

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-00469-COA

JOE LEE BRUNNER

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

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

REBUTTAL BY APPELLANT

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

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REBUTTAL BY APPELLANT

Comes now JOE LEE BRUNNER, Appellant herein and pursuant to MISSISSIPPI RULE OF APPELLATE PROCEDURE 28(C) makes this, his *Rebuttal* to *Brief of the Appellee* on Issue I. In so doing, Mr. Brunner reiterates all arguments and citation of authority in his *Brief on the Merits by Appellant*, incorporated herein by reference, and in no way abandons other errors and issues not specifically addressed in this *Rebuttal*.

I. The trial judge abused his discretion when he denied Instruction D-10 regarding factors by which the jury could evaluate the credibility of the identification by Lorea May, as this denial prevented presentation of Mr. Brunner's defense of misidentification;

With all due respect to honored counsel for the State, Mr. Brunner humbly submits that the argument his proffered jury instructions were repetitious of those given by the trial court is essentially a play on semantics rather than substance, as the Mississippi Supreme Court has repeatedly held in prevailing case law discussed in greater detail below.

Again, for the Court's convenience, Mr. Brunner recites Instruction D-10, rejected as "repetitious" by the trial court:

Instruction D-10 (CP 35-36)

The Court instructs the jury that in any criminal case the State must not only prove the essential elements of the offense or offenses charged, but must also prove the identity of the defendant as the perpetrator of the alleged offense or offenses.

In evaluating the identification testimony of a witness you should consider your assessment of the credibility of any witness in general, and should also consider, in particular, whether the witness had an adequate opportunity to observe the person in question at the time or times about which the witness testified.

You may consider, in that regard, such matters as *the length of time the witness had to observe the person in question, the prevailing conditions at that time in terms of visibility or distance and the like, and whether the witness had known or observed the person at earlier times. You may also consider the*