

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**CEDRIC CATCHINGS**

**APPELLANT**

**V.**

**NO. 2008-KA-1260-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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**MISSISSIPPI OFFICE OF INDIGENT APPEALS**

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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. Cedric Catchings, Appellant
3. Honorable Robert Schuler Smith, District Attorney
4. Honorable Winston Kidd, Circuit Court Judge

This the 6<sup>th</sup> day of January, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS .....	i
TABLE OF AUTHORITIES .....	iv
STATEMENT OF THE ISSUES .....	1
STATEMENT OF INCARCERATION .....	2
STATEMENT OF JURISDICTION .....	2
STATEMENT OF THE CASE .....	2
FACTS .....	2
SUMMARY OF THE ARGUMENT .....	7
ARGUMENT .....	9
ISSUE ONE:	
WHETHER THE APPELLANT WAS DEPRIVED OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL BY REPEATED ACTS OF PROSECUTORIAL MISCONDUCT, INCLUDING INADMISSIBLE “SEND A MESSAGE” ARGUMENTS AND IMPROPER QUESTIONS WHICH UNDOUBTEDLY INFLAMED THE PASSIONS OF THE JURY. AND, WHETHER IMPROPER COMMENTS ON THE APPELLANT’S POST- <i>MIRANDA</i> SILENCE BY THE STATE’S LEAD INVESTIGATOR DEPRIVED THE APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL? .....	
9	
ISSUE TWO:	
WHETHER THE TRIAL COURT ERRED IN NOT ALLOWING TRIAL COUNSEL TO FULLY CROSS-EXAMINE DANIEL JEANTY, A NON-PARTY WITNESS, REGARDING HIS TWO PREVIOUS FELONY CONVICTIONS WHEN THERE WAS NO WAY THAT THE ADMISSION OF HIS PRIOR CONVICTIONS WOULD RESULT IN ANY PREJUDICE. ....	
17	
ISSUE THREE:	
WHETHER ANY OF THE ABOVE ERRORS, ALL CONCERNING VIOLATION OF THE APPELLANT’S CONSTITUTIONAL RIGHTS, MAY BE CONSIDERED HARMLESS. ....	
20	
ISSUE FOUR:	
WHETHER CUMULATIVE ERROR, EFFECTING THE APPELLANT’S FUNDAMENTAL RIGHTS GUARANTEED TO HIM BY THE UNITED STATES	

CONSTITUTION, DEPRIVED THE APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL .....	22
CONCLUSION .....	24
CERTIFICATE OF SERVICE .....	25

## TABLE OF AUTHORITIES

### **CASES**

<i>Barnes v. State</i> , 460 So. 2d 126, 135 (Miss. 1984) .....	23
<i>Brown v. State</i> , 986 So. 2d 270, 276 (Miss. 2008) .....	11
<i>Chapman v. California</i> , 386 U.S. 18, 23 (1967) .....	21
<i>Collins v. State</i> , 408 So. 2d 1376, 1380 (Miss. 1982) .....	23
<i>Fahy v. Connecticut</i> , 375 U.S. 85, 86-87 (1963) .....	21
<i>Griffin v. State</i> , 557 So. 2d 542, 553 (Miss. 1990) .....	22, 23
<i>Hansen v. State</i> , 582 So.2d 114, 142 (Miss. 1991) .....	22
<i>Hickson v. State</i> , 472 So. 2d 379, 385-86 (Miss. 1985) .....	23
<i>Hiter v. State</i> , 660 So. 2d 961, 966 (Miss. 1995) .....	12
<i>Hobgood v. State</i> , 926 So. 2d 847, 852 (Miss. 2006) .....	20
<i>Kelly v. State</i> , 735 So. 2d 1071, 1087 (Miss. Ct. App. 1999) .....	15
<i>McFee v. State</i> , 511 So. 2d 130, 136 (Miss.1987) .....	22
<i>Payne v. Arkasnas</i> , 356 U.S. 560, 568 (1958) .....	21
<i>Payton v. State</i> , 785 So. 2d 267, 271 (Miss. 1999) .....	10
<i>Peterson v. State</i> , 518 So. 2d 632 (Miss. 1987) .....	19
<i>Puckett v. State</i> , 737 So.2d 322, 351 (Miss. 1999) .....	14
<i>Quick v. State</i> , 569 So. 2d 1197, 1199 (Miss. 1990) .....	14
<i>Ross v. State</i> , 954 So. 2d 968, 1018 (Miss. 2007) .....	22, 23
<i>Spicer v. State</i> , 921 So. 2d 292, 318-19 (Miss. 2006) .....	10, 11
<i>Stringer v. State</i> , 500 So. 2d 928, 939 (Miss. 1986) .....	23
<i>Tate v. State</i> , 912 So. 2d 9191, 924 (Miss. 2005) .....	18

<i>Turner v. State</i> , 945 So. 2d 992, 999 (Miss. Ct. App. 2007) .....	20
<i>White v. State</i> , 785 So. 2d 1059,1061 (Miss. 2001) .....	19
<i>Wilcher v. State</i> , 697 So. 2d 1087, 1143 (Miss 1997) .....	20
<i>Williams v. State</i> , 445 So. 2d 798, 810 (Miss. 1984) .....	23
<i>Williams v. State</i> , 522 So. 2d 201, 209 (Miss. 1988) .....	10
<i>Williams v. State</i> , 539 So. 2d 1049, 1051-52 (Miss. 1989) .....	16
<i>Young v. State</i> , 731 So. 2d 1145, 1151 (Miss. 1999) .....	19, 20
<i>Young v. State</i> , 981 So. 2d 308, 313 (Miss. Ct. App. 2007) .....	18

## STATUTES

U.S. Const. amend V .....	13
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## RULES

Miss. R. Evid. 609 .....	19
Miss. R. Evid. 609(a) .....	19

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**STATEMENT OF THE ISSUES**

**ISSUE ONE:**

**WHETHER THE APPELLANT WAS DEPRIVED OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL BY REPEATED ACTS OF PROSECUTORIAL MISCONDUCT, INCLUDING INADMISSIBLE "SEND A MESSAGE" ARGUMENTS AND IMPROPER QUESTIONS WHICH UNDOUBTEDLY INFLAMED THE PASSIONS OF THE JURY. AND, WHETHER IMPROPER COMMENTS ON THE APPELLANT'S POST-MIRANDA SILENCE BY THE STATE'S LEAD INVESTIGATOR DEPRIVED THE APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL?**

**ISSUE TWO:**

**WHETHER THE TRIAL COURT ERRED IN NOT ALLOWING TRIAL COUNSEL TO FULLY CROSS-EXAMINE DANIEL JEANTY, A NON-PARTY WITNESS, REGARDING HIS TWO PREVIOUS FELONY CONVICTIONS WHEN IT WAS IMPOSSIBLE THAT THE ADMISSION OF HIS PRIOR CONVICTIONS WOULD RESULT IN ANY PREJUDICE.**

**ISSUE THREE:**

**WHETHER ANY OF THE ABOVE ERRORS, ALL CONCERNING VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS, MAY BE CONSIDERED HARMLESS.**

**ISSUE FOUR**

**WHETHER CUMULATIVE ERROR EFFECTING THE APPELLANT'S FUNDAMENTAL RIGHTS GUARANTEED TO HIM BY THE UNITED STATES CONSTITUTION, DEPRIVED THE APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.**

### **STATEMENT OF INCARCERATION**

Cedric Catchings, the Appellant in this case, 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. 99-35-101**.

### **STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Hinds County, Mississippi, and a judgment of conviction on one count of capital murder against Cedric Catchings, following a trial on May 19-21, 2008, the Honorable Winston L. Kidd, Circuit Judge, presiding. Catching was subsequently sentenced to life without parole in the custody of the Mississippi Department of Corrections.

### **FACTS**

Before any evidence was presented at trial, the Hinds County District Attorney, in his opening statement, said the following;

“Defendant Catchings decided that Mr. Redmond would see no other day and the only just verdict in this case is guilty for capital murder because he murdered and robbed Mr. Redmond. The only just verdict for the City of Jackson, for Hinds County, for the State of Mississippi, the United States of America and Mr. Redmond who is no longer here —“

(T. 56).

This was immediately objected to as a “send a message argument.” (T. 56). The trial court directed the District Attorney to rephrase his statement, thus sustaining defense counsel’s objection. (T. 56). After one additional sentence, the District Attorney’s opening statement ended, and the trial continued.

According to the testimony presented at trial, on March 3, 2007, Jackson Police Department



Officer Mark Coleman (Officer Coleman) responded to a call on Hanging Moss Circle. (T. 57). When he arrived on the scene, he exited his car and approached a white vehicle parked on the left side of the street. (T. 57). As he approached he noticed a young deceased male in the front seat who he observed was bleeding from the head. (T. 57).

After notifying his supervisor, Officer Coleman approached a group of people nearby to obtain statements from any potential witnesses. (T. 58). Officer Coleman was given a description of someone seen running west from the area. (T. 58). Officer Coleman also ran the tag of the vehicle in question, and it came back as registered to the man found in the car, Kareen Redmond (Redmond). (T. 58).

Upon closer examination of the vehicle, Officer Redmond observed spent rounds in the back seat of the vehicle. (T. 59). Officer Redmond also observed that Redmond's pockets had been turned out. (T. 59).

Daniel Jeanty (Jeanty) testified that he was living in Jackson and was at a barbeque at his sister-in-law's house on the day in question. (T. 62). While outside, Jeanty heard a shot, looked towards a car, and saw a man exit the vehicle, and look around. (T. 63). When officers arrived, Jeanty gave them a description of the person he saw. (T. 63). Jeanty then said he thought "something ain't right" and he and his brother-in-law decided to go to the store. (T. 63). Then, Jeanty testified he heard more shots. (T. 63).

Jeanty testified that eventually police showed up and he gave them a description of the person he saw. (T. 63). Jeanty further testified that the next day he was at Auto Zone and saw the same person he saw exiting the vehicle. (T. 65). According to Jeanty, when the person saw him, he "took off." (T. 65).

At the close of Jeanty's testimony, the District Attorney asked the following question; "Can

you tell us if the suspect who shot, murdered, and robbed Mr. Redmond, is he in the courtroom today?" (T. 65-66). Defense counsel immediately and timely objected to the question, to which the trial court asked the District Attorney to rephrase his question. (T. 66). The District Attorney then simply asked; "The person that you saw running from the scene that day, do you see him in the courtroom today?" (T. 66). Jeanty responded affirmatively, ending his testimony. The trial continued.

*Prior Convictions*

During Jeanty's cross-examination, defense counsel attempted to question him regarding his prior criminal convictions for burglary and fleeing from a police officer. Outside of the presence of the jury, the trial court heard arguments from both sides, ultimately concluding that Jeanty's prior convictions would be more prejudicial than probative. (T. 75-76). Catchings' trial continued without being able to question Jeanty regarding his previous felony convictions.

Jackson Police Department Sergeant Perry Tate then testified to finding a piece of paper inside of Redmond's vehicle. (T. 81). According to his testimony, that paper contained information, which, through the course of some investigation, led police officers to Cedric Catchings. (T. 81-83). Law enforcement agents went to Catchings' house and spoke with Catchings. (T. 88). Police checked Catchings for local warrants, and arrested him on two misdemeanor warrants. (T. 88). Police, through both a consent search and, later, a search warrant, recovered a nine millimeter handgun, bullets, clips, and a holster. (T. 88-89). Crime Scene Investigator Charles Taylor testified to recovering spent nine millimeter cartridges at the crime scene. (T. 94). Carl Fullilove ("Fullilove"), a forensic scientist with the Mississippi Crime Laboratory, testified that six cartridge cases submitted to him from the scene of the crime matched a nine millimeter that was recovered pursuant to a search warrant of Catchings' residence. (T. 130).

After Investigator Taylor's testimony, trial counsel made a motion that any testimony based on the phone records be excluded. (T. 102). Trial counsel contended that the documents were hearsay and that the proper avenue for admittance was through the custodian of records. (T. 102). The District Attorney argued that because the phone numbers were part of the detective's investigation, they were admissible. (T. 103). The trial court concluded that the records had not been admitted, but overruled the objection because the officer gave testimony based upon his observation of the record. (T. 103).

Leslie Blakeney (Blakeney), an employee of Trustmark National Bank, testified as to the contents of Redmond's credit card transactions. (T. 104). Blakeney testified to four completed transactions in Jackson, as well as several declined transactions. (T. 104-105). These transactions occurred from 2:15 P.M. to 4:24 P.M. On March 3, 2007. (T. 105-06).

Homicide Detective Kent Daniels (Detective Daniels) then took the stand. Detective Daniels testified that he obtained a video of the transactions involving Redmond's bank account. (T. 111). Detective Daniels testified that upon the execution of a search warrant on Catchings' home, police officers several items that were purchased on Redmond's credit card. (T. 114-16).

During Detective Daniels testimony, he testified; "So this particular day Mr. Catchings was carried to police headquarters where he was interviewed but he refused to give a statement." (T. 113). Defense counsel immediately and timely objected, and approached the bench. (T. 114). After Daniels's testimony, defense counsel moved for a mistrial. (T. 139). Defense counsel argued the Fifth Amendment right to remain silent was a fundamental right, and comment on the exercise of such right by witnesses is impermissible. (T. 139-40).

The District Attorney responded,

"Your Honor, we do not believe under the recent case law, the latest case law, that this is reversible error. The detective commenting on a suspect's

refusal to make a statement was just a matter of fact. It was not a matter of his Fifth Amendment right, not being advised of the Defendant's right to not make a statement."

(T. 140).

After additional argument, the trial court denied the motion for a mistrial, concluding that the testimony given did not have any prejudice on Catchings. (T. 141) The trial continued, and, after one additional witness, Dr. Steven Hayne, who testified as to the cause of Redmond's death, the State rested. (T. 145-50). Subsequently, the defense moved for a directed verdict, which was denied.

(T. 151-55).

Cedric Catchings took the stand in his own defense. Catchings, an evacuee from Hurricane Katrina, testified that on the day in question he was at a barbershop. (T. 157). While at the barbershop, he was approached by a man he knew as "Little Robert." (T. 157). Little Robert asked Catchings if he could use his (Catchings') phone, and Catchings obliged. (T. 157). There was no answer, but shortly after someone called back. (T. 158). Little Robert then told Catchings that he was going to meet with the caller and asked if he could borrow Catchings' gun. (T. 158). When Little Robert returned he had some marijuana. (T. 159). Catchings testified that Little Robert gave him a card to purchase some gasoline for his car. (T. 159). Catchings then returned home and picked up his wife, went to the gas station, used the card to purchase gas, then went to the mall. (T. 159-60). Catchings admitted to using the Redmond's card but denied robbing him or killing him. (T. 162). Catchings further denied even knowing Redmond.

During its cross-examination of Catchings, the State of Mississippi, through the District Attorney, continually attempted to question Catchings regarding the content of the cellular telephone records that had not been admitted into evidence. (T. 168-70). This was done over the repeatedly sustained objection of defense counsel.

After Catchings' testimony, the defense rested its case. Upon hearing the evidence presented against the Appellant at trial, both properly and improperly put before them, the jury, after deliberation, returned verdicts of guilty of capital murder against the Appellant. (C.P. 42, R.E.6). The Appellant was sentenced to life in the custody of the Mississippi Department of Corrections without the eligibility of parole. (C.P. 42, R.E. 6).

On May 28, 2007, the Appellant filed a Motion for a New Trial, or, in the Alternative, for a Judgment Notwithstanding the Verdict. (C.P. 44-46, R.E. 7-9). The motion was denied by the trial court on June 26, 2008. (C.P. 48, R.E. 10). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant timely filed a notice of appeal. (C.P. 49, R.E.11).

### SUMMARY OF THE ARGUMENT

Every criminal defendant is entitled to a fair trial. Every jury is entrusted to decide the case based on the evidence properly presented before them. Neither Cedric Catchings, nor the jury that found him guilty were afforded such opportunity.

The State of Mississippi, through the Hinds County District Attorney himself and a homicide investigator, who surely was experienced in testifying in trials, dismantled the machine of justice cog by cog. First, the Hinds County District Attorney made a "send a message" argument during his opening statement. This statement was timely objected to and sustained by the trial court. The jury was never told to disregard the statement. Nevertheless, the trial continued. Then, during the direct examination of Daniel Jeanty, one of the State's witness, the District Attorney made a calculated and deliberate attempt to inflame the passions of the jury during what should have been a routine in-court identification. This was timely objected to and sustained by the trial court.

Then, Detective Kent Daniels, a homicide investigator for the Jackson Police Department commented that Catchings failed to give a statement when taken into custody. The was objected

① send a msg open

② Jeanty's method prejudicial

③

Failure to give statement

to. Out of the presence of the jury, trial counsel moved for a mistrial, which was subsequently denied by the trial court. Catchings' trial continued, despite that multitude of improprieties.

④ Next, during the cross-examination of Catchings, the District Attorney attempted to question Catchings regarding the content of telephone records that had not been admitted into evidence. Defense counsel made a timely objection, which was sustained by the trial court. The trial court specifically instructed the District Attorney not to question Catchings regarding the content of the records. Then, in flagrant disregard of the trial court's ruling, the District Attorney asked the same question. This was objected to. The District Attorney asked the same question again. Nevertheless, the Catchings' trial continued.

During closing arguments, the State again made a "send a message" argument, which was objected to. The trial court, however, overruled the objection, focusing on one word rather than the entirety of the statement.

After this multitude of actions on the part of the State, the jury returned a guilty verdict which was undoubtedly influenced by the State's impermissible conduct. The State's actions were calculated to deprive Catchings of his fair trial and the jury of their sworn duty. The State knew or should have known better, and the trial court should have declared a mistrial.

Furthermore, the trial judge also erred when it would not allow Catchings to fully cross-examine Daniel Jeanty regarding his previous felony convictions. The trial judge concluded that the prejudicial effect far outweighed the probative value. However, there was no prejudice to Jeanty as he was a third-party witness. Furthermore, the probative value was substantial, as his credibility was important towards the determination of the truthfulness of his testimony. The failure to allow Catchings to fully cross-examine limited his fundamental right to confront the witnesses against him and resulted in error.

## ARGUMENT

### ISSUE ONE:

**WHETHER THE APPELLANT WAS DEPRIVED OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL BY REPEATED ACTS OF PROSECUTORIAL MISCONDUCT, INCLUDING INADMISSIBLE “SEND A MESSAGE” ARGUMENTS AND IMPROPER QUESTIONS WHICH UNDOUBTEDLY INFLAMED THE PASSIONS OF THE JURY. AND, WHETHER IMPROPER COMMENTS ON THE APPELLANT’S POST-MIRANDA SILENCE BY THE STATE’S LEAD INVESTIGATOR DEPRIVED THE APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL?<sup>1</sup>**

*i. The Hinds County District Attorney improperly made a “send a message” argument during his opening Statement.*

Before any evidence had been presented to the jury and before any witness had taken stand, the State of Mississippi, through Hinds County’s District Attorney, took its first step in dismantling Cedric Catching’s fundamental right to a fair trial.

During its opening statement, the District Attorney said the following;

“This Defendant, after you listen to the evidence, exercised unlawfully the power to take another man out of this world. Defendant Catchings decided that Mr. Redmond would see no other day and the only just verdict in this case is guilty for capital murder because he murdered and robbed Mr. Redmond. The only just verdict for the City of Jackson, for Hinds County, for the State of Mississippi, the United States of America and Mr. Redmond who is no longer here —

[DEFENSE COUNSEL]: Objection, Your honor.

**THE COURT:** Hold on.

[DEFENSE COUNSEL]: Objection. Sending a message from the community.

**THE COURT:** You can rephrase, Mr. Smith.  
Sustained.

[DISTRICT ATTORNEY]: The only just verdict after the evidence is guilty of capital murder for Mr. Redmond who is no longer here and never will be.

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<sup>1</sup> This is merely the most objectionable actions of the Hinds County District Attorney’s office. The record is replete with instances of improper and impermissible comments by the Hinds County District Attorney’s office not limited to the ones presented in this issue.

(T. 55-6).

For two decades, the Mississippi Supreme Court has warned prosecutors to not encourage juries to use their verdict to “send a message” to the public or other criminals;

“The jurors are representatives of the community in one sense, but they are not to vote in a representative capacity. Each juror is to apply the law to the evidence and vote accordingly. The issue which each juror must resolve is not whether or not he or she wishes to “send a message” but whether or not he or she believes that the evidence showed the defendant to be guilty of the crime charged. The jury is an arm of the State but it not an arm of the prosecution. The State includes both the prosecution and the accused. The function of the jury is to weigh the evidence and determine the facts. When the prosecution wishes to send a message they should employ Western Union. Mississippi jurors are not messenger boys.”

*Williams v. State*, 522 So. 2d 201, 209 (Miss. 1988).

Depending upon the facts and circumstances of each case, “send a message” arguments may-  
standing alone- constitute reversible error. *Payton v. State*, 785 So. 2d 267, 271 (Miss. 1999).

When assessing whether the prosecution improperly made a send a message argument, there are two threshold inquiries, followed by a two-pronged test. The first threshold question is whether the defense counsel objected to the statements made by the prosecution. See *Spicer v. State*, 921 So. 2d 292, 318-19 (Miss. 2006).<sup>2</sup> The second threshold question is whether the defense counsel invited the comment made by the prosecution. *Id.* at 318.

As noted above, defense counsel objected to the statements made by the prosecution; therefore, the first threshold inquiry is satisfied. Secondly, there is nothing in the record to indicate that defense counsel in any way invited the comments. Therefore, the second threshold question has

<sup>2</sup> It should be noted, however, that the Supreme Court has stated that despite the absence of objection, the Court will not procedurally bar the issue where “the [send a message] argument is so ‘inflammatory’ that the trial judge should have objected on his own motion.” *Spicer*, 921 So. 2d at 317 (internal citations omitted). This is indicative of the seriousness in which the Mississippi Supreme Court considers such send a message arguments.



Fact speaker

been satisfied.

Test  
Improper  
questioning  
pros

Once the threshold questions have been satisfied for a finding of reversible error, "the court must determine (1) whether the remarks were improper, and (2) if so, whether the remarks prejudicially affected the accused's rights." *Id.* (internal citations omitted).

In clarifying the proper assessment of the second prong of the *Spicer* test, the Mississippi Supreme Court recently concluded, "[T]o meet the second prong of the test, we hold that it must be clear beyond a reasonable doubt that, absent the prosecutor's inappropriate comments, the jury would have found the defendant guilty." *Brown v. State*, 986 So. 2d 270, 276 (Miss. 2008) (emphasis in original). The Court reasoned that this is essentially a harmless error analysis. *Id.*

There can be little doubt that such comments had an effect on the conviction of Cedric Catchings. The first thing the jury heard from the District Attorney was a comment which has been routinely criticized and condemned by the Mississippi Supreme Court. The bell had been rung. And, though trite, the adage is true, "you can't un-ring a bell."

With its "send a message" argument, the District Attorney had set the table for a trial that would continue, littered with inappropriate questions, prosecutorial misconduct and statements by State officials which were inadmissible.

***ii. The Hinds County District Attorney's improper questioning of Daniel Jeanty was deliberately calculated to inflame the passions of the jury and had no basis in evidence.***

During the course of a routine in-court identification, the Hinds County District Attorney, being fully aware of what had previously been testified to by Daniel Jeanty, asked the following question to Jeanty:

"Q. Can you tell us if the suspect who shot, murdered, and robbed Mr. Redmond, is he in the courtroom today?

[DEFENSE COUNSEL]: Objection to the form of the question.

**THE COURT:** Rephrase your question.

Q. The person that you saw running from the scene that day, do you see him in the courtroom today?"

(T. 65-6).

It is abundantly clear, given the nature of the follow-up question posed by The District Attorney, the State was well-aware of the nature of what Jeanty testified to. There can be no inference drawn which can hold that the District Attorney's comments were anything other than a deliberate attempt to inflame the passions of a jury already primed by his previous inadmissible comments.

It is well established in Mississippi that attorneys are given wide latitude in arguing their cases to the jury, however, tactics which are inflammatory, highly prejudicial and reasonably calculated to unduly influence the jury are not permissible. Hiter v. State, 660 So. 2d 961, 966 (Miss. 1995). While this principle typically outlines the parameters under which attorneys may argue in closing arguments, the same principles and policies are just as applicable in the questioning of witness.

The District Attorney impermissibly exploited a routine in-court identification by adding unnecessary and inflammatory commentary concerning Catchings. The only rational inference that can be drawn from such a comment is that the District Attorney made a concerted effort to excite the passions and prejudices of the jury. This was clearly a calculated attempt to unduly influence the jury. No other purpose is served by the highly prejudicial remarks. Counsel objected and the court ordered the District Attorney to rephrase the question, but the damage was already done. The jury had already heard the District Attorney, a trusted officer of the State and its courts, interject such highly prejudicial and inflammatory comments. Ultimately, the District Attorney knew or

should have known better. With these prejudicial comments ringing in the ears of the jurors, Cedric Catchings' trial continued.

***iii. The State of Mississippi, through homicide detective Kent Daniels, improperly commented on Catchings' post-Miranda silence.***

Cedric Catchings was taken into custody and interrogated by homicide detective Kent Daniels. During the course of such interrogation, Catchings was afforded the full protection of his right to remain silent. This bedrock constitutional guarantee may not be circumvented or coerced by agents of the State. None of this mattered when Detective Daniels commented on Catchings' exercise of that right.

The Fifth Amendment of the United States Constitution provides that "No person shall .... be compelled in any criminal case to be a witness against himself..." U.S. Const. amend V. The Mississippi Constitution further provides that "In all criminal prosecutions the accused...shall not be compelled to give evidence against himself;...." Art. III § 26, Miss. Const. The privileges against self-incrimination are embedded in framework of both the State and Federal Constitutions, serving as bedrock constitutional principles under which our system of criminal justice functions.

In the case *sub judice*, during the testimony of Detective Kent Daniels, the following was stated; "So this particular day Mr. Catchings was carried to police headquarters where he was interviewed but he refused to give a statement." (T. 113). Defense counsel immediately objected to the statement, and there was an off the record bench conference. After Detective Daniel's testimony, defense counsel moved for a mistrial. (T. 139-40).

After defense counsel made its motion, the prosecution responded, "The detective commenting on a suspect's refusal to make a statement was just a matter of fact. It was not a matter of his Fifth Amendment right, not being advised of the Defendant's right to not make a statement." (T. 140). The logical inference to be drawn from the District Attorney's response is that

constitutional rights exist in a vacuum separate from facts. Regardless, the District Attorney's assertion was directly to the contrary of Mississippi Supreme Court precedent.

In *Quick v. State*, the Mississippi Supreme Court concluded, "[i]t is improper and, ordinarily, reversible error to comment on the accused's post-*Miranda* silence." *Quick v. State*, 569 So. 2d 1197, 1199 (Miss. 1990). The *Quick* court further noted,

"[i]n *Doyle*, the U.S. Supreme Court held that if an accused under arrest was given a *Miranda* warning and told that he had a right to remain silent, and the accused did remain silent, that the government thereafter could not use his choice of remaining silent as a weapon during his trial testimony cross-examination to cast suspicion on his guilt or innocence. Simply put, the government cannot use an accused's exercise of a Constitutional right as a weapon to convict him." *Puckett v. State*, 737 So.2d 322, 351 (Miss. 1999)(citations omitted).

While in the case *sub judice*, the improper questioning by the State did not come during cross-examination of the defendant, the same concerns are present, if not heightened. There can be little doubt that Daniels' testimony was using the Appellant's exercise of his constitutional right as a "weapon to convict him." *Id.*

Furthermore, the jury was never instructed to disregard the statements made by Detective Daniels. Thus, this undoubtedly resulting in prejudice to Catchings. Regardless of the gravity of the constitutional violation by the State of Mississippi, Catchings' trial, stripped of any semblance of fairness, continued.

***iv. The prosecution flagrantly disregarded the trial court's ruling regarding a line of questioning concerning documents that had not been admitted into evidence.***

The State, through the Hinds County District Attorney's office repeatedly referenced, over objection, and a ruling by the trial court, the content of cellular telephone records that had not been admitted into evidence. During the cross-examination of Catchings, the following line of questioning occurred;

Q. And your number appears in his number [sic] nine times. Did you know that?

A. Well, when I was at the barbershop the guy had my phone for a minute, you know, so who he was talking to, know what I'm saying –

[DEFENSE COUNSEL]: Objection, Your Honor. I don't believe the phone records were introduced into evidence.

**THE COURT:** They're not in evidence.

[DEFENSE COUNSEL]: Then I object to any reference to the phone records.

**THE COURT:** You can just ask a question but don't refer to the phone records. Sustained. \_\_\_\_\_

Q. Are you aware that your number appears in there nine times?

[DEFENSE COUNSEL]: You Honor, I thought the Court –

Q. Did you call him nine times?

A. No, I didn't call him at all.

**THE COURT:** Hold on just a minute you can approach.

(T. 168-69).

The trial court unequivocally and clearly made a ruling which the Hinds County District Attorney himself refused to abide by. The District Attorney asked a question, which was objected to. Then, after the trial court sustained the objection, The District Attorney again asked the exact same question. This prompted another objection, and the same question again.

In *Kelly v. State*, this Court reversed a conviction in which, among other grounds, the prosecuting attorney disregarded the prior ruling of the trial court when questioning a defendant. *Kelly v. State*, 735 So. 2d 1071, 1087 (Miss. Ct. App. 1999). Interestingly enough, the ruling that was disregarded was a pre-trial ruling. *Id.* at 1086. In the case *sub judice*, the the District Attorney flagrantly disregarded the ruling of the trial court mere seconds after the ruling, then again mere seconds later.

In *Williams v. State*, the Mississippi Supreme Court reversed a conviction in which to prosecutor repeatedly referenced a video tape which was not in evidence. *Williams v. State*, 539 So. 2d 1049, 1051-52 (Miss. 1989).

The *Williams* Court further held that, although the jury was instructed to disregard the remarks regarding the video tape, "it cannot be said with confidence that the repeated subsequent references of the video tape did not influence the jury." *Id.* at 1052.

In the case *sub judice*, there does not appear on the record to be an instruction from the trial court to disregard the repeated references to the contents of the telephone records, thus making the case *sub judice* more warranting of a finding of error than *Williams*. Therefore, in accordance with *Williams*, there was error when the District Attorney repeatedly commented on the content of phone records that were not admitted into evidence.

Despite this, Cedric Catchings' trial continued, despite the overwhelming degree of improprieties surrounding it.

***v. The State made another impermissible "send a message" argument in closing arguments.***

Despite the Hinds County District Attorney's "send a message" argument in opening statements being objected to and sustained, the District Attorney again improperly made such an argument to the jury. During closing arguments, the prosecution again made a send the message argument to the jury;

"Now, he said he's from New Orleans. Now, they may do that in New Orleans but he didn't need to be bringing that mess here to Jackson, Mississippi. And it is up to the jury to find him guilty of capital murder to let him know that we're not going to put up with that mess.

MR. KNAPP: Objection, Your Honor. Showing a message.

THE COURT: He said to let him know. It's overruled. Proceed."

(T. 211).

The trial court's ruling that the argument by the District Attorney was not a "send a message" argument was apparently rooted in the fact that the District Attorney used the third-person singular, "him," rather than the third-person plural, "them." However, the Appellant contends that the appropriate analysis is not whether one word in the statement makes it a "send a message" argument, but, rather, if the entire statement, when taken as a whole constitutes a send a message argument.

When you look at the entire content of the District Attorney's statement, it is clear that it was intended as a "send a message type argument." The intent and effect of the statement is not lost in linguistic subterfuge. Under the *Spicer* test outlined above, it is clear that the argument made by the District Attorney, is improper, and, therefore, warrants reversal.

***vii. Conclusion.***

The numerous and repeated actions of the Hinds County District Attorney, combined with the impermissible comments by the State's investigator deprived the Appellant of his fundamental right to a fair trial. The State, no matter the strength or weakness of the case it presents, it should not be given a pass to run afoul of the rules of procedure, evidence, and court practice. Allowing such conduct in Mississippi Courts not only deprives defendants of rights afforded to them by the United States Constitution, but lessens the integrity of the legal system as a whole.

**ISSUE TWO:**

**WHETHER THE TRIAL COURT ERRED IN NOT ALLOWING TRIAL COUNSEL TO FULLY CROSS-EXAMINE DANIEL JEANTY, A NON-PARTY WITNESS, REGARDING HIS TWO PREVIOUS FELONY CONVICTIONS WHEN THERE WAS NO WAY THAT THE ADMISSION OF HIS PRIOR CONVICTIONS WOULD RESULT IN ANY PREJUDICE.**

The Appellant was denied his fundamental right to fully confront the witnesses against him when the trial court would not allow trial counsel to cross-examine a crucial State's witness, Daniel

Jeanty, regarding his prior felony convictions. The trial court's determination that the admission of the prior felony convictions would prejudice Jeanty has no foundation in the laws of the state of Mississippi.

The standard of review regarding admission or exclusion of evidence is the abuse of discretion standard. *Tate v. State*, 912 So. 2d 9191, 924 (Miss. 2005). The Appellate Court will not reverse a trial court's decision "unless a substantial right of the defendant is adversely affected by the improperly admitted or excluded evidence." *Young v. State*, 981 So. 2d 308, 313 (Miss. Ct. App. 2007).

During the course of trial, defense counsel attempted to question Daniel Jeanty regarding his prior criminal convictions for burglary and fleeing from a police officer. The trial court held a hearing outside of the presence of the jury where trial counsel made its argument. After hearing argument from both sides, the trial court ultimately ruled;

"With respect to the rules, Rule 609 states that this type of evidence can be allowed and the Court can perform a balancing test in terms of whether or not the convictions would be more prejudicial than probative to the witness' credibility. And the Court has listened to this witness give testimony on direct and cross and further the Court has reviewed this matter and finds that the convictions of this witness are not relevant and that they would be more prejudicial than probative as to his credibility. Therefore his convictions will not be admissible"

(T. 75-76).

**Rule 609(a)** states:

(a) **General Rule.** For the purpose of attacking the credibility of a witness, (1) evidence that (A) a nonparty witness has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and (B) the party has been convicted of such a crime shall be admitted if the court determines the probative value of admitting this evidence outweighs its prejudicial effect to the party[.]

**Miss. R. Evid. 609(a).**



While the trial court's ruling does, on its face, properly apply Rule 609, the trial court failed to give any reason why the convictions prejudiced Jeanty. Furthermore, the comments to Rule 609 provide that the rule was amended to take into consideration the Mississippi Supreme Court's decisions which "reasoned that when the impeachment by convictions is of a witness other than the accused in a criminal case there is little or no unfair prejudice which can be caused to a party. Thus, the probative value on the credibility of the witness will almost always out-weigh any prejudice."

**Miss. R. Evid. 609 cmt.**

In *White v. State*, the Mississippi Supreme Court concluded that "[a] criminal defendant is afforded greater protection than the prosecution via the Fifth and Sixth Amendments." and further stated that "[t]o deny the accused the right to explore fully the credibility of a witness testifying against him, is to deny him the Constitutional right of a full confrontation." *White v. State*, 785 So. 2d 1059, 1061 (Miss. 2001). This has long been the case in Mississippi Courts;

"The right to confrontation "extends to and includes the right to fully cross-examine the witness on every material point relating to the issue to be determined that would have a bearing on the credibility of the witness and the weight and worth of his testimony." *Young v. State*, 731 So. 2d 1145, 1151 (Miss. 1999)(citing *Myers v. State*, 296 So. 2d 695, 700 (Miss. 1974)).

In *Young v. State*, the Mississippi Supreme Court reversed a murder conviction when the trial court failed to allow the defense to cross-examine a third party witness. *Young v. State*, 731 So. 2d 1145 (Miss. 1999). In *Young*, the trial court did not directly address the factors outlined in *Peterson v. State*, 518 So. 2d 632 (Miss. 1987)(listing several factors to consider when weighing the probative value against the prejudicial effect), but it was apparent from the record that the judge did conduct a balancing test in a discussion in chambers. *Young*, 731 So. 2d at 1151. The Supreme Court explicitly held that the trial court in *Young* performed the wrong analysis; "What the trial

judge failed to consider is because [the witness] is not a party in this case, any prejudice to him is irrelevant.” *Id.* This point is perhaps best illustrated by Justice Sullivan’s dissent in *Wilcher v. State*;

“MRE 609(a)(1) refers to the ‘prejudicial effect on a party.’ Since [the witness] was not a party to the suit but merely a witness, the prejudicial effect on his testimony is irrelevant. In other words, when a defendant or party to a suit ... testifies, and a prior conviction is sought admissible for impeachment purposes, the court must weigh the probative effect of the prior conviction and its prejudicial effect on the ‘party.’ However, a non-party may not be prejudiced.”

*Wilcher v. State*, 697 So. 2d 1087, 1143 (Miss 1997)(Sullivan, P.J., dissenting).

In the case *sub judice*, there was no risk of prejudice to Jeanty in the admission of his convictions. The Appellant was thus denied his fundamental right to fully confront the witnesses against him. Therefore, the trial court erred in not allowing Jeanty’s prior convictions to come into evidence under **Mississippi Rule of Evidence 609**. Furthermore, “the right to confront and cross examine a witness is a fundamental right...” *Turner v. State*, 945 So. 2d 992, 999 (Miss. Ct. App. 2007) citing *Hobgood v. State*, 926 So. 2d 847, 852 (Miss. 2006). Therefore, any harmless error analysis should be done in accordance with the proper method outlined for the harmless error analysis in constitutional violations outlined below.

### ISSUE THREE:

#### WHETHER ANY OF THE ABOVE ERRORS, ALL CONCERNING VIOLATION OF THE APPELLANT’S CONSTITUTIONAL RIGHTS, MAY BE CONSIDERED HARMLESS.

The repeated holdings of the United States Supreme Court show that the proper harmless error analysis for a constitutional violation is not a review of whether there was overwhelming evidence of guilt properly before the jury upon which the jury could have convicted. Rather, the appropriate analysis is whether the constitutional error “might have contributed to the conviction” or “possibly influenced the jury.”

In *Payne v. Arkansas*, the state of Arkansas asked the United States Supreme Court to affirm a conviction despite the admission of a coerced confession into evidence. *Payne v. Arkansas*, 356 U.S. 560, 568 (1958). The State's assertion was that the conviction should be affirmed because "there was adequate evidence before the jury to sustain the verdict." *Id.* at 567-68. The Supreme Court rejected the State's assertion recognizing that "no one can say what credit and weight the jury gave to the confession." *Id.* at 568.

In *Fahy v. Connecticut*, the Court revisited this issue ultimately holding, "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

Four years later, the Court recognized that the state of California applied a "miscarriage of justice" rule, with "emphasis, and perhaps overemphasis, upon the court's view of 'overwhelming evidence.'" *Chapman v. California*, 386 U.S. 18, 23 (1967). The Supreme Court rejected the California rule, preferring instead the *Fahy* approach addressing "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* The court reasoned that this analysis, "emphasizes an intention not to treat as harmless those constitutional errors that 'affect substantial rights' of a party." *Id.* Thus, an "error in admitting plainly relevant evidence which *possibly influenced* the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless." *Id.* at 23-24 (emphasis added).

These cases show that for at least fifty years, the United States Supreme Court has rejected a harmless error analysis which simply questions whether there was overwhelming evidence of guilt properly before the jury upon which the jury could have convicted. Rather, the reviewing court

should look at the facts and evidence of the case to determine whether the constitutional error “might have contributed to the conviction” or “possibly influence the jury.”

Under the proper analysis noted above, it is clear that the multiple violations of Catchings’ fundamental right to a fair trial as well as the inadmissible comment on Catchings’ post-*Miranda* silence “might have contributed to [his] conviction” and “possibly influene[d] the jury.” Therefore, the above errors should not and cannot be deemed “harmless.”

With respect to Issue II, as noted above, the right to confront witnesses is a fundamental right. Therefore, the violation of such a right is subject to the harmless error analysis outlined by the United States Supreme Court over the past fifty years. The “overwhelming weight of the evidence” is not a relevant consideration in an appropriate harmless error analysis.

#### **ISSUE FOUR:**

#### **WHETHER CUMULATIVE ERROR, EFFECTING THE APPELLANT’S FUNDAMENTAL RIGHTS GUARANTEED TO HIM BY THE UNITED STATES CONSTITUTION, DEPRIVED THE APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.**

The cumulative error doctrine stems from the doctrine of harmless error. *Ross v. State*, 954 So. 2d 968, 1018 (Miss. 2007). It holds that individual errors, not reversible in themselves, may combine with other errors to constitute reversible error. *Hansen v. State*, 582 So.2d 114, 142 (Miss. 1991); *Griffin v. State*, 557 So. 2d 542, 553 (Miss. 1990). The question under a cumulative error analysis is whether the cumulative effect of all errors committed during the trial deprived the defendant of a fundamentally fair and impartial trial. *McFee v. State*, 511 So. 2d 130, 136 (Miss.1987).

Relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the

crime charge. **Ross**, 954 So. 2d at 1018.

The quantity of the error in the instant case is significant. The District Attorney repeatedly overstepped the rules of procedure and evidence. The investigator in the case usurped the Appellant's constitutional right. The trial judge erred in ruling on evidence which was central to the credibility of the eyewitness's testimony. Furthermore, the quality of the errors in the instant case is significant. All errors involve basic essential constitutional rights guaranteed to all criminal defendants.

The Mississippi Supreme Court has routinely and consistently held that improper prosecutorial acts, even without one act which is specifically reversible error, can, when cumulatively require reversal. **Griffin v. State**, 557 So. 2d 542, 552 (Miss. 1990); **Stringer v. State**, 500 So. 2d 928, 939 (Miss. 1986); **Hickson v. State**, 472 So. 2d 379, 385-86 (Miss. 1985); **Barnes v. State**, 460 So. 2d 126, 135 (Miss. 1984); **Williams v. State**, 445 So. 2d 798, 810 (Miss. 1984); **Collins v. State**, 408 So. 2d 1376, 1380 (Miss. 1982).

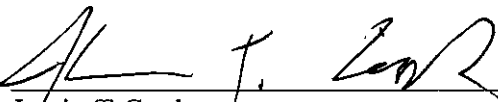
Through the course of his trial, Catchings was denied his constitutional right to a fair trial, to fully confront the witnesses against him, and the right to remain silent. Ultimately, the question must be answered: Is it acceptable, in the State of Mississippi, for a criminal defendant to be convicted in a trial wherein his rights under the Fourth Amendment and Fifth Amendments of the United States Constitution and the Due Process guaranteed to him by that Constitution are nugatory? The Appellant would respectfully contend that it is not.

### 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 on the merits of the indictment on one charge of capital murder, 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 Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully Submitted,  
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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## CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Cedric Catchings, 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:

Honorable Winston Kidd  
Circuit Court Judge  
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Honorable Robert Schuler Smith  
District Attorney, District 7  
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This the 6<sup>th</sup> day of January, 2009.

  
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