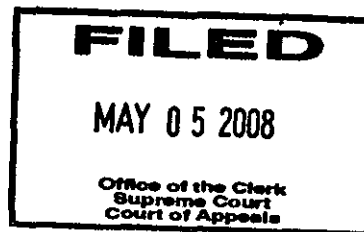


COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01781-COA



ANTHONY THOMAS

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT
OF
HINDS COUNTY, MISSISSIPPI**

BRIEF ON THE MERITS BY APPELLANT

**OFFICE OF THE PUBLIC DEFENDER,
HINDS COUNTY, MISSISSIPPI**

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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 the Supreme Court and the judges of the Supreme Court may evaluate possible disqualification or recusal.


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So certified, this the 5th day of May, 2008.


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Certifying Attorney

Anthony Thomas v. State of Mississippi

2007-KA-01781-COA

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STATEMENT OF THE ISSUES

- I. The trial court erred in permitting the prosecutor to inquire into details of a 1999 aggravated assault conviction, as it was irrelevant and far more prejudicial than probative, and thus deprived Mr. Thomas of his fundamental right to a fair and impartial trial;
- II. The trial court abused its discretion when it barred inquiry by Mr. Thomas into the drug and alcohol use of Karen Burks, as it bore on her credibility and state of mind, and
- III. The trial court erred in denial of the *Motion to Sever* by Mr. Thomas, denying him his fundamental fair trial rights.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS BELOW

Anthony Thomas was indicted for aggravated assault in violation of MISS. CODE ANN. § 97-3-7(2) (1972) and for possession of a weapon by a convicted felon, in violation of MISS. CODE ANN. § 97-37-5 (1972) by a grand jury of the 1st Judicial District of Hinds County, Mississippi in connection with the May 21, 2006 stabbing of Karen Burks. CP 5.

Mr. Thomas stood trial on the two-count indictment beginning May 29, 2007 and was convicted on May 31, 2007. RE13-19; 26-27; CP 44-50; T. 450; 452. On July 19, 2007, Mr. Thomas was sentenced as a habitual offender to life in prison without possibility of parole, under MISS. CODE ANN. § 99-19-83 (1972). T. 472-473; RE 19; 28-29; CP 50.

Following pursuit of all applicable post-trial motions, Mr. Thomas appealed his cause, now before this honorable Court for review. RE 20; CP 55; 58.

B. STATEMENT OF FACTS

Anthony Thomas and Karen Burks met at the home of a mutual friend shortly after Burks moved to Jackson in the wake of Hurricane Katrina. T. 212. Burks, who lost everything in the storm that claimed so much, needed some work done at her one-bedroom apartment at Magnolia Court. T. 213; 379. Mr. Thomas offered to help and within two weeks, the couple was living together at 242 East Bell Street, next door to the niece of Burks. T. 225; 380.

The pair argued “a lot,” Mr. Thomas testified, but there “wasn’t no fighting.” T. 380. On the night of May 20, 2006, the arguing commenced again and Burks

locked Mr. Thomas out of their shared apartment. T. 381. He returned the next morning and asked her to go grocery shopping with him, which she did, promising not to argue. T. 381. After they returned, Mr. Thomas left to check into a possible job for the next day and while gone, he imbibed a few beers. T. 381. When he went back to 242 East Bell Street, Mr. Thomas found that Burks was “more higher than I am drunk.” T. 381. Despite her earlier promise, Mr. Thomas testified Burks began arguing and he prepared to leave. T. 381.

Mr. Thomas testified he kept two tote bags always packed; he got them and took six cans of chili before heading into the bedroom to get his shoes. T. 382. At this point, Burks came into the bedroom with a knife. T. 382. Burks had little strength in her left arm, injured in a car accident twenty years before. T. 213. Nevertheless, Mr. Thomas testified that she had great strength in her right arm and put all of it in trying to stab him that night. T. 382. Mr. Thomas told the jury he was trying to pull down on her arm to make her drop the knife when Burks “snatched” and the knife hit her in the chest. T. 383. Mr. Thomas said he tried to assist Burks; he unbuttoned her shirt and pulled up other clothing to see the knife sticking out from her chest. He testified he pulled it out, told Burks she would not use that knife again and then broke the blade from the handle and put the remains in his back pocket. T. 383-384. Mr. Thomas testified he threw the blade fragments away as he walked to the home of friends to use a telephone to summon help. T. 384. The friends were not home, and as he headed back to 242 East Bell Street, he saw an ambulance go by and by the interior lights, saw paramedics working on someone. T. 384. Fearful of retribution by Burks’ family, whom he said carried

firearms, Mr. Thomas returned to his home for the night. T. 384. He testified he called the University of Mississippi Medical Center (UMMC) to find out Burks' condition, but was told she either was not there or that the information could not be given. T. 385.

Burks' version predictably differed significantly, although much of her testimony was punctuated by her stated inability to recall events of the night. For instance, Burks testified she remembered Mr. Thomas was "tipsy" when he returned to the apartment, but she does not recall what they fought about or what was said. T. 228. Burks also testified that Mr. Thomas said he was going to kill her, then put one hand over her mouth, held her with the other hand and began stabbing her, which appears to be a physical impossibility. T. 234. Burks also testified that she was stabbed nine times, which is in conflict with medical records which show two stab wounds, and differs from other statements she gave authorities that Mr. Thomas stabbed her five times. T. 230; 333; 411.

Officer Jerrick Taylor responded to the call about a domestic violence incident and arrived about 11 P.M. May 21 to find Burks collapsed on the porch of the home of Lakita Evans, niece to Burks. T. 189. Taylor testified that Burks was conscious and identified Mr. Thomas as her assailant. T. 192. Burks gave a physical description of 5'10" to 6'2" in height, about 200 pounds with a medium Afro hairstyle, some missing front teeth – and a nickname, Peanut. T. 192. Taylor testified that he remained at the scene until Burks left by ambulance and that she was conscious when the ambulance departed. T. 200.

Upon arrival at UMMC, Burks told Dr. Hunter Mafera, an Emergency Room resident that she had been using both alcohol and marijuana that night; as Burks came into the hospital with a life-threatening low blood pressure of 70, having lost as much as forty percent of her total blood volume, she was immediately rushed into surgery. T. 332; 334; 412. Burks remained in the Intensive Care Unit (ICU) from May 22 to June 8, heavily sedated virtually the entire time. T. 338-339. Burks' injuries, coupled with the lengthy sedation while in ICU, could result in "mental status changes," or potential memory loss of the events of May 21, according to Dr. Christine Toves, a UMMC surgeon who oversaw some of the care given Burks. T. 337.

SUMMARY OF THE ARGUMENT

The unifying doctrine underlying all three assignments of error in the case at bar is the fundamental right of citizens to have a fair trial by an impartial jury.

Anthony Thomas was denied his fair trial rights, guaranteed under both state and federal constitutions, when the trial judge permitted the prosecutor to go far afield into the details of a proper conviction for a similar crime in violation of MISS.R.EVID. 609. The trial court also failed to perform the on-the-record balancing of prejudice versus probative value required *before* a prosecutor questions a defendant about prior convictions, as required by MISS.R.EVID. 404(b).

The trial court abused its discretion to the point of necessitating reversal of this cause due to its refusal to permit full confrontation of Karen Burks regarding her use of alcohol and marijuana on the night of May 21, 2006. Mr. Thomas claimed self-defense; the jury was entitled to know the full story of the events of May 21, including the use of drugs that may have tarnished the credibility of Burks – or enhanced the believability of Mr. Thomas. The fact is, neither this Court nor the jury will ever know because the trial court refused to permit full confrontation of the complaining witness.

Finally, in an issue that continues to arise, Mr. Thomas alleges it was prejudicial error for the trial court to deny his *Motion to Sever* or alternatively, to refuse stipulation by Mr. Thomas of his prior crime in lieu of parading before the jury the circumstances of his prior conviction for aggravated assault. Mr. Thomas contends the trial court acted in violation of standing U.S. Supreme Court law interpreting Federal Rule of Evidence 403, upon which MISS.R.EVID. 403 is based.

ARGUMENT

I. The trial court erred in permitting the prosecutor to inquire into details of a 1999 aggravated assault conviction, as it was irrelevant and far more prejudicial than probative, and thus deprived Mr. Thomas of his fundamental right to a fair and impartial trial;

During direct examination, Anthony Thomas testified about the aftermath of the incident with Burks.

BY MR. THOMAS

So I go to the apartment then. I couldn't go back to the house. I couldn't go back to the house. Her son probably would have killed me, and don't even know what really went on. So I couldn't go back. That's the very reason I couldn't go back to the house, because her son probably would have probably shot me.

Her nieces carry pistols, he carry pistols. I don't carry pistols. He probably would have killed me, you understand. Don't even know what's happened. So that the reason I didn't go back to the house. I know she was in an ambulance, the very reason I don't go back to the house." T. 384.

According to the prosecutor, that statement by Mr. Thomas "invited error" by "opening the door" to questions on cross-examination about the details of his prior conviction for aggravated assault in 1999. The statements of Mr. Thomas clearly refer to present practice, the night of May 21, 2006. Nevertheless, the trial court permitted, over objection of defense counsel, the following:

BY MS. [WOOTEN] MANSELL:

Q. Did you say that you don't carry a pistol? Is that what you said?

A. I don't carry a pistol no more because I'm a convicted felon.

Q. You said I don't carry a pistol. Do you remember saying that?

A. I don't carry a pistol.

Q. Okay. Do you remember back in 1999 when you shot Ms. Alice Proctor, the aggravated assault that you were convicted of?

BY MR. MCWILLIAMS: Your Honor, I'm going to object to that.

BY THE COURT: Pardon me?

BY MR. MCWILLIAMS: I'm going to object to that. There's no testimony about him shooting anybody –

BY MS [WOOTEN] MANSELL: Your Honor, he opened the door. Well, we've got the indictment right here.

BY THE COURT: All right. Overruled.

BY MS. [WOOTEN] MANSELL:[Continuing]

Q. Do you remember shooting Ms. Alice Proctor, a woman that was going to leave you? Do you remember shooting her?

A. Yes, ma'm. I remember shooting her.

Q Okay. So you do carry pistols?

A. But –

Q. I didn't ask you –

A. -- it was about no leaving.

Q. I didn't ask you for an explanation.

A. Okay.

BY MR. MCWILLIAMS: May he answer the question, Your Honor?

BY THE COURT: Pardon me?

BY MR. MCWILLIAMS: May he answer the question?

BY MS. [WOOTEN] MANSELL: I didn't – I asked him did he shoot Alice Proctor.

A. Yes, ma'm.

Q. Okay. So you did carry pistols?

A. No, ma'am.

Q. You did back in 1999?

A. Yes, ma'am.

Q. So you've been convicted of aggravated assault of a woman back in 1999 because she was going to leave you right?

A. No, ma'am.

T. 387-389; RE 25.

The trial court clearly abused its discretion and violated MISSISSIPPI RULES OF EVIDENCE (MISS.R.EVID) 404(b) and 609(a)(1) in permitting the State to delve into the details of his past conviction for aggravated assault. Furthermore, the trial court failed to engage in the on-the-record MISS.R.EVID. 403 balancing test of prejudice versus probative value, as required by *Peterson v. State*, 518 So.2d 632, 636 (Miss. 1987). In *Peterson*, the state Supreme Court reversed a marijuana possession conviction for admission into evidence of the fact of a prior conviction for the same offense. In its analysis of the MISS.R.EVID. 404 violation, the *Peterson* Court outlined five factors trial courts must consider in deciding whether to admit evidence of a prior crime: (1) the kind of crime involved (similarity of past crime and offense for which accused on trial weighs against admission); (2) time between prior offense and charged crime (closer in time favors admission of the conviction); (3) similarity of offense charged and prior conviction (a factor which militates against admission into evidence due to the very real fear that the jury is more likely to infer guilt from the prior crime as from the charged offense); (4) the importance of the testimony of the accused (when, as here, Mr. Thomas was the only one who could establish his defense, which was self-defense) and finally, (5) whether credibility is central and when a crime is so similar, the prejudicial effect outweighs the probative value. *Id.* Under at least four of five factors, the balancing test strongly weight *against* admission of evidence of the prior crime.

Under MISS. R. EVID. 404(b), evidence of a past conviction may be admitted to show “other purposes such as proof of motive, opportunity, intent, preparation, plan,

knowledge, identity, or absence of mistake or accident.” The prosecutor told the trial court, in opposition to the *Motion in Limine* filed by Mr. Thomas, that the information was necessary to show “motive, opportunity and intent,” that Mr. Thomas “likes to assault women. He’s got three prior convictions of it. He apparently just likes to use different weapons and chooses different women.” T. 36. The prosecutor made no further showing of how prior convictions provided either a motive to assault Karen Burks, an opportunity to assault Karen Burks or intent to assault Karen Burks on May 21, 2006. All it did was fatally prejudice the jury in deciding the single charge before them: Whether or not Mr. Thomas feloniously and not in necessary self defense assaulted Karen Burks on the night of May 21, 2006.

Mississippi case law views the legal landscape far differently than this prosecutor, whose antics are distressingly familiar to this Court, perhaps most recently in *Douvell Davis v. State*, 970 So.2d 164 (Miss.Ct.App., 2006), *reh’g den’d*, *cert. den’d*.

In *Spraggins v. State*, 606 So.2d 592 (Miss. 1992), the Mississippi Supreme Court reversed the sale of controlled substance conviction of Spraggins due to the prosecution’s questions about a prior conviction, prior arrests and other bad acts, all in violation of MISS.R.EVID. 404(b). The Court contrasted the situation of *Quinn v. State*, 479 So.2d 706 (Miss. 1985), in which the accused not only denied involvement in the charged sale of marijuana, but having *ever* sold marijuana, which the Court found constituted “opening the door” to the questioning by the State. *Id.*, at 596-597. The Court held Spraggins “went no where near the door” as had Quinn and cited

the case of *Stewart v. State*, 596 So.2d 851, at 853 (Miss. 1992): “[t]he prosecution’s impeachment privilege may not exceed the invitation extended.”

More recently, in *Sanders v. State*, 755 So.2d 1256 (Miss.Ct.App. 2000), this Court wrote that testimony by Sanders regarding discussions with his probation officer did *not* open the door into a grilling by the State as to why Sanders had a probation officer. *Id.*, at ¶¶ 4-5. Ultimately, the jury heard Sanders, on trial for armed robbery, had a prior conviction for conspiracy to commit armed robbery. This Court found, as the Supreme Court had in *Quinn* and *Stewart*, that the State far exceeded the invitation, if any, that may have been offered. *Id.*, at ¶¶ 9-10.

The Court’s decision in *Sanders* was based in part on MISS.R.EVID. 609, which governs impeachment by evidence of a prior conviction. Mr. Thomas would also respectfully point out that under MISS.R.EVID. 609, “[t]his Court has held many times that this examination must be limited to convictions and even then the details of the crime cannot be inquired into.” *Alison v. State*, 274 So.2d 678, 682 (Miss. 1973). It is clear from this record that this prosecutor substantially deviated from the Court’s standard in excoriating Mr. Thomas upon cross examination. He did not open the door, for it is clear from his testimony he refers to present practice – not that of seven years earlier.

The fact of Mr. Thomas’s conviction was already before the jury, ostensibly to establish an element of the crime of a convicted felon possessing a weapon, in this case, a knife. T. 297-300; Exh. 34. The next day, the trial court delivered a limiting instruction to the jury, directing jurors to only consider the conviction for the limited purpose of Count Two of the indictment against Mr. Thomas. While it is

generally accepted law that jurors follow instructions given them, it is also true that given the prosecutor's performance during cross-examination of Mr. Thomas virtually no juror would be able to limit consideration of the prior conviction. As Justice Banks noted in *Hickson v. State*, 707 So.2d 536 (Miss. 1997).

"Where the resolution of a case comes down to factual disputes, the jury's role becomes paramount as it weighs the credibility of the witnesses and determines which factual accounts to accept or reject. Thus, it is absolutely imperative that the jury be unbiased, impartial, and not swayed by the consideration of improper, inadmissible information. We can not say, with any degree of certainty, that this was the case here because the fact of the matter is that the juror "threw the proverbial skunk into the jury [room]" during the deliberations by asking about other charges against Hickson. *See Dunn v. U.S.*, 307 F.2d 883, 886 (5th Cir.1962) (" '[I]f you throw a skunk into the jury box, you can't instruct the jury not to smell it' "). *Id.*, at ¶ 33. While *Hickson* referred to the refusal of the trial court to grant a change of venue in the sexual battery trial of the defendant, counsel for Mr. Thomas believes the decision is particularly insightful when applied to the facts of this case regarding prior bad acts.

In *Campbell v. State*, 750 So.2d 1280 (Miss.Ct.App. 1999), the late Justice James Thomas, a former Harrison County prosecutor, reversed the cocaine sale conviction of Campbell due to repeated improper testimony of other pending charges that deprived him of a fair trial, despite repeated limiting instructions delivered by the trial court. *Id.*, at ¶¶ 12-13. Mr. Thomas would humbly submit the limiting instruction delivered earlier in the trial failed to cure the error of the prosecutor's

inquisition into his past conviction. There can be little doubt that the prosecutor's clearly contemptuous questions of Mr. Thomas was meant to imbed into the minds of jurors the fact that Mr. Thomas historically assaulted women; ergo, he was guilty of assaulting Burks on May 21, 2006.

Because Mr. Thomas was denied a fundamentally fair trial due to the prosecutor's interjection of prior bad acts, which Mr. Thomas respectfully argues was inadmissible on the basis upon which the State relied, and which was far more prejudicial than probative, his conviction requires reversal and remand for a new trial.

**II. The trial court abused its discretion when it
barred inquiry by Mr. Thomas into the drug and
alcohol use of Karen Burks, as it bore on her
credibility and state of mind, and**

Under *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), it is a violation of the Sixth Amendment confrontation right to unfairly restrict cross-examination of a witness. The trial court abused its discretion in denying to Mr. Thomas the right to cross-examine Karen Burks as to her use of alcohol and marijuana the night of May 21 and in so doing, denied him the right to fully confront the state's case. RE 22; 23-24; T. 35; 353-354.

The defense of Mr. Thomas was that of self-defense; the jury is the ultimate arbiter of witness credibility and all factual disputes. In this case, however, the only notice they received of possible drug and alcohol use by Burks on the night in question was through the testimony of Dr. Hunter Mafera, the emergency room resident who took her history. T. 412. Dr. Toves testified that due to the trauma and resulting treatment to save her life, Burks may not recall much about May 21, 2006.

T. 337-338. Indeed, Burks frequently testified she did not remember what the couple was arguing about May 21. It is entirely possible that Burks would have been unable to recall for the jury the use of any alcohol or illicit drugs that night.

In *Shaffer v. State*, 740 So.2d 273 (Miss. 1998), the Mississippi Supreme Court reversed and remanded a murder and sexual battery conviction due to the denial by the trial court to allow the defense to fully cross-examine a prosecution expert regarding the alcohol and drug intake of the victim on the night she died, as such information was crucial to determination of the cause of death. *Id.*, at ¶¶ 23-24.

“The right to impeach or to attack a witness’s credibility is considered the most valid safeguard for providing the trier of fact complete access to the truth.” *Valentine v. State*, 396 So.2d 15, 16 (Miss. 1981). The Mississippi Supreme Court reversed the marijuana sale conviction against Valentine due to a similar situation as in the case at bar. The trial judge granted the State’s *Motion in Limine* to prohibit cross-examination of the undercover purchaser except for those dealing with the purchaser’s truthfulness.

Mr. Thomas humbly submits that the jury was denied “complete access to the truth” and he was denied full access to the fundamental protections guaranteed him under both state and federal constitutions. AMEND. VI, XIV, U.S. CONST; art. III, § 26, MISS. CONST.

III. The trial court erred in denial of the Motion to Sever by Mr. Thomas, denying him his fundamental fair trial rights.

This issue is before the Court in two other cases, *Charlie Sawyer v. State*, 2007-KA-0136-COA and *Michael Wayne Williams v. State*, 2007-KA-0135-COA.

As in those cases, Mr. Thomas contends that under the authority of *Old Chief v. United States*, 519 U.S. 172 (1997), the trial court erred by denying the *Motion to Sever*. RE 21; T. 19. The trial court also erred in its failure to properly weigh the prejudice to Mr. Thomas of presenting to the jury the circumstances of his 1999 aggravated assault conviction, which error the prosecutor promptly compounded by her inquisition into the details of the 1999 incident. RE 25; T. 388. The decision in *Old Chief* is based in part of the Supreme Court's interpretation of Federal Rule of Evidence 403, which the MISS.R.EVID. 403 is a virtual copy.

In *Old Chief*, the basis for reversal was the refusal of the trial court to permit proof of an essential element of the assault charge by stipulation from defense counsel for Johnny Old Chief because of the similarity of the prior crime and the charge for which he was then on trial and the resulting prejudice.

There was no necessity to run the risk of a tainted verdict by agreeing to a stipulation offered by the defense; none other than the fact the prosecution would have had, perhaps, to rely upon well-reasoned legal argument to the jury, rather a performance guaranteed to inflame and or prejudice the jury.

As a matter of policy, to condone these continuing antics by an officer of the Court, acting for and on behalf of the people of the State of Mississippi, does nothing but encourage greater, more preposterous actions. Trials are not spectator sports.

Trials are not theatrical entertainment, as counsel for Mr. Thomas respectfully submits this prosecutor seems to behave. The case for guilt may be overwhelming, but one would never know from this record due to the improper actions by this prosecutor which deprived him of his fundamental right to fair and impartial trial.

While counsel for Mr. Thomas recognizes and acknowledges this Court's proper reverence for the verdict of a jury, he also asks that this Court set limits beyond which out-of-control prosecutors may not go. And that the penalty is reversal and assessed cost of retrial. To continue to condone this course of conduct results in an erosion of public trust in the criminal justice system.


Therefore, Mr. Thomas requests reversal of his conviction and remand for a constitutionally proper trial.

CONCLUSION

Mr. Thomas respectfully submits that the errors detailed herein provide ample proof of violations of established case law and evidentiary rules to the point that he was denied his fundamental right to a fair trial before an impartial jury. It was an abuse of discretion for the trial court to permit the State to delve into details of a prior conviction, an error further compounded by the failure of the trial court to conduct the required on-the-record balancing of prejudice and probative value. Finally, it was an abuse of discretion to deny the *Motion to Sever* or, alternatively, to deny his effort to offer proof by stipulation as to an essential element of the crime of possession of a weapon by a convicted felon.

For these reasons, Mr. Thomas humbly asks this honorable Court to vacate his conviction and remand for a new trial.

Respectfully submitted,


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Assistant Public Defender

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Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing BRIEF OF APPELLANT ON THE MERITS to the following:

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Jackson, Mississippi 39225

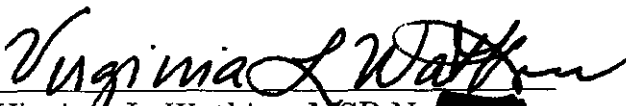
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So certified, this the 5th day of May, 2008.


Virginia L. Watkins, MSB No. [REDACTED]
Certifying Attorney

amended *VW*

Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing BRIEF OF APPELLANT ON THE MERITS to the following:

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So certified, this the 7th day of May, 2008.


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