IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DANNY HURT	APPELLANT
V.	NO. 2008-KA-0424-COA
STATE OF MISSISSIPPI	APPELLEE

BRIEF OF THE 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. Danny Hurt, Appellant
3. Honorable Ronnie Harper, District Attorney
4. Honorable Forrest A. Johnson, Circuit Court Judge

This the 24th day of September, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE ISSUES

ISSUE NO. 1 : WHETHER REPEATED REFERENCES BY THE PROSECUTION TO THE DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT VIOLATED THE DEFENDANT'S 5TH AMENDMENT RIGHTS AND DENIED THE DEFENDANT A FUNDAMENTALLY FAIR TRIAL?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Franklin County, Mississippi, and a judgement of conviction for the crime of armed robbery against Danny Hurt following a jury trial on February 12, 2008, Forrest A. Johnson, Circuit Judge presiding. The indictment had been enhanced under M.C.A. § 99-19-351, the victim being over the age of sixty-five (65), and was amended to charge Hurt as an habitual offender. Mr. Hurt was thereafter sentenced to a term of twenty-five (25) years as an habitual offender. He is presently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

The trial transcript early reveals a Faulknerian monologue by the State in it's opening statement, on the topic of Hurt's post-arrest silence.

> Now Sheriff Newman is going to tell you about he and Mr. Travis went to New Albany to get Danny Hurt after this affidavit was signed for Mr. Hurt for his arrest. That they went up there, they picked him up, and on the ride home, **Mr. Hurt said absolutely nothing** to either one of them. Now, he is told what he is charged with, armed robbery of Curtley Hayes that occurred on April 25th, last year. **They drive all the way from New Albany back to Franklin County, and Mr. Hurt says absolutely nothing about it.** They stopped in Brookhaven first at the Mississippi Highway Patrol substation, Mr. Travis' office and at that time Mr. Hurt says, "Oh that's not – I couldn't possibly been involved in that because I was in new Albany, Mississippi on April 25th." Now they just left New Albany where the Sheriff could have interviewed witnesses, gotten names and gone right then. **He didn't say a word when the sheriff put him in the car.** (T. 49-50)

Thus, the State's "roadmap"of its intended proofs indicated it would show that Hurt's exercise of his right to remain silent was tantamount to either an admission of guilt or impeachment of his testimony. Following such a course clearly traversed Hurt's constitutional rights.

Testimony began with Curtley Hayes, ["Hayes"], a seventy nine year old "well pumper." (T. 52-54) Hayes, a man of habitude, routinely attended the wells in his charge. On April 25, 2007, he went to his usual first well at the usual time. As he unlocked the gate, he was hit in the head from behind. As he lay on the ground a knife was put to his throat. His attacker took his money, advised him to not look and drove off in his truck. (T. 54) Hayes could not identify his assailant, saying only that he was a man about 5'9" tall, 165 pounds, with his face covered.(T. 55-56) He went to a nearby house for help. The sheriff arrived about one hour later, and he returned to work, driving a truck his wife brought him.

Hayes knew Danny Hurt for six to eight months and testified to drinking coffee with him on

several occasions. Hurt had also worked for Cornwell Well Services, hauling salt water from the same well as the scene of the crime. It should be noted here that Hayes gave no testimony indicating that the voice of his assailant sounded even vaguely familiar. (T. 57)

Counsel for Hurt examined Hayes. Hayes was known, by many people over twelve years, to work that well and to carry significant amounts of cash with him. (T. 61) Curiously, at least one month later, a woman and man (not Hurt) came to visit Hayes. The woman, Bridget Jones, inquired if there if he had "been robbed lately..." and was there a reward. (T. 62) Jones named Hurt as the robber. (T. 63-64)

Bridget Jones, ["Bridget"], had been indicted along with Hurt. However, she had plead but not been sentenced and agreed to testify. The State readily disclosed her unsavory nature. She had known Hurt for over a year, having met him at a strip joint. She sold drugs to Hurt. (T. 66) The day before the robbery, she had sold drugs to Hurt. On the day of the robbery, she rode with Hurt as he drove to Hayes house, then to his work and finally out to a gravel road with a church nearby. She stayed in Hurt's car at the church as Hurt got out, saying he was going to get some money. (T. 67-68) Hurt came back, driving fast, in Hayes' truck. (T. 67-68) She didn't explain how she knew it was Hayes' truck.

Afterwards, Bridget, showered, went to Louisiana to see her probation officer and left for Atlanta to visit her mother who just was released from prison. (T. 70-71) While in Atlanta, she begged money from Hurt. She claimed Hurt told her that he had done something he should not have done.(T. 71) Then, supposedly, on the way back, Hurt told her that he had robbed Hayes and took his money. (T. 72) After she returned to Franklin County, she went to Hayes to tell him Hurt was the robber. (T. 73) According to Hayes, she went there to extort a "reward" from him to tell who committed the robbery. (T.62-63) She then met with the Sheriff and then an investigator. She told

them the robbery was committed by Hurt. (T. 74) She was arrested shortly thereafter, and while incarcerated, she wrote letters or "kites" telling a different story, but she claimed that Hurt, also incarcerated, made her do it.(T. 75-76, 82-83, 85)

Cross examination quickly revealed her motive for framing Hurt, he had reported her to the Department of Human Services, resulting in the removal of her daughter. (T. 78-79) Another motive became apparent when she testified she was doing what she was doing so that the Sheriff would help her get her girl back. (T. 81-82) She claimed that despite her admitted continual selling of drugs (T. 72) and constant exacting cash from Hurt, she had a "carpenters degree" and regularly worked at "Kitchen Design Specialities." (T. 79)

On July 1st she made a statement in which she claimed that she went with Hurt and her boyfriend, Randall Paul Nevels, to rob Hayes. How she knew this is unclear since she claimed she was passed out on drugs. (T. 80) Apparently her boyfriend, had lost favor with Bridget, as she claimed that it was Randall, not her, that demanded money from Hayes. (T.81) Of course she changed that story testifying that Nevels was not there.

Randall Nevels worked offshore as a deckhand. He first met Hurt the day before the robbery when Bridget sold him some drugs. (T. 91-93) Nevels denied being in Franklin County on the day of the robbery. (T. 93) While providing little to the State's case, he did impeach Bridget on cross examination. He contradicted Bridget's testimony, saying it was Bridget not him that asked Hayes for money. (T. 96)

Arthur Bell, a jailhouse snitch, was in the cell next to Hurt. Bridget was in a cell down the hall. (T. 97-98) He overheard "hollering" back and forth between Hurt and Bridget. Incredibly, one of the "hollered" messages was for Bridget to seduce a guard, which would somehow give them leverage to get the charges dropped. (T. 99) Bell also claimed Hurt told him Bridget couldn't testify

against him because she was passed out during the robbery. (T. 99)

Cathy Cornwell Davis of Cornwell Oilfield Services said Hurt had worked for them driving a truck hauling waste water from wells. She also knew Curtley Hayes, confirming that he was an independent gauger, a man of regular habits. She knew Hayes to always carry cash. (T. 104-108)

Sheriff James Henry Newmman was headed to Adams County when advised of the Hayes robbery. He arrived at the scene about an hour later. He found Hayes at the church, Hayes' glasses in a ditch and his cellphone up the road. (T. 109-115) The Sheriff had acquired Hurt's cell phone records and testified that they showed numerous calls from his phone, before the robbery, going through an apparently nearby tower. (T. 122-124)

Hurt's exercise of his right to remain silent had thus far not come up in testimony. However, when the Sheriff was asked if he had talked to Hurt he replied:

> A. I had not, but the Pike County investigators had talked to him, and basically they told me I'd be wasting my time to talk to him.

The Pike County investigators should have advised him of his rights if they attempted to talk to him. Therefore it was implicitly suggested to the jury was that he had never denied committing the robbery. (T. 118) What followed was not so subtle. The Sheriff was asked about retrieving Hurt from Union County, where he was being held after an arrest:

> Q. Why don't you tell us about what, if anything, occurred on that trip. Now as I understand it, Mr. Hurt was with you at this time, present with you?
>
> A. Yes, Sir.
>
> Q. Would you tell us what happened on that trip. What was said, what if anything. What happened?
>
> A. Troy and myself talked a little bit. **Danny (Hurt) never said a thing.**
>
> Q. **Did he ask you anything about what he was being charged**

with or anything like that ?

A. No, Sir.

Q. **No conversation at all?**

A. He didn't to me.

Q. **Okay, did he say anything to you before he left the sheriff's department in Union County?**

A. **Didn't say nothing to me.**

******

Q. And so y'all stopped there (a highway patrol substation). What, if anything, did you do ?

A. We went inside, used the rest room, went into a room to talk to Danny a little bit.

Q. Did you advise him of his Miranda rights at that time?

A. Yes, Sir.

******

Q. You went through them. Did you have a form, did you have a form or did you just talk to him orally about it/

A. Just talked to him. I told him, I said, I know Mr. Hayes. I been knowing him a long time, and you do too, and I said, you know I have got a job to do and intend to do it. **I said do you want to make a statement about this, and it kind of went down hill after that and we left.**

Q. Why don't you tell us what conversation ensued after you asked him if he wanted to make a statement. Did you tell him the date and time that the robbery occurred ?

******

Q. What if anything did he tell you at the Brookhaven substation?

A. He said that he had a- - at first he said he'd give me a statement, **and then he said he wouldn't**, and then he said I got fifteen or twenty people, friends family that can vouch I was in New Albany on

April the 25th, and I told him, well, you're going to need them.

******

Q. **Did he give you a written statement or any kind of oral statement other than what you just said/**

A. **Said he wasn't going to tell me anything else.** (T. 129-133)

When Hurt arrived in Franklin County, the Sheriff confronted him with the person of Bridget. Hurt called her a "ratty whore" for "ratting him out." Hurt threatened to kill Bridget. (T. 134-135) Sheriff Newman also told the jury that Bridget and Hurt passed notes, one saying they should jump a jailer, another trying to plan an escape.(T.135-136)

Before ending direct examination, the Sheriff was asked how long did the trip from New Albany take, a reminder to the jury that, as was pointed out in the State's opening statement, for three hours Hurt exercised his right to remain silent. (T. 137)

After the Sheriff was cross examined, the State rested. (T. 141) Defense moved for a directed verdict. The motion was denied due to the testimony of Bridget Jones. (T. 142-143)

Hurt, after being advised pursuant to *Culbertson*, chose to testify in his own behalf. He testified he met Bridget in December 2006. They began a relationship, during which he continually was asked to give her money. (T. 148) Bridget was a regular drug user, preferring prescription pain pills, but also using crack. (T. 149)

At the time of the robbery, he was living in New Albany, working as a roofer. He came to Brookhaven a day or so before the robbery to see Bridget. Bridget and Nevel needed money, having been kicked out of their trailer and needing a car payment. (T. 150) He saw her daily and gave her some drugs. The night before the robbery, Bridget came to his motel room. Hurt got up the next morning, leaving early for New Albany. Before he left, he gave Bridget a cell phone for her use. The

phone was later thrown out of the car window by Nevel when they were returning from Atlanta. (T. 154-155)

He acknowledged that he didn't talk to the sheriff on the way back from Union County and that the Sheriff didn't talk to him. (T. 156) At the substation, when informed of who he supposedly robbed, Hurt agreed he may have offered to whip the Sheriffs hindquarters. (T. 157) He Knew Curtley Hayes and respected him. He's been to the site of the robbery many times and had even met Bridget there to have sex while the truck was filling up. (T. 157-158)

The incident where the Sheriff brought Bridget to the lobby, Hurt recalled her crying and accusing him of having her baby taken away. As to Arthur Ball, Hurt said he was in the next cell, but he never told him he had done anything.

Hurt proffered what must have been glaringly obvious at that point, that Bridget was not a carpenter, she was a hustler. Further, that in addition to a boyfriend and a relationship, Bridget also had a disabled husband and two children. (T. 162-164)

On cross examination, he agreed he knew Hayes and that he would carry some money with him, but he did not know it to be much. (T. 166-167) He explained his statement about alibi witnesses to the Sheriff was made before he knew the date of the incident. He agreed he had written "kites" to Bridget in jail and explained that saying Bridget ratted him out was not admitting to a crime.

However, the issue of Hurts' silence was again hurled before the jury, again insinuating that his decision not to talk should be treated as an implicit admission and to impeach his testimony.

> Q. Uh-hum... Of course, when they picked you up in New Albany, you didn't have any idea of what they were accusing you of ; is that right?
>
> A. The Union County officials told me I was charged with armed robbery in Franklin County.

Q. But you didn't know anything else about it other than that?

A. No, Sir.

Q. **You weren't curious. You didn't ask them. Here you are being taken all the way back down to Franklin County for a crime you didn't commit, and you didn't even ask them what the heck they were talking about?**

A. No, Sir.

Q. **You just rode in the car silently** because I believe you said, " I didn't figure I had nothing to say to them." is that right ?

A. I got leg irons on, handcuffs on.

Q. **You didn't have a muzzle on, did you?** (T. 177)

After further cross, the defense rested, the State finally rested. The defense moved for a directed verdict and instructions were resolved.

Comments on Hurts' right to remain silent, obdurately continued in closing argument.

> [L]adies and gentlemen, **do you think if an innocent man is arrested,** put in handcuffs and shackles and driven three hours away and he says, "I have alibi witnesses in New Albany," **do you think he's going to ride for three hours and never say a word.** That makes no sense whatsoever.

The intent of the repeated references to Hurts refusal to speak is trenchantly made, silence admits guilt.

SUMMARY OF THE ARGUMENT

The case against Hurt would have been non-existent but for the impeached accusations of a co-indictee/accomplice, testimony that at law is viewed with great care, caution and suspicion. That testimony is buttressed by a jail house snitch, another historically unreliable and untruthful witness. Thus the State found it necessary to augment its case with improper questions and comments on Hurts remaining silent, using his silence as an implicit admission of guilt, beginning well in advance of Hurts' taking the stand to testify on his own behalf. The comments, at least in part, also were comments on Hurt's post-Miranda silence.

ARGUMENT

"It is improper and, ordinarily, reversible error to comment on the accused's post- Miranda silence. The accused's right to be silent then is equally as strong as the right not to testify and it is error to comment on either. Certainly it is improper to inquire of the defendant as to whether he made any protest or explanation to the arresting officers." (citations omitted) *Quick v. State*, 569 So.2d 1197, 1199 (Miss.1990)

It has been held that comments on a defendant's post Miranda silence is reversible. But that a defendant must have received a Miranda warning, before a comment on a defendant's silence is reversible error. It is urged herein that such reasoning is logically inconsistent. The Constitutional right to remain silent does not come into being only after a Miranda warning. The government neither confers, nor invokes rights. Those rights enumerated in the Constitution as an endowment of the Creator. The Constitution predates Miranda and it exist independent of the police advising a defendant of it's rights. The incantation of Miranda does not conjure it's existence. If a defendant's pre-Miranda statement cannot be used, how much more so his pre-Miranda silence? The root case permitting the use of pre-Miranda silence concerned use of said silence for impeachment after the defendant takes the stand, while this reasoning fails the above arguments, it cannot be said to allow silence to be equated to admission before the accused takes the stand. Indeed, such use vitiates the accused's right to not testify and instead compels a defendant to testify to rebut the notion.

However, regardless of the preceding argument, the facts of this case fall under the proscribed activity in *Doyle v. Ohio*, 426 U.S. 6110, 96 S.Ct. 2240 (1976) and *McGrone v. State*, 807 So. 2d 1232 (Miss. 2002) Comments on Hurt's post arrest silence included silence occurring post-*Miranda* . As observed in *Jenkins v. Anderson*,447 U.S. 231, 100 S.Ct. 2124, (1980) , the use of a defendant's silence (pre-*Miranda)* is only permissible when used to impeach trial testimony. Such questioning or comment is limited to the testing of credibility. It should not be permitted as direct and highly prejudicial direct evidence of guilt. And after Miranda warnings, it is not permissible as impeachment.

> The question ... is whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the

> defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest. We conclude that use of the defendant's post-arrest silence in this manner violates due process, and therefore reverse the convictions of both petitioners.

Doyle, *Id at* 611 Furthermore, the host of comments was used prior to Hurt taking the stand and therefore prior to any possible impeachment. As such, the multitude of references to Hurt's silence were used as direct evidence, a kind of reverse admission of guilt; in other words, if Hurt didn't deny it he must be guilty.

No objection to the harping on Hurt's post-arrest silence was ever interposed. This should not operate as a bar under the facts of this case. "In cases where an appellant cites numerous instances of improper and prejudicial conduct by the prosecutor, this Court has not been constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no objections were made." (citations omitted) *Smith v. State*, 457 So.2d 327, 333 -334 (Miss. 1984) In this case repeated references to Hurt's silence began in the opening statement and continued throughout. Moreover, comments on the exercise of the right to remain silent are of such constitutional importance as to not require an objection. *Griffin v. State,* 557 So. 2d 542, 552 (Miss. 1990) This complained of error is patently plain error and is error of constitutional proportion. In this case a fundamental constitutional right has been breeched. *Conerly v. State*, 760 So. 2d 737,740 (Miss. 2000)

When analyzing a plain issue argument, it is often reasoned that the evidence was overwhelming, and thus any error, even plain error, is harmless. It is strongly urged that this rationale is inapplicable where, the State's case is almost wholly dependant on two of the historically most unreliable of forms of evidence; the testimony of an impeached co-indictee with a motive to lie and the word of a jailhouse snitch:

> Regarding this sort of "jail-house snitch" testimony, we have stated that it is "becoming an increasing problem in this state, as well as throughout the American criminal justice system." *McNeal v. State*, 551 So.2d 151, 158 (Miss.1989). In *Sherrell v. State*, 622 So.2d 1233, 1236 (Miss.1993), we held that the trial court did not err in allowing the testimony of a "jail-house informant." We qualified this holding, though, stating:

> Although the trial judge allowed the testimony of [the informant] into evidence, he made certain that a cautionary instruction was given to the jury.... The jury was instructed to view his testimony with caution and suspicion in light of [his] criminal conviction. The judge also reminded the jurors that they should consider the rest of the physical evidence presented during the trial and not judge the case based on the alleged confession ... No evidence was presented which showed that [the informant] would benefit in any way for testifying against Sherrell.
>
> Id. at 1236 (emphasis added). Sherrell indicates the importance of cautionary instructions when such "snitch" testimony is offered. In Gray, this Court reiterated that it does not view inmate testimony favorably.

Moore v. State, 787 So.2d 1282, 1287 (Miss.2001) Bridget, the co-indictee participated in the crime, in an attempt to extort a "reward" and was an acknowledged drug dealer. Testimony of motive for her to lie was twice shown in the evidence. She contradicted her own testimony claiming she knowingly went on the robbery, and also claiming she was passed out at the time. She claimed Nevel was part of the robbery and later, not so. Perhaps most telling was the testimony that Bridget and Nevel had strong motivation to commit a robbery, they had been thrown out of their trailer and desperately needed car payments. Meanwhile Hurt had a job and money. The accomplice and the snitch were virtually the entire case against Hurt. Accordingly, this was not a case of overwhelming evidence. But the State continually commented on Hurt's silence, implying he was tacitly admitting guilt but not proclaiming his innocence. Over and over, his right to remain silent was turned against him. It was clearly part of a trial strategy, not an isolated comment made during a closing argument. It was not an isolated incident floating in a sea of irrefutable proofs. It was the beginning, the middle and the conclusion of a weak case. And for these reasons this cause should be reversed and remanded for a trial conforming to constitutionally recognized inalienable rights which were endowed upon every citizen.

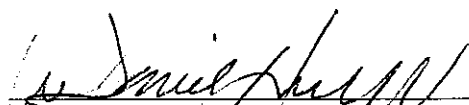
CONCLUSION

The centerpiece of the State's case against Hurt was his post arrest silence. Comment, questions and continued reference to his post arrest silence violated Hurt's constitutionally guaranteed right to not be compelled to offer evidence against himself. It is therefore axiomatic that this case be 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 Danny Hurt, 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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This the 24th day of September, 2008.

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