IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-00630-COA

QUINTIN LAMAR WILLIAMS APPELLANT

vs.

STATE OF MISSISSIPPI APPELLEE

## 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:

**Quintin Lamar Williams,** Appellant;

**Thomas P. Setser, Esq.**, trial attorney;

**Andrew Seth Robbins, Anderson Ellis, and Phillip W. Broadhead, Esqs.,** Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law, and **Leslie S. Lee, Esq.**, Mississippi Office of Indigent Appeals;

**Richard E. Smith, Jr., Esq.**, District Attorney, Office of the District Attorney;

**Angela T. Carpenter., Esq.**, Assistant District Attorney, Office of the District Attorney;

**Jim Hood, Esq.** Attorney General, State of Mississippi;

**Honorable Frank G. Vollor**, presiding Circuit Court Judge; and

**Vicksburg Police Department**, investigating/arresting agency.

Respectfully submitted,

**PHILLIP W. BROADHEAD**, MSB #4560
Clinical Professor, Criminal Appeals Clinic

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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QUINTIN LAMAR WILLIAMS — APPELLANT

vs.

STATE OF MISSISSIPPI — APPELLEE

## STATEMENT OF ISSUES

### ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE PRE-TRIAL IDENTIFICATIONS OF THE APPELLANT DUE TO THE SUBSTANTIALLY SUGGESTIVE NATURE OF THE POLICE PHOTO "SHOW-UP" AND "SIX-PACK" LINE-UPS RESULTING IN A SIGNIFICANT LIKELIHOOD OF THE VICTIM'S RELIANCE ON THESE PHOTOS DURING HER IN-COURT IDENTIFICATION CREATING A SUBSTANTIAL LIKELIHOOD OF A MISIDENTIFICATION.

### ISSUE TWO:

WHETHER THE TRIAL COURT'S ERROR IN FAILING TO PROVIDE THE JURY WITH ALL EXHIBITS OF BOTH PRE-TRIAL IDENTIFICATIONS WHICH WOULD ENABLE THE JURY TO MAKE COMPARISONS AND PROPERLY WEIGH THE EVIDENCE PRESENTED AGAINST THE APPELLANT PREJUDICED THE APPELLANT, WHICH THE TRIAL JUDGE FURTHER COMPLICATED DURING THE "SHARPLIN" CHARGE.

### ISSUE THREE:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE OF THE STATE'S FAILURE TO MEET ITS BURDEN OF PROOF AND ESTABLISH EVERY ELEMENT OF ARMED ROBBERY AND THAT THE TOTAL WEIGHT OF THE EVIDENCE IS UNCONVINCING.

## STATEMENT OF INCARCERATION

Quintin Lamar Williams is presently incarcerated in the Mississippi Department of Corrections.

## STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann. Section 99-35-101*** (Supp. 2008).

## STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case is very fact-intensive and the Appellant, through counsel, would respectfully request this Court to grant oral argument to present conflicts in the rulings of the trial court based on the evidence and testimony presented at trial that are alleged by the Appellant to be erroneous.

## STATEMENT OF THE CASE

In March of 2007, Madaliso Hargrove packed her son in her car and headed to a birthday party. Mrs. Hargrove never made it to the party, however, as an attacker struck her in the head with a gun, knocked her to the ground, demanded money, and forced her to drive a short distance at gun point. No one but Mrs. Hargrove witnessed the incident, and there is no record of any police attempt to recover physical, forensic, or any other type of evidence linking anyone to the crime or to provide possible exculpatory evidence for the misidentified. Unfortunately, Mrs. Hargrove, dizzy, faint, confused, and scared, provided the State's only evidence against the accused, Quintin Williams.

On March 31, 2007, Madaliso Hargrove was loading her son into the car outside her apartment in Vicksburg. (T. II. 168). Just after Mrs. Hargrove was removing a jacket from her car she was violently hit in the back of her head with a gun. (T. II. 170). The assailant demanded money and forced her to drive a few miles down the road. (T. II. 171). The assailant sat directly behind Mrs. Hargrove and ordered her where to go, and a few moments later, upon arriving at local Vicksburg ball fields, the assailant asked Mrs. Hargrove to stop, and fled the scene. (T. II. 173-74). Mrs. Hargrove, in an understandably confused state, flagged down another motorist who subsequently called the Vicksburg Police. (T. II. 177-78). After the incident, Mrs. Hargrove was admitted to the hospital where she received medical treatment, but the investigator assigned to the case did not attempt to take her statement until the 5th of April, six days later. (T. II. 179). There is no record of any attempt to collect physical evidence such as fingerprints from Mrs. Hargrove's car at any time after the incident. (T. II. 245).

On Thursday, April 5th, Mrs. Hargrove gave a statement to the Vicksburg police in which she indicated that she had seen her assailant the day before (April 4th) in the apartment complex, but did not call the police. (T. II. 235) (CP. 20-24, RE. 22-26) Mrs. Hargrove described her assailant to the Vicksburg police as about five-foot six inches tall, 120 pounds, with a very dark complexion, and side burns. (CP. 24, RE. 26). Mrs. Hargrove allegedly saw her assailant walking in her apartment complex with two other individuals about April 10th, which she reported to Vicksburg Police. (T. II. 235-36). Upon receiving this report, the lead investigator, Jeff Merritt (hereinafter "Merritt"), went to the apartment complex and questioned two individuals about the person they were previously with, which they identified as "Little Edward." (T. II. 236). Merritt entered the name

"Little Edward" into the Vicksburg Police Database, but did not find any listing under that alias and performed no other investigation of "Little Edward." (T. II. 236). The next day, April 11th, Vicksburg Police received an anonymous tip indicating the person they were looking for was "Little Quint". (T. II. 238). This alias, when entered into the database returned the Appellant's name, Quintin Williams (hereinafter "Mr. Williams"), but provided only a profile picture of the suspect, but not a frontal view. (T. II. 239) (Exh. S-1, RE. 27). This profile view contained on the photograph the sex, race, weight, height, date of birth, and social security number when it was shown by Merritt to Mrs. Hargrove on April 15th, sixteen days later, which she admitted influenced her assertion that Mr. Williams was the assailant. (T. II. 204-206, RE. 30-32). Several months later, on September 28th, Mrs. Hargrove was shown a photo array of six individuals, or "six-pack" one of which being Quintin Williams. (T. II. 256). She pointed to Quintin Williams' picture, which was third in the array, but when she requested to see the other pictures collected in the investigation, she was told by Merritt that she identified Quintin Williams' photo and was instructed to initial and date it before seeing the remaining photos. (T. I. 129, T. II. 256-262, RE. 33-39).

The trial began March 26, 2008. During pre-trial motions, Quintin Williams's defense counsel raised three important issues. First, they asked that Williams's prior larceny conviction be excluded from the proceedings. (T. I. 8). Second, defense counsel argued that the anonymous tip that Merritt received should be excluded due to a lack of credibility. (T. I. 14). The trial judge overruled both motions and allowed testimony of the tip. (T. I. 21). After the jury was selected, defense counsel brought a motion asking to suppress Madaliso Hargrove's photo identification based upon the questionable techniques employed by the investigators. (T. I. 108) (CP. 33-35, RE.

40-42). After arguments, the trial judge ruled that the photographic "show-up" and the photo array was conducted properly by police and overruled Mr. Williams's motion. (T. II. 151, RE. 40-42).

After opening statements, the State called Madaliso Hargrove to the stand as their first witness. (T. II. 167). During her direct examination, Mrs. Hargrove emotionally recounted the attack and identified Mr. Williams as her attacker. (T. II. 171). However, on cross-examination, Mrs. Hargrove contradicted the transcription of her statement to Merritt given after the incident. (T. II. 195). Mrs. Hargrove provided details regarding the attack and her identification of Mr. Williams that differed from those that she provided in her statement to police, explaining that she believed that the official police transcription must have been typed incorrectly. (T. II. 197, 200, 202).

Merritt was called next by the State. (T. II. 221). Merritt testified that Mrs. Hargrove was "emotional... distraught, upset" on the night in question. (T. II. 222). He also testified regarding the anonymous tip, bringing an objection that was again overruled by the trial judge. (T. II. 224). On cross-examination, Merritt admitted that no investigative steps were taken regarding the suspect "Little Edward" after his name failed to produce any results in the police database. (T. II. 238). He also admitted that there was no attempt to recover fingerprints from the scene, even though Mrs. Hargrove clearly told them that the attacker touched the interior of the car. (T. II. 199, 246). Merritt concluded that the only evidence linking Mr. Williams to the crime was Mrs. Hargrove's photo identification. (T. II. 255).

Upon the State resting, defense counsel moved for a directed verdict, arguing that the State's case was based solely upon the testimony of an obviously distraught witness, which was denied (T. II. 282-84). The defense rested, and jury instructions were given.

After closing arguments, the jury retreated to deliberate. (T. II. 237). Less than one hour later, a note from the jury asked the trial court to provide the photographs that had been introduced into evidence. (T. III. 328). The pictures were supposedly sent to the jury, but later information shows that the profile picture used by Mrs. Hargrove to first identify Mr. Williams was in the possession by the State's attorney and was never provided to the jury. (T. III. 347). Without the complete evidence, the jury sent out another note that they were deadlocked 10 to 2. (T. III. 329). While giving the jury the "***Sharplin***" charge, the judge commented on the jury's division in the deadlock, and less than one hour later, the jury returned a verdict finding Quintin Williams guilty on all four counts brought against him. (T. III. 334).

On April 10, 2008, defense counsel moved for a new trial based upon the lack of evidence, the suggestive nature of the photo identification, and the failure to provide the jury with all exhibits during deliberations. (T. III. 343-349) (CP. 93-98, RE. 15-20). The trial judge denied the motion for JNOV and/or a new trial. (T. III. 358). The next day, the Appellant was sentenced by the trial judge. (T. III. 366). After reviewing actuarial tables that predicted Mr. Williams's remaining life expectancy was no more than 46 years, the trial judge sentenced the Appellant to serve consecutive terms of imprisonment for each of his four counts: 25 years for armed robbery, 30 years each for two kidnaping counts, 3 years for felon in possession of a firearm, and 10 years for use of a firearm to commit a felony. (T. III. 392). The total number of years that Mr. Williams was sentenced to serve was 98 years in the custody of the Mississippi Department of Corrections. (T. III. 393). Feeling aggrieved by the verdict of the jury and the sentence of the trial judge, the Appellant, through counsel perfected his appeal to this honorable Court. (CP. 110, RE. 21).

## SUMMARY OF THE ARGUMENT

This is a misidentification case, where the sole reason for the Appellant's conviction rests in the victim's confused and admittedly dizzy recollection of a violent crime. In such cases where the evidence is thin, the pre-trial police investigation and standard operating procedures can tremendously influence the outcome of the case. In this case, the suggestive nature of the pre-trial identifications, the failure of the trial court to provide the jury with all the exhibits admitted into evidence, and the insufficiency of the evidence separately and cumulatively illustrate the failure to protect the basic right to due process of law guaranteed to every accused. Mr. Williams is now serving 98 years, twice his life expectancy, despite a suggestive pre-trial photo array, which was not available to the jury in their deliberations, and the underwhelming weight of evidence to allow a reasonable juror to conclude beyond a reasonable doubt that the appellant was in fact the assailant.

The Appellant would first state to this honorable Court that the procedure used by police was so unreliable that the trial court erred in failing to suppress evidence and testimony of the pre-trial procedure and the in-court identification. The investigation began with police obtaining Mrs. Hargrove's statement several days after the crime took place, followed six days later by a "show-up" with a single profile picture of the Appellant. Months later, she was shown a "six-pack", where she hesitantly suggested to Merritt that the Appellant was the assailant. A pre-trial identification cannot be unreasonably suggestive as to create a substantial likelihood that the in-court identification is based not on the victim's recollection of the actual crime, but rather on the pre-trial identification. The trial judge abused his discretion in admitting the evidence of the pre-trial identification.

During the course of the trial, the State successfully introduced into evidence both the "six-

pack" and "show-up" photo lineups, which Mrs. Hargrove used to identify Mr. Williams. However, when the trial ended and the jury retreated to deliberate, they were not given these pieces of evidence by the trial court. They requested to be supplied with these pictures, and the "six-pack" lineup was provided, but the "show-up" photograph was never given to the jurors. Compounding this error, the trial judge's "Sharplin" to the deadlocked jury implicitly pressured those jurors disagreeing with the majority. Because the jury was never provided the admitted evidence during their deliberations and were mislead by the trial judge, their decision was incomplete and cannot be relied upon, and the Appellant contends that these errors require reversal and a remand for a new trial.

Mr. Williams was found guilty on all his charges based solely upon the testimony of the victim, who was admittedly shaken, traumatized, and woozy. She was first shown a "show-up" photograph of Mr. Williams with his vital information published on it, and then was coerced into choosing Mr. Williams from a "six-pack" lineup of photographs. Her second out-of-court and in-court identifications were most likely based upon the "show-up" solo photograph and were not reliable. Mr. Williams was found guilty based upon a weight of evidence that could not be described as overwhelming or even convincing. However, even if the weight of the evidence was ample, the quality of the evidence presented was suspect, and the sufficiency of that evidence was not adequate to survive a motion for directed verdict. Therefore, this honorable Court should reverse the lower court's verdict and render and discharge the Appellant from the custody of the Mississippi Department of Corrections or, in the alternative, remand the Appellant's case for a new trial.

## ARGUMENT

## ISSUE ONE:

**WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE PRE-TRIAL IDENTIFICATIONS OF THE APPELLANT DUE TO THE SUBSTANTIALLY SUGGESTIVE NATURE OF THE POLICE PHOTO "SHOW-UP" AND "SIX-PACK" LINE-UPS RESULTING IN A SIGNIFICANT LIKELIHOOD OF THE VICTIM'S RELIANCE ON THESE PHOTOS DURING HER IN-COURT IDENTIFICATION WHICH CREATES A SUBSTANTIAL LIKELIHOOD OF A MISIDENTIFICATION.**

The questions before this honorable Court today ask whether the testimony of an eyewitness who is significantly impeached on the stand constitutes substantial credible evidence upon which the trial court can admit both a highly suggestive pre-trial identification process and an in-court identification based on tainted police investigative procedures without being found to have abused its discretion. The proper standard of review for trial court decisions regarding identification testimony is, "whether or not substantial credible evidence supports the trial court's findings that, considering the totality of the circumstances, in-court identification testimony was not impermissibly tainted." ***Isom v. State***, 928 So.2d 840, 847 (Miss. 2007) (quoting ***Roche v. State***, 913 So.2d 306, 310 (Miss. 2005) (emphasis added)). The appellate review should not disturb the trial court's admission of identification testimony unless "there is an absence of credible evidence supporting it." ***Id.***

A. The Pre-Trial Identifications.

The Mississippi Supreme Court has held that, "Pretrial photograph identifications have been generally upheld if...there is no emphasis placed on certain photographs as opposed to others." ***Isom***, 928 So.2d at 847 (quoting ***Burks v. State***, 770 So.2d 960, 963 (Miss. 2000) (citing ***Simmons v.***

***United States***, 390 U.S. 377 (1968)). In ***Simmons***, the Supreme Court noted that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals, and that the witness is likely to remember the photograph instead of the person actually seen at the incident at issue. ***Simmons***, 390 U.S. at 383.

In this case, Mrs. Hargrove's statement was taken by Merritt several days after the incident. No suspects were located specifically from Mrs. Hargrove's description, but the Appellant was preliminarily identified and developed by police after an "anonymous tip" that the person the police were looking for was known by the name "Little Quint." Despite also being first told by a tipster that "Little Edward", was the person that Mrs. Hargrove identified in the apartment complex, that alias *did not* turn up any results in the police database; "Little Quint", however, was linked to the Appellant. The first step in the investigative process after the incident as a result of the "anonymous tip" was a photograph shown to Mrs. Hargrove of a profile view of Mr. Williams. This was the only available photograph under his name in the police database, and it also contained the Appellant's name, sex, race, weight, height, date of birth, and his Social Security number located directly below the picture. Mrs. Hargrove testified that she saw the information on the photograph and it convinced her that this individual was in fact the assailant. (T. II. 206).

Mrs. Hargrove was then shown a "six-pack" of photographs that included the Appellant on September 28, about six months after the incident occurred. (T. II. 206). Mrs. Hargrove hesitated when examining one phot in the "six-pack", and requested to see the remaining photos. (T. II. 207-08) Upon this hesitation, Merritt offered her the name of the person she was hesitating with as

Quintin Williams, after she had previously learned of his name at the first highly suggestive picture identification. (T. II. 208). Further, Mrs. Hargrove testified that this individual matched the individual in the first identification "show-up" photograph or the "side profile." (T. II. 209). So, it logically follows that Mrs. Hargrove selected the Appellant's picture in the "six-pack" based on her knowledge of the first highly suggestive show up, and not on her personal observations in experiencing the attack by an unknown assailant.

The United States Department of Justice (hereinafter "DOJ") has promulgated model "best-practices" procedures to guide police investigations involving eyewitness identification and describes the processes that should and should not be employed "to best ensure the accuracy and reliability of this evidence" since "a witness' memory of an event can be fragile and that the amount and accuracy of information obtained from a witness depends in part on the method of questioning."[1]

This manual encompasses almost every facet of a criminal investigation, but the model procedure is most relevant in illustrating Merritt's tremendous deviation from proper police procedure in conducting the pre-trial identifications and failure to collect physical evidence such as fingerprints. The procedure manual suggests cautioning a witness that they could be looking at a person that may or may not be the perpetrator, but Merritt provided Mrs. Hargrove with a profile picture containing the Appellant's height, weight, and name among other characteristics and never

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[1] Eyewitness Evidence: A Guide for Law Enforcement, pp. 3-4, United States Department of Justice, Office of Justice Programs, National Institute of Justice (October 1999). Internet accessible at: http://www.ncjrs.gov/pdffiles1/nij/178240.pdf (Last visited March 25, 2009).

cautioned Mrs. Hargrove that the photo may or may not be the perpetrator. Further, its obvious that Merritt's conduct in administering the "six-pack" line up suggested Mrs. Hargrove identify the Appellant. Investigator Merritt prohibited Mrs. Hargrove from viewing other photographs when she hesitated on the Appellant's photo. He instructed her to initial the Appellant's photo before she made a final positive identification and communicated to her that she had identified "Quintin Williams," whose name she learned from the first "show up"photograph. Finally, the manual states that "preservation and documentation of the scene, including...physical evidence are necessary for a thorough preliminary investigation." Merritt blatantly failed even attempt to collect any physical evidence from the scene such as finger prints that could conclusively link or absolve the Appellant from this crime.

The trial court clearly erred in admitting the pre-trial identifications into evidence as there is no substantially credible evidence supporting the identifications. There was a significant amount of time between the incident and the identifications. The first pretrial identification was tainted by the availability of the Appellant's height, weight, name, and other distinguishing characteristics on the photo. Mrs. Hargrove even testified to her consideration of these characteristics when making this identification of the Appellant. Mrs. Hargrove testified that the Appellant's photo resembled the previously viewed side profile picture from the first "show-up" (T. I. 205-06). Further, despite the fact that Mrs. Hargrove's subsequent pre-trial identification was likely based on the previous identification, the investigator essentially forced Mrs. Hargrove's identification of the Appellant from the six pack when he refused to show Mrs. Hargrove the last three photos until she initialed

and dated the third picture. Finally, upon initialing the Appellant's photo, the Merritt told Mrs. Hargrove that she had identified Quintin Williams, which likely made her relax and be completely confident in her identification as she had previously seen the same name on the first single photo "show-up."

B. The In-Court Identification.

This Court has adopted the five factors enunciated by the U.S. Supreme Court for determining the admissibility of identification testimony. ***Outerbridge v. State***, 947 So.2d 279, 282 (Miss. 2006) (citing ***Neil v. Biggers***, 409 U.S. 188, 199-200 (1972)). The five factors are (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty exhibited by the witness at the confrontation; and (5) the time between the crime and the confrontation. ***Id.***

The first ***Biggers*** factor is the opportunity of the witness to view the criminal at the time of the crime. ***Id.*** In this case the victim, Mrs. Madaliso Hargrove had a short opportunity to view the criminal at the time of the events at issue. Mrs. Hargrove testified that she saw a suspicious figure that was wearing a hood across the parking lot, but consciously evaded direct eye contact. (T. II. 168). Mrs. Hargrove was hit in the back of the head with a gun and testified that she was dizzy. (T. II. 170). After demanding money and Mrs. Hargrove's purse, the assailant then forced Mrs. Hargrove to drive a short distance across town while the assailant was in the back seat. (T. II. 170-74). The only opportunity that Mrs. Hargrove had to view the assailant before the attack the

assailant was wearing a hood and at a significant distance. After the attack, a dizzy Mrs. Hargrove testified that she saw the assailant's face when his hood fell down and during the short drive when the assailant was in the back seat directly behind the driver's seat. Mrs. Hargrove's mental state is illustrated by the fact that she had to flag down another motorist after the incident, but didn't directly call the police.

The second ***Biggers*** factor is the witness's degree of attention. ***Id.*** At the prompting of the prosecution on direct, Mrs. Hargrove testified that she had no doubt that the defendant at trial was the assailant. (T. II. 186). However, its arguable that this confidence didn't stem from the actual incident, but from the highly suggestive pre-trial identifications. Mrs. Hargrove confirmed the one profile picture that was shown to her, but that picture contained the suspect's height, weight, and other distinguishing characteristics that logically bolstered her identification. Further, when presented with the "six-pack" of pictures six months after the incident, Mrs. Hargrove was not confident in her identification of the third picture, that of the Appellant, but initialed the picture at the insistence of Merritt before seeing the remaining pictures in the "show-up" photograph.

The third ***Biggers*** factor is the accuracy of the witness' prior description of the criminal. ***Id.*** Five days after the incident, Mrs. Hargrove described her assailant to the Vicksburg Police as about five-foot six inches tall, 120 pounds, with a very dark complexion, and side burns. (CP. 24, RE. 26). Another five days after giving this description to the police, Mrs. Hargrove allegedly saw the assailant in the apartment complex on two different occasions, but this was never substantiated and it arguably could be that she was seeing her assailant in anyone that vaguely resembled the assailant.

(T. II. 182-83). She then viewed a one person photo of the Appellant that contained the Appellant's height, weight, and other distinguishing characteristics. Mrs. Hargrove alleged that the transcript of her first statement to the police taken six days after the incident was incorrect regarding how the assailant obtained her purse. (T. II. 201). This illustrates that Mrs. Hargrove was not very accurate in her description of the events and the assailant, because it is less likely that such a transcription error would occur than Mrs. Hargrove having an unclear and unreliable memory.

The fourth ***Biggers*** factor is the level of certainty exhibited by the witness at the confrontation. ***Id.*** At the prompting of the prosecution on direct, Mrs. Hargrove testified that she had "no doubt" that the defendant at trial was the assailant. (T. II. 186). However, its arguable that this confidence didn't stem from the actual incident, but from the highly suggestive pre-trial identifications. In fact, Mrs. Hargrove added to her description of the assailant from apparently seeing him a few days after the incident when she later described the assailant having facial hair. (T. II. 197-98).

The fifth ***Biggers*** factor is the time between the crime and the confrontation. ***Id.*** Almost a full year elapsed between the incident and trial. The incident occurred on March 31, 2007, and trial began March 26, 2008. Undoubtedly, a year is a long time to remember an individual from an incident that lasted only a few minutes. Further, the highly suggestive pretrial identifications tainted Mrs. Hargrove's memory so that her in-court testimony was based not on the actual crime, but on the pre-trial identifications. Mrs. Hargrove's trial identification should be based on the actual incident, but the actual incident occurred a year before trial and subsequent to trial Mrs. Hargrove

viewed several pictures of the Appellant that were highly suggestive and contained the his name.

This case comes down to lazy police investigation. Immediately after the incident occurred no physical or forensic evidence was obtained or sought by the police, and Merritt allowed almost a full week to elapse before even interviewing the victim of an assault and kidnaping. The DOJ "best practices" manual, *supra*, states unequivocally that "[p]reservation and documentation of the scene, including information from witnesses and physical evidence, are necessary for a thorough preliminary investigation. The methods used by the preliminary investigating officer have a direct impact on the amount and accuracy of the information obtained throughout the investigation." Eyewitness Evidence: A Guide for Law Enforcement, *supra*, p. 14. The police investigation went abysmally off-course from the very start and only worsened as the days and months passed.

After receiving a suspicious anonymous tip, the police locate what they then believed to be a suspect, and began the march to build a case around the Appellant. First, the police showed the victim a profile picture of the Appellant that contained the Appellant's name, sex, race, weight, height, date of birth, and Social Security number located directly below the picture. Mrs. Hargrove testified that she considered these physical characteristics from the "show-up" photograph in making her initial identification. (T. II. 206). The DOJ manual instructs investigators that "When circumstances require the prompt display of a single suspect to a witness, the inherent suggestiveness of the encounter can be minimized through the use of procedural safeguards. The investigator shall employ procedures that avoid prejudicing the witness." ***Id.***, p. 27 (emphasis added). Once again, the Vicksburg Police failed miserably in following standard operating

procedures to insure a correct identification process.

Second, the police showed Mrs. Hargrove a photo array containing six individuals, one of which was the same person as the first pre-trial identification six months after the incident, putting into serious doubt the source of her identification of the Appellant as her assailant. This procedure raises a very troubling question: did Mrs. Hargrove make her identification from her personal observations that day or did she base her identification on the "show-up" photograph displayed to her by police months before? Further compounding the highly suggestive nature of the "show-up," the indolent inquiries in the course of the investigation, and the completely discrepant identification process utilized, the police then prohibited Mrs. Hargrove from viewing photographs 4 through 6 until she signed the photo of the Appellant. The DOJ report sets out a completely different procedure than employed by the police in this case:

> ***Photo Lineup:*** Prior to presenting a photo lineup, the investigator should:
> 1. Instruct the witness that he/she will be asked to view a set of photographs.
> **B. Instructing the Witness Prior to Viewing a Lineup**
> 2. Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
> 3. Instruct the witness that individuals depicted in lineup photos may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
> 4. Instruct the witness that the person who committed the crime may or may not be in the set of photographs being presented.
> 5. Assure the witness that regardless of whether an identification is made, the police will continue to investigate the incident.
> 6. Instruct the witness that the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification.

***Id.***, p. 32 (emphasis added)

Finally, at trial about a year after the attack, Mrs. Hargrove testified that the Appellant was her assailant; however, given the highly suggestive nature of the pre-trial identifications there is more than a substantial likelihood of a misidentification by the victim in this case. Therefore, the Appellant respectfully contends that the trial court erred in admitting the pre-trial identifications, and also in allowing the in-court identification testimony by Mrs. Hargrove. Therefore, the Appellant contends this honorable Court should reverse the verdict of the jury and the aggregate sentence of 98 years of imprisonment handed down by the trial judge and remand this case with proper instructions to the lower court for a new trial.

## ISSUE TWO:

## WHETHER THE TRIAL COURT'S ERROR IN FAILING TO PROVIDE THE JURY WITH ALL EXHIBITS OF BOTH PRE-TRIAL IDENTIFICATIONS WHICH WOULD ENABLE THE JURY TO MAKE COMPARISONS AND PROPERLY WEIGH THE EVIDENCE PRESENTED AGAINST THE APPELLANT PREJUDICED THE APPELLANT, WHICH THE TRIAL JUDGE FURTHER COMPLICATED DURING THE "SHARPLIN"CHARGE.

During deliberations, the jury was not provided with all of the photographs that had been admitted into evidence, even after clearly requesting that the trial judge have them delivered to the jury room. (T. III 328-329). According to the Mississippi statute, the jury must be provided with all properly admitted evidence during their deliberations. ***Miss. Code. Ann. § 99-17-37*** (Supp. 2007). The failure of the trial judge to provide these crucial pieces of evidence confused the jurors and prevented them from being able to properly examine the evidence in the case. Further compounding the jury's confusion, the trial judge improperly addressed the jury during the "***Sharplin***" charge. In ***Sharplin v. State***, 330 So.2d 591 (Miss. 1976), the Court enunciated a permitted statement that could

be delivered to a deadlocked jury to encourage their deliberations and prevent them from changing their verdicts based upon pressure. Here, however, the trial judge went beyond the parameters allowed by ***Sharplin*** and addressed the jury additionally regarding their voting split, thereby creating pressure against those who had "caused" the deadlock during deliberations. These combined errors on the part of the trial court created prejudice against Mr. Williams, and resulted in a defective verdict.

A. Failure of Court to Provide Jury With Admitted Evidence For Deliberations.

During deliberations, the foreman of the jury sent a note to the trial judge asking to be provided with the "six-pack of pictures", referring to the photo lineup that had been admitted into evidence as State's Exhibit 2. (T. III. 328-29, RE. 43-44). The trial judge attached a note saying, "These two exhibits should have been sent to you." (T. III. 329). However, only the "six-pack" photo lineup was provided to the jury, not the "show-up" single photo admitted into evidence as State's Exhibit 1. (T. III. 348-349, RE. 45-46). During the hearing on the Motion for JNOV or New Trial, the trial court admitted that the failure to provide the photo was error, but denied the Motion claiming the error to be "harmless." (T. III. 362).

According to Mississippi statute, "[a]ll papers read into evidence... may be carried from the bar by the jury." ***Miss. Code Ann. § 99-17-37*** (Supp. 2007). Addressing the same point, ***Mississippi Rule of Circuit and County Court Practice (UCCCR) 3.10*** specifically states that "[t]he court shall permit the jury, upon retiring for deliberation, to take to the jury room the instructions and exhibits and writings which have been received into evidence, except depositions." ***UCCCR 3.10*** (emphasis

added).

These rules have been interpreted by this honorable Court before in case law cited by the defense and State attorneys during the JNOV hearing. In ***Pettit v. State***, the Court held that ***UCCCR 3.10.***(then still Rule 5.14) should be considered mandatory. ***Pettit v. State***, 569 So. 2d 678, 680 (Miss. 1990). Supporting this holding, these rules were again addressed in ***White v. State***, where the Court stated that the words "shall permit" from Rule 3.10 must be considered the same as "shall." ***White v. State***, 732 So. 2d 961, 965 (Miss. 1999). The Court's interpretation of these rules as mandatory means that all instructions, exhibits, and writings which have been admitted into evidence during the course of a trial must be provided to the jury for consideration during their deliberations. In this case, even after the admitted evidence was expressly requested by the jurors, the trial judge erred by failing to provide the exhibits. Considering the course of the jury's deliberations, it cannot be said with any confidence that this error was"harmless."

The limited right of the trial court to intentionally prohibit exhibits from being taken back with the jury was preserved. Evidence should be given to the jury unless, within this slight exception, the trial judge has a valid reason to exclude it. ***Walker v. State***, 671 So. 2d 581, 604 (Miss. 1995). This exception is limited to withholding exhibits that are potentially dangerous or prone to destruction. ***Pettit***, 569 So. 2d at 680. The trial court is also permitted to exercise discretion in limiting the number of times audio or video media is played during a trial. ***Id.***

In ***Pettit***, relied upon by the State in their argument against the defense Motion for a New Trial, the trial judge excluded a tape recording from the jury's deliberations. The Court ruled that

this exclusion was erroneous, but because of the poor quality of the recording and the extensive examination during trial, the jury had adequate notice of the exhibit and the error was harmless. ***Pettit***, 569 So. 2d at 680. This case is easily distinguishable from the case at hand because the quality of the "show-up" photograph is not, and was not, in question. Additionally, the State argued during the motion hearing that the jury had adequate time during trial to examine the picture; yet, the jury members requested to see the pictures during their deliberations. (T. III. 328-329). One can reasonably infer that since the majority of the State's case was based upon two photographic identifications, the jury would need extensive time to examine these photographs. Had the quality of the recording in ***Pettit*** not been an issue, the error found would likely not have been "harmless."

***White*** is most analogous to the current case, and was presented by the defense team during the Motion for a New Trial. Unlike ***Pettit***, the Court in ***White*** found that the State's case centered around an identification, and the defense's claim of mistaken identity made the close examination of the evidence of the utmost importance. ***White***, 732 So. 2d at 964. The Court distinguished ***White*** from ***Pettit*** because of the "quality of evidence" issue, and reversed the trial court's decision based on the exclusion error. ***Id.*** at 965.

Like ***White***, the State here relies on the victim's identifications of Mr. Williams. Also like ***White***, the examination of both the "show-up" and "six-pack" photo lineups was of maximum importance to the jury's deliberations. Rule 3.10 mandates that all admitted evidence be provided to the jury unless an acceptable reason exists for the trial judge to exclude. The trial judge's note that "these two exhibits should have been sent to you" shows that the trial judge did not intend to exclude

the exhibits from jury deliberations; therefore, it was error to fail to provide the jury with these exhibits. (T. III. 328-329). Why the trial judge failed to provide the exhibits is inconsequential, as the effects on the jury's deliberations were the same: the reliability of the verdict is seriously called into question and cannot be passed off as "harmless" error in a case where identification is central to the prosecution's burden of proof. The jury was prevented from considering all of the evidence presented against Mr. Williams because of an error by the trial judge, and the resulting verdict was prejudiced against him, is improper, and should be reversed.

B. Improper Additional Language Delivered With the "***Sharplin***" Charge.

After an hour of jury deliberations, the trial judge announced in chambers that the jury foreman had emerged and said that the jury was hung 10 votes to 2 votes. (T. III. 329). Both defense and State attorneys were asked by the trial judge if the "***Sharplin***" or "dynamite" charge should be given, and proceeded to record the permissible language from ***Sharplin v. State***, *supra*. (T. III. 330-331); *see generally* ***Sharplin v. State***, 330 So.2d at 596. The trial judge then brought the jury back into the courtroom. While delivering the language of the charge accurately, the trial judge prefaced his otherwise proper jury charge with these comments:

> Ladies and gentlemen, your foreperson has sent word through the bailiff that you may be hung, and I don't know which way you're hung, and I don't want to know which way you're hung or what the vote is. I think the word was sent out that it might be 10 to 2, but I don't know. I don't want to know which way it's hung, but I tell you, you've only been deliberating a little over an hour and a half at this point, which is not a long time to deliberate over such

a serious matter.

(T. III. 331) (emphasis added).

The language provided in ***Sharplin***, which the Court has determined is acceptable to deliver to a deadlocked jury to encourage continued deliberation, was presented by the trial judge accurately. The error claimed by the Appellant herein involves the additional commentary interjected by the trial judge preceding the charge. By remarking upon the division, the trial judge brought the attention squarely upon the two opposing votes; his comment had the effect of pressuring these two jurors to acquiesce to the opinion of the whole merely for the sake of the jury rendering a verdict.

In ***Brasfield v. United States***, the United States Supreme Court condemned the practice of asking an undecided jury how it is divided, even if the issue of guilt or innocence is not discussed. ***Brasfield v. United States***, 272 U.S. 448, 449 (1926) (*citing* ***Burton v. United States***, 196 U.S. 283, 307 (1905)). The Supreme Court adamantly stated that this question served no useful purpose, cannot be asked without resulting in improper influence, and is not to be sanctioned. ***Id.*** So essential to a fair trial, the Court stated that merely asking the question should result in a reversal. ***Id.***

The decision in ***Brasfield*** has been enforced in federal courts, but some states have declined to apply it as a "per se" rule. In ***Sharplin***, the Mississippi Supreme Court, specifically addressing this issue, held that asking how the jury is divided serves the purpose of allowing the trial judge to examine the likelihood of juror agreement among a split panel. ***Sharplin***, 330 So. 2d. at 595.

Mr. Williams's case is distinguishable from the factual basis in ***Sharplin***, where the trial judge's knowledge of the numerical division of the jurors was the issue. The issue here is whether

it is proper for the trial judge to refer to this division when charging the jury to continue deliberating. No purpose was served by the trial judge's inclusion of his own comments to the language of the "***Sharplin***" charge except to isolate the two holdout jurors among their own panel. The knowledge was not used to determine the jury's ability to agree; it was used to pressure the two dissenting votes to submit to the will of the majority. The specifically language of the "***Sharplin***" charge was constructed by the Mississippi Supreme Court to prevent this from happening, and the trial judge's comments destroyed this purpose. While the State of Mississippi has not previously adhered to the ***Brasfield*** holding as a "*per se*" rule, the Appellant respectfully contends that this instance of error is uniquely distinct and should be examined and considered under the abuse of discretion standard of appellate review.

The trial judge first erred by failing to provide the jury with the all of the properly admitted evidence during their deliberations, which prevented the jury from being able to judge the totality of the evidence against Mr. Williams. This error produced a deadlock, and the Appellant respectfully contends this inadvertence on the part of the trial court created a flawed process of jury deliberations in this case. Compounding the error in failing to provide the jury with the evidence admitted at trial, the comments interjected by the trial judge during the "***Sharplin***" charge served no purpose but to pressure jurors into reaching a verdict, thereby further prejudice the Appellant's rights to a fundamentally fair trial. The Appellant respectfully contends that these errors individually and combined was prejudicial to the Appellant, causing the jury to arrive an improper verdict, and that this honorable Court should reverse and remand this case to the lower court for a new trial.

## ISSUE THREE:

## WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE OF THE STATE'S FAILURE TO MEET ITS BURDEN OF PROOF AND ESTABLISH EVERY ELEMENT OF ARMED ROBBERY AND THAT THE TOTAL WEIGHT OF THE EVIDENCE IS UNCONVINCING.

This is a case where faulty police procedure left the prosecution with only one avenue, the victim, to prove the elements of each offense. Mrs. Hargrove told Merritt at the first police investigative interview on April 5, 2007, almost a full week after the incident, that the assailant took her purse from the driver's side of the car when she was on the ground by the passenger side of the car. (CP. 22, RE. 24). However, at trial, Mrs. Hargrove testified that she handed her purse to the assailant. (T. II. 172, 199-200). This testimony is the only evidence that the prosecution put forth to prove the elements of armed robbery.

Recognizing that legal sufficiency and weight of the evidence are separate and distinct assignments of error, the Appellant would present both in this single issue argument. At the close of the trial, Mr. Williams was denied both his Motion for Judgment Not Withstanding the Verdict or in the alternative, a New Trial, which are challenges made to the legal sufficiency of the evidence presented by the prosecution and the weight of the evidence presented at trial being supportive of the jury's verdict. (T. III. 358, CP. 93-98, RE. 15-20).

A. The Legal Sufficiency of the State's Case-in-Chief.

The standard of appellate review for challenges to the legal sufficiency of the evidence is articulated in ***Bush v. State,*** 895 So.2d 836, 843 (Miss. 2005). In ***Bush***, the Court restated that "the

relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Bush***, 895 So.2d at 843 (citing ***Jackson v. Virginia***, 443 U.S. 307, 315 (1979)). The Court emphasized that "[s]hould the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render." ***Id.*** (emphasis added) (citing ***May v. State***, 460 So. 2d 778, 781 (Miss. 1984)).

***Mississippi Code Annotated 97-3-79*** defines "armed robbery," *ie.*, robbery with a deadly weapon, as follows:

> Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.

***Miss. Code Ann. § 97-3-79*** (Supp. 2008).

The language of the statute indicates that, for a person to be convicted of robbery with a deadly weapon, five elements must be met. The elements are (1) a felonious taking or attempt to take, (2) from the person or from the presence, (3) the personal property of another, (4) against his/her will, (5) by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon. ***Bush v. State,*** 895 So.2d at 843 (citing ***Miss. Code Ann. § 97-3-79*** (Rev. 2000).

In this case the only evidence presented by the prosecution is the direct testimony of the victim. Although the credibility of Mrs. Hargrove's testimony is at least questionable and at most, completely inconsistent, the prosecution is entitled to a presumption of its truthfulness when the court is determining whether sufficient evidence to support a conviction for armed robbery has been presented to the jury. However, the failure of the prosecution to present legally sufficient evidence as to each and every element of the offense charged is most glaring in their lack of credible evidence to establish the essential element of "a felonious taking...from the person or from the presence" a thing of value. ***Id.*** A thing is in the "presence" of a person, in respect to armed robbery, which is "so within her reach, inspection, observation or control, that she could, if not overcome with violence or prevented by fear, retain her possession of it." ***Davis v. State***, 684 So.2d 643, 659-60 (Miss. 1996).

However, the testimony of Mrs. Hargrove is insufficient to support the conviction of "armed" robbery because there is no other conclusive evidence than the substantially impeached testimony of Mrs. Hargrove that the Appellant took her property from her "person or from [her] presence." In

a pre-trial conference with Merritt on April 5, 2007, Mrs. Hargrove stated that she told the assailant to get her purse. (CP. 22). However, at trial Mrs. Hargrove completely contradicted herself when she changed her story and testified that she physically gave the assailant her purse. (T. II. 171, 199-200). Mrs. Hargrove alleged that the transcript of her previous statement was incorrect. (T. II. 200). Even allowing the State the benefit of all reasonable inferences regarding Mrs. Hargrove's testimony that her property was taken from her person or presence did not provide sufficient evidence for this element of armed robbery beyond a reasonable doubt because Mrs. Hargrove's testimony is self-contradictory and cannot be given any substantial credibility.

Therefore, the State has failed to put forth evidence allowing a reasonable juror to conclude beyond a reasonable doubt that each element of the charged crimes is satisfied. Due to the prosecution's failure to conclusively prove, by legally competent and credible evidence, the essential elements of the armed robbery charge, the Appellant herein respectfully requests that this Court, with respect to the armed robbery charge, reverse the verdict of the jury and render judgment on his behalf.

B. The Overall Weight of the Evidence.

After the jury's verdict and the sentencing was handed down by the trial court, the Appellant also made a final Motion For New Trial, which was denied by the trial court. (CP. 93-98, RE. 15-20) This motion was made as a challenge to the total weight of the evidence presented in trial. A reversal of the lower court's verdict is warranted when it is clear that the trial court abused its discretion in denying a motion for a new trial. ***Dilworth v. State***, 909 So.

2d 731, 736 (Miss. 2005). The trial court erred when it failed to first grant the Motion for Directed Verdict and Motion for JNOV amidst insufficient evidence presented by the State, and it furthered this error when it failed to grant the Motion for New Trial with an underwhelming weight of evidence to support the jury's verdict.

In ***Bush v. State***, *supra*, the Court stated that the lower trial court sits as a "thirteenth juror" when it hears a case, and that a motion for new trial is sustained or denied at the discretion of the trial court. ***Bush v. State***, 895 So. 2d at 844. A new trial should be granted in exceptional cases where the evidence weighs overwhelmingly against the verdict issued by the jury. ***Id.*** The analysis of this evidence should be made using the light most favorable to the verdict. Although the Mississippi Supreme Court has repeatedly made clear that instances where the jury's verdict should be disturbed are "rare," they acknowledged that they do exist in situations where allowing a verdict to stand would sanction an unconscionable injustice. ***Venton v. Beckham***, 845 So.2d 676 (Miss. 2003) (citing ***Herrington v. Spell***, 692 So.2d 93, 103-4 (Miss.1997)); *see also* **Moss *v. State***, 977 So.2d 1201 (Miss. 2008). An appropriate situation to exercise this authority is one where, when examining the entirety of the evidence presented against the defendant and weighing the trustworthiness of testimony and the convincing nature of the case as a whole, the Court finds that the first jury's determination of guilt was based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict. ***Dilworth***, 909 So.2d at 737. A reversal does not mean that acquittal was the only proper verdict; rather, a reversal and order for new trial merely

affords the defendant a second opportunity to receive a favorable judgement. ***Tibbs v. Florida***, 457 U.S. 31 (1982).

In the case at hand, the investigative tactics of the police created a situation where there is very little conclusively convincing evidence. Beginning with the delay between the crime and the taking of Mrs. Hargrove's statement, the police failed to investigate this crime in such a way to develop reliable evidence against any suspect. The police failed to attempt to collect any forensic evidence from Mrs. Hargrove's car or the surrounding crime scene, instead relying on errant witness identification techniques and anonymous tips. Even in this pursuit, the police failed to follow up on the first lead they received, instead choosing to follow the path of least resistance in pursuing Mr. Williams. The result of these decisions by the Vicksburg police investigators is a case where the weight of the evidence collected by the police was very small, and patently error-prone.

Additionally, both the out-of-court identifications and in-court identification of the Appellant by Mrs. Hargrove were tainted and unconvincing. During the second identification, Mrs. Hargrove raised questions about the physical similarities between Mr. Williams (shown in the photo) and her attacker. (T. II. 207-208, RE. 48-49). Also during the second identification, Mrs. Hargrove was hesitant to identify Mr. Williams in the "six-pack" lineup until coerced to do so by Merritt. (T. II. 208). However, Mrs. Hargrove testified in court, in opposition to the police transcript of her prior identifications, that she had no doubt that Mr. Williams was her attacker. (T. II. 209). Doubt thrives in a case where a witness's certainty in

her identification inexplicably grows as time passes. The fact is that Mrs. Hargrove's identifications, from the very beginning, were likely created out of the languid, unimaginative, and coercive tactics of the police, and her challenge of the accuracy of the police transcription brings serious doubt as to the reliability of her entire testimony.

The lack of substantial evidence against Mr. Williams has been stated above, leaving the conclusion that the jury must have been carried away with prejudice and passion, fueled by the unreliable identifications offered by Mrs. Hargrove and the coercive tactics employed by the Vicksburg Police Department. For this honorable Court to affirm this conviction would most certainly sanction an unconscionable injustice based on the shaky, inconclusive, and unconvincing nature of the evidence, and the disproportionately small total weight of the evidence presented in this trial used to justify the defendant's convictions. For these reasons, the trial court erred in refusing to set aside the guilty verdict by denying the Motion for New Trial, and this honorable Court should reverse and remand this case to the lower court with proper instructions for a new trial.

## CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial with instructions to the lower court. In the alternative, the Appellant herein would submit that

the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The claim of error in this issue is brought by the Appellant under ***Article 3, Sections 14, 23, and 26 of the Mississippi Constitution*** and the ***Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution***. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

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This the 3RD day of April, 2009.

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