T.318)

Rebutting alibi testimony in such a fashion is substantial and prejudicial and cannot be considered harmless error. The Appellant's alibi witness was attacked without any meaningful opportunity to defend.

Because the phone records were illegally obtained, and therefore a phone number had been illegally obtained, testimony from Ms. Krantz in this regard should not have been admitted. *Silverton Lumber Company v. United States*, 251 U.S. 385, 392 (1920) The Court should not have allowed her to testify, and therefore a reversal is in order.

V. WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE PHOTOGRAPH OF THE APPELLANT

A. Relevant Facts to Issue V

A photograph of the Appellant wherein a weapon was displayed, was admitted into evidence. (R.E.11) The photograph had been seized from his apartment by the Picayune Police Department. The photograph was over nine (9) months old at the time of its seizure.

B. Statement of the Law Relevant to Issue V

The Court in *Hodges v. State*, 912 So.2d 730, 780 (Miss.2005)held that "evidence of prior offenses committed by a defendant, not resulting in conviction, is generally inadmissible either for impeachment purposes or as a part of the State's case in chief."

"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 that "single" issue." *Flowers v. State*, 842 So.2d at 541 (Miss.2003)

"There is a natural tendency to infer from the mere production of a material object the truth of all that is predicated of it. Secondly, the sight of death weapons, cruel injuries, etc. tends to overwhelm reason and associate the accused with the atrocity without sufficient evidence." *Hickson v. State*, 472 So.2d 379, 385 (Miss.1985)

"The jury's attention should not be deflected nor its passions inflamed by evidence of other illegal or otherwise anti-social conduct of the defendant." *Hughes v. State*, 470 SO.2d 1046 (Miss.1985)

Most importantly, the Court in *Gavin v. State*, 785 So.2d 1088 (Miss.App.2001) addressed how proof of a weapon prior to the offense date as charged in the indictment is not admissible.

C. Argument Relevant to Issue V

The photograph was not in any way relevant to the crimes that the Appellant was charged with. The State failed to connect the photograph to the crimes in any manner. The presentation of the Appellant with what appeared to be a deadly weapon in a totally remote and unrelated act is prejudicial error requiring a new trial.

VI. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN FAILING TO GRANT A CIRCUMSTANTIAL EVIDENCE INSTRUCTION

A. Relevant Facts to Issue VI

During trial, the parties never discussed the need for circumstantial evidence jury instruction. Other jury instructions were admitted, however a circumstantial evidence instruction was not addressed in any manner.

B. Statement of the Law Relevant to Issue VI

According to *Price v. State* and *Keys v. State*, "when the evidence for the prosecution is wholly circumstantial in nature,

the accused is entitled to have circumstantial evidence instruction given." *Price v. State*, 749 So.2d 1193 (Miss.App.1999) *Keys v. State*, 478 So.2d 266, 267 (Miss.1985)

The instruction must be given where the prosecution is without a confession and wholly without eyewitnesses to the gravamen of the offense charged and the case rests solely and alone upon circumstantial evidence. Id. and *Mack v. State*, 481 So.2d 793 (Miss.1985), *Clark v. State*, 502 So.2d 277, 278 (Miss.1987)

C. Argument Relevant to Issue VI

The whole of the evidence presented by the prosecution is circumstantial at best and each piece of circumstantial evidence clearly rests to support the gravamen of the offenses of armed robbery and possession of a firearm as a convicted felon. Though the State would potentially contend that it presented evidence of a direct witness to the crimes, no direct evidence was presented because the only person present at the scene of the crime who could possibly identify the armed robber, gave three different descriptions of him. The Appellant would contend that these varied descriptions serve to nullify her as a direct, effective eyewitness.

To understand the nature of the evidence presented by the State, it is necessary to gain a complete understanding of the meaning of direct evidence versus circumstantial evidence.

Direct evidence must directly and not by inference implicate the accused and not just show that there has been a crime. *Price v. State*, 749 So.2d at 1195. Such evidence includes specific eyewitness accounts and confessions by a defendant because the confession is a statement by an eyewitness that admits that person's own guilt. *Id.*

Circumstantial evidence is evidence that is not direct and inferences of guilt are drawn rather than actualities of what was directly experienced.

The questions that remain are whether the testimonies of the three eyewitnesses and any additional evidence presented by the State is circumstantial or direct.

Specifically, the State presented the following evidence: (1)Michael Petree, an officer with the Picayune Police Department, testified that he was dispatched to the Pit Stop. Upon his arrival, he talked to the three eyewitnesses at the scene. However, no witness could give a complete facial description of the male who robbed the store. He stated that he was told that the male left in a red oldsmobile and he noticed that a portion of the parking lot of the store was muddy. He completed a police report. (R.E.18)

(2)Scott Wagner, another officer with the Picayune Police Department, testified that he also responded to The Pit Stop and patrolled the area for the red oldsmobile. A BOLO (Be on the

Lookout) was broadcasted and a witness had indicated that the vehicle had no tag, had square tail lights on each end, with lights going all the way across the rear end of the vehicle. He testified that he found a vehicle fitting this description at the Arbor Gate Apartments and that he also saw a Ford F-150 backing out of a parking spot next to the red car. Officer Wagner saw the passengers of the F150 and then focused back on the red vehicle. He testified that he observed that the red oldsmobile had mud under the rear wheel welds and the back fender. The vehicle was still warm when he touched it. A receipt was found in the vehicle, but it did not suggest any ownership. No report was completed.

(3) Rhonda Poche, a Pearl River County Sheriff's deputy, testified that she was also worked as a security guard at the Arbor Gate apartments. She was on duty with the Sheriff's Department the night of the crimes, heard the BOLO, and went to the Arbor Gate Apartments after hearing that the alleged vehicle had been spotted at this destination. Officer Poche testified that she had seen the Appellant get something out of that vehicle previously that day and she assisted the Picayune Police Department in ascertaining which apartment the Appellant lived in. She had never seen the Appellant drive the car before and could not testify whether the red oldsmobile was his vehicle. No

report was completed and she didn't know she was being called as a witness until one day prior to the trial.

(4)Thomas Clark, an investigator with the Picayune Police Department for three months at the time of the alleged crimes, arrived at the Pit Stop approximately thirty minutes after the alleged crimes occurred. Upon his arrival, he spoke to Ms. Childs, Mr. Grant and Ms. Quintana. Ms. Childs told him that the male was dark skinned wearing a dew rag on his face, appeared to be of mixed race, was wearing a long sleeved black shirt and pants and black gloves. Mr. Grant told him that the male had a dew rag over his face and that he wore all dark clothing. Ms. Quintana told him that the male was possibly a white male with a dark complexion and that she had possibly seen him before.

Detective Clark composed a photo lineup containing thirteen separate photographs. (T.137, 138) He showed the photographs to Ms. Quintana and Mr. Stevens. (T.139) Ms. Quintana picked out the Appellant under questionable circumstances. (T.139) Mr. Stevens could not identify anyone. (T.139)

Detective Clark searched the Appellant's apartment and obtained certain items, namely cash, a photograph of the Appellant, gloves and an item worn that could be worn as a head garment, but never spoke to his roommate about who the items belonged to.

(5)Stephanie Childs, a customer at the store, described the male as wearing a black shirt and having a black stocking pulled over his head. (T.189, 197) She indicated that she had seen a little bit of his neck and a piece of his wrist. (T.190) She indicated that she did not know the male (T.191), that she had never seen him before (T.190, 191) and that she did not get a good enough look at his face to ever be able to identify him. (T.192) Ms. Childs was not shown a photo lineup by police officials.

(6) Jeanette Quintana, a cashier at the Pit Stop, described the male as having on a long sleeved shirt, a pair of pants and a dew rag pulled over his head. (T.204) One police offense report indicated that Ms. Quintana described the male as a black male. (R.E.16)(T.214, 215) Another offense report, which was completed after the photo lineup was viewed, indicated that Ms. Quintana described the male as a mixed male. (R.E.17)(T.231) And yet another report indicated that Ms. Quintana's description of the male was that he was dark skinned. (R.E.18)(T.244)

(7)Grant Stevens, another employee at the Pit Stop described the male as wearing a black mask that covered his entire face, his entire head and his entire neck. (T.250) The male had on a black long sleeved shirt and wore gloves that came up to his wrist with dark jeans. (T.250) Mr. Stevens could not identify the male. (T.251).

Mr. Stevens observed the type of vehicle that the male drove away in. He described it as being a red oldsmobile (T.261) with a specified type of taillights. (T.261) A similar vehicle to that described by Mr. Stevens was later found at the apartments where the Appellant resided. However, ownership or the Appellant's actual efforts to drive the red oldsmobile in question were not established.

A review of the aforementioned statements and testimony does not suggest that any of the State's witnesses presented direct evidence to support the guilty verdicts. The three eyewitnesses gave some information about the description of the robber, but two of them could not identify him and the remaining witness gave different accounts of the skin color of the male.

Ms. Quintana picked the Appellant out in the photo lineup because he stood out like a sour thumb. She had seen him before, so he must have been the one who committed the crime in her mind. The vehicle could not directly be associated with the Appellant because no state witness had seen him drive it and ownership of said vehicle had not been determined.

Mr. Stevens saw the vehicle drive away from the scene, but could not say directly that the Appellant was driving it. Money was found at the Appellant's apartment, but it was not determined that it belonged to his roommate or the Appellant, and that the monies taken from the apartment were less than that

reported stolen from the Pit Stop. A photograph of the Appellant was seized, but it was not established that it even relevant to the instant crime. Every bit of State evidence was indirect and yielded to inference rather than to whole and direct association to the Appellant.

The Supreme Court has reversed many cases where the State's evidence consisted entirely of circumstantial evidence and the trial court failed to grant a circumstantial evidence instruction. *Henderson v. State*, 453 SO.2d (Miss.1984); Gilleylen v. State, 255 So.2d 661 (Miss.1971); *Kendall v. State*, 217 So.2d 35, 36 (Miss.1968). Because a circumstantial evidence instruction was not granted by the Court, the Appellant urges the Court to reverse and remand the instant convictions.

VII. WHETHER DEFENSE COUNSEL'S LEGAL REPRESENTATION AT TRIAL CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

1. Relevant Facts to Issue VII

Specifically, the Appellant asserts the following facts regarding his ineffective legal representation at the lower court:

a. Defense counsel failed to challenge Quintana's out-of-court identification and object to her in-court identification

b. Defense counsel improperly sought admission of Detective Clark's offense report into evidence

c. Defense counsel improperly stipulated that certain State exhibits could be admitted into evidence

d. Defense counsel failed to fully investigate State and Defense witnesses

e. Defense counsel failed to submit jury instructions regarding the Appellant's alibi defense and eyewitness testimony

f. Defense counsel failed to file motions challenging the warrantless search of the Appellant's apartment

g. Defense counsel failed to object during specified times during the trial

h. Defense counsel failed to obtain a copy of the 911 tape in this matter and file a Motion for Discovery

B. Statement of the Law Relevant to Issue IV

First and foremost, the United States Supreme Court has determined that the test for establishing ineffective assistance of counsel requires showing that the performance of defense counsel was deficient and that this deficient performance of defense counsel's conduct prejudiced the Defendant. The determination of whether Defense counsel's conduct was deficient is done with a strong presumption that counsel's actions were reasonable. However, regarding prejudice, the Appellant must demonstrate that, but for counsel's unprofessional errors, there was a reasonable chance that the results of the trial court

would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 764 (1984)

In *Bryant v. Scott*, 28 F.3d at 1416, the Fifth Circuit held that "an attorney must engage in a reasonable amount of pre-trial investigation and "at a minimum, interview potential witnesses and make an independent investigation of the facts and circumstances in the case." "The failure to interview eyewitnesses to a crime may strongly support a claim of ineffective assistance of counsel"

Further, the Fifth Circuit found the counsel in the *Bryant* case to be constitutionally deficient representation by "restricting his pretrial investigation to discussions with the [defendant], and examination of the prosecutor's files. *Bryant* 28 F.3d at 1418.

According to *United States v. Molina*, 934 F.2f 1440, 1447 (9th.Cir.1991), a defendant "arguably has everything to gain and nothing to lose in filing a motion to suppress." "It is not professionally unreasonable to decide not to file a motion clearly lacking in merit." See *Tomlin v. Myers*, 30 F.3d 1235, 1238 (9$^{th}$Cir.1994) Yet, the photo lineup before the court had significant merit.

C. Argument Relative to Issue IV

***(Defense counsel failed to challenge Quintana's out-of-court identification and object to her in-court identification)***

In discussions with the Appellant, information available to the defense was substantial to indicate that the State would rely heavily on Ms. Quintana's identification of the Appellant to help advance the State's case. It was also the theory of the defense that the State's case was based on misidentification. Thus, it was unreasonable, and without excuse, for Defense counsel to fail to file a Motion to Suppress Ms. Quintana's out of court photo identification. The photo line-up was extremely suggestive, and considering that she thought she had seen the Appellant before, and that he was the only person in the lineup who had drastically different characteristics, it was only natural for her to pick the Appellant out of the line-up. Defense counsel failed to object to presentation of evidence regarding this lineup and that was improper considering the sole defense of the case was that of misidentification and alibi.

The Appellant points out to the Court that he made several requests of Defense counsel to file a Motion to suppress the out of court identification and set a hearing in this regard with little success. (R.E.21)

*(Defense counsel improperly stipulated that certain State exhibits could be admitted into evidence)*

Defense counsel submitted Det. Clark's police report into evidence (T.233, R.E.14). This police report, in particular, exposed the jury to prejudicial, inadmissible hearsay, namely that the Appellant was on probation, that the Appellant's

roommate had stated that the Appellant was gone in the red oldsmobile, that the apartment manager and other residents said that the red oldsmobile belonged to the Appellant, and speculations of the amount of money that was seized from the Appellant's apartment, of which the State eagerly pointed at in its closing arguments (T.364).

The Mississippi Supreme Court on at least three occasions has addressed improper bolstering and essentially aiding the State's case. In *Scott v. State*, 446 So.2d at 585, the Court noted that "allowing the jury to have [the officer's] notes while it deliberated amounts to an improper bolstering of his testimony". *See* Byrom v. State, 863 So.2d 836, 889 (Miss.2003) Justice Mcrae's Dissent. In *Waldrop v. State*, 506 So.2d 273, 276 (Miss.1989), the Court held that "counsel not only failed to defend his client effectively, but also aided, albeit unwittingly, the prosecution". "We cannot by any stretch of the imagination construe this action as legitimate strategy for any competent criminal defense attorney." An NCIC report had been admitted into evidence in the *Waldrop case*. And in *Rose v. State*, 556 So.2d 728, 733 (Miss.1990), the Court recognized the dangers in *West v. State*, 249 So.2d 650 (Miss.1971) "of allowing a jury to be presented with what appears to be the official opinion of the police department that the defendant is guilty". Though in another district, in *Freeman v. Class*, 95 F.3d 639 (8th

Cir.1996), the District Court held that the trial counsel's introduction into evidence of a police report containing hearsay statements was improper. "As the district court noted, introduction of the document by the defense was particularly damaging. Had it come from the prosecution, the may not have given it much weight, whereas, in this situation, they would be more inclined to treat it as indistinguishable from an admission by the defense." *Freeman*, 911 F.Supp. at 408.

The State's case was clearly bolstered. This report was the only report that revealed the witness' description of the robber which matched the Appellant's description. The admission of the report was not necessary because any effort to impeach Detective Clark or point out discrepancies could have been accomplished by merely presenting the report to the detective and pointing out said discrepancies while he was on the witness stand. The Appellant asserts that admission into evidence was clear, reversible error!

*(Defense counsel improperly stipulated that certain State exhibits could be admitted into evidence)*

During trial, exhibits 1-13 were stipulated as evidence by Defense counsel and the State (T.63, 421). These stipulations were made in the Appellant's absence. Exhibits 19 and 20 were admitted without objection from Defense counsel and with comments that he agreed said items had been found in a legal search of the Appellant's apartment. (T.142) Considering that

the search was unreasonable and that no motions had been filed to suppress said items, it was therefore unreasonable and incompetent to easily relieve the State of its burden to show relevance and authentication.

Throughout the Appellant's communications with Defense counsel, he expressed his concern regarding the admissibility of the items listed in the aforementioned exhibits and that they had been illegally seized through efforts of his probation officer and the Picayune Police Department.

Mississippi Rule of Evidence 901(a) governs authenticity and comments of the Advisory Committee opine that "The authentication and identification aspect of evidence are central to the concept of relevancy." "Unless it be satisfactorily shown that an item of evidence is 'genuine', the item is irrelevant and should be excluded." Needless to say, however, no pre trial motions in this regard were filed despite the Appellant's objections.

*(Defense counsel failed to fully investigate State and Defense witnesses)*

Defense counsel failed to investigate any of the State's witnesses and investigate for potential defense witnesses for trial.

The Appellant advised Defense counsel regarding Appellant's conversation with Officer Wagner on the evening of the robbery (Appellant was in his vehicle, a Ford F150) as well as his conversation with Terry Harper who was present when this

In *Hersick v. State*, 904 So.2d 116, 132 (Miss.2004), the Court held that "While it is true that courts are deferential to lawyers' judgment in such matters, there are limits. It has been held that at a minimum, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case."

In *Hodges v. State*, 912 So.2d 730, 762 (Miss.2005), the Court held that "It has been recognized that adequate investigation is a requisite of effective assistance. To establish a constitutional violation, a defendant must show both a failure to investigate adequately and prejudice arising from the failure."

Specifically, counsel's failure to speak to Mr. Harper eliminated the opportunity for him to contradict Officer Wagner's testimony that he did not speak to the Appellant. Mr. Harper witnessed the conversation between the Appellant and the Officer. Counsel's failure to talk to the apartment manager eliminated the opportunity for her to contradict statements made by Ms. Poche and other police officials regarding entry into the apartment and ownership of the red oldsmobile. Theses failures clearly prejudiced the Appellant.

*(Defense counsel failed to submit jury instructions regarding the Appellant's alibi defense and eyewitness testimony and the importance of the Biggers factors)*

The jury that considered the case at bar were not instructed how to deal with a defendant's alibi as well as the sensitivity of eyewitness testimony. Defense counsel failed to submit any instructions of this type and thus, this was substantially prejudicial to the defense. (R.E.19) Again, the sole theory of the Appellant's case was misidentification and that he was somewhere else at the time of the robbery. Not a jury single instruction was submitted in this regard.

In *Young v. State*, 451 So.2d 208, 211 (Miss.1984), the Court admonished that "trial counsel [should] submit among his six requested instructions, one which presents his theory of the case as supported by the evidence". The Court noted that the jury was left uninstructed on the defendant's alibi defense and such an error required reversal.

In *Jackson v. State*, 645 So.2d 921, 925 (Miss.1994), the Court noted that the Defendant was entitled to an alibi instruction because that was his theory of the case as well as in *Sanford v. State*, 372 So.2d 276 (Miss.1979) "Alibi as a defense is well established in our criminal jurisprudence. We had held many times that alibi testimony, if believed by the jury when considered along with all other evidence, requires acquittal. Without question, one who interposes an alibi as the theory of his defense, and presents testimony in support of such a plea, is entitled to a jury instruction focusing upon such a

theory." *Id., See also Hester v. State*, 602 So.2d at 365 (Miss.1996)

*(Defense counsel failed to file motions challenging the warrantless search of the Appellant's apartment)*

One day after the robbery, Det. Krantz of the Picayune Police Department, went to the office of the Appellant's parole officer, Brenda Varnado. Det. Krantz asked Ms. Varnado to go with her to the Appellant's apartment. According to the incident report she completed (R.E.20), it was not Ms. Varnado's idea to go to the apartment. After arriving at the apartment, Det. Krantz initiated a search in the absence of the Appellant and certainly without obtaining a search warrant.

Trial counsel was made aware that the Appellant wanted him to file motions to suppress the seized property. He failed to file any motions and later during trial conceded that the search was conducted legally.

When the Appellant confronted trial counsel regarding his failure to file motions challenging the warrantless searches, he stated that a parolee must submit to a search involving his parole officer. (R.E.21) However, the Appellant was not under any warrantless search conditions or any conditions of parole that required that he submit to a search by his parole officer. It was a condition of his parole that his parole officer could visit him at his residence. Yet, that in no way required him to submit to a warrantless search.

Although it was condition of the Appellant's parole that Ms. Varnado could visit him, it was not a condition of searches. In *Wyman v. James*, 400 U.S. 309, 325, 27 L.Ed. 29 408, 91 S.Ct. 381 (1971), the Supreme Court sharply distinguished home visits from searches. The Picayune Police Department used Ms. Varnado as a "stalking horse" to avoid obtaining a search warrant. See *Latta v. Fitzharris*, 521 F.2d 246, 249 (9thCir.), *United States v. Richardson*, 849 F.2d 439, 441 (9thCir.1988), *United States v. Harper*, 928 F.2d 894, 897) (9thCir.1991)

*(Defense failed to object during specified times during the trial and request that the jury be instructed)*

Throughout the trial, trial counsel failed to object to inadmissible evidence and request that the jury be instructed during the following instances:

(a) State's presumption of innocence comment (T.29)

(b) Undisclosed statements (oral) causing surprise (T.103)

(c) Hearsay (jury should have been instructed to disregard (T.104)

(d) Detective Clark's in-court identification of the Appellant (T.141)

(e) Quintana's in-court and out of court identification (T.212)

(f) Undisclosed oral statement of Mr. Stevens (T.262)

(g) Improper questions from the prosecution to Mr. Blank during cross examination (T.301, 305)

(h) Cross examination of Ms. Hernandez about the Appellant being in jail and possible flight (T.319-323)

(i) Krantz testimony when no proper predicate had been laid

(j) Flight comments during closing arguments by the State (T.354, 367)

*(Defense counsel failed to obtain a copy of the 911 tape in this matter) and file a Motion for Discovery*

It was obvious to those investigating this case, that a 911 tape of the robbery existed. However, despite the fact that this case really centers around misidentification, this tape was not obtained for trial purposes. The fact that trial counsel did not try to obtain said tape to determine whether there was any indication of a description of the robber, considering the sole of the Appellant during trial, suggests ineffective assistance of counsel.

The Appellant has filed a Motion in this Court requesting additional time to provide said tape to the Court to determine whether this tape would be have been an asset to the Defense.

Further, it does not appear from the record that a Motion for Discovery was filed. (The State filed a motion and response R.E.22) To ensure that all rights to discovery are protected, it was incumbent upon the Defense counsel to file said Motion.

## CONCLUSION

In the extreme interests of justice, due process, and substantive/fundamental rights "a party who fails to make a contemporaneous objection at trial must rely on plain error to raise the issue on appeal, because it is otherwise procedurally barred". "The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." *Sims v. State*, 919 So.2d 264, 266 (Miss.2006)

Defense counsel did not object to a plethora of errors during trial and the Appellant prays upon this Court to review these errors under the plain error doctrine. The Appellant argues vehemently that he truly faced two indictments in July 2007, without the effective assistance of counsel at a point up to and including trial. Defense counsel seemed to never have enough time to consult with the Appellant and was virtually impossible to contact. No pre-trial suppression motions were filed regarding the photo-line up or other items illegally seized from the Appellant's apartment, no investigations were conducted and the trial seemed to be handled as if many issues came as a surprise to defense counsel. Defense counsel expressed to the Appellant that by stipulating evidence, that would mean that "we don't have to put them on the stand."

Defense counsel did not provide a clear defense on behalf of the Appellant to the jury, but instead relied on using terms of "mulatto", and focusing too much trial time on whether the correct vehicle had been obtained. The primary defense was misidentification and alibi, but Defense counsel though all of his mistaken efforts never provided that clear defense.

Considering all of the errors and oversights by trial counsel, the Appellant contends that but for Defense Counsel's deficient representation, the results of the trial would have been different.

The Appellant argues that for all of the aforementioned reasons submitted throughout Issues I through VII, he is entitled to have his sentences and convictions reversed and remanded.

Respectfully submitted,

JAEL FRAISE

BY: _____

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## CERTIFICATE OF SERVICE

I, the undersigned, DARLA M. PALMER, attorney for the Appellant, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF THE APPELLANT, to:

Honorable R. I. Prichard, III
Circuit Judge
P. O. Box 1075
Picayune, MS 39466

Honorable Haldon Kittrell
Honorable Manya Creel
Honorable Kurt Guthrie
District Attorney and Assistant District Attorneys respectively
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Jael Fraise #108460
Mississippi State Penitentiary
Unit 32-C
Parchman, MS 38738

Dated, this the 18th day of April, 2008.

DARLA M. PALMER

CERTIFICATE OF SERVICE

I, the undersigned, DARLA M. PALMER, attorney for the Appellant, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing APPELLANT, RECORD EXCERPTS to:

Honorable R. I. Prichard, III
Circuit Judge
P. O. Box 1075
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Honorable Manya Creel
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Dated, this the 18th day of April, 2008.

DARLA M. PALMER