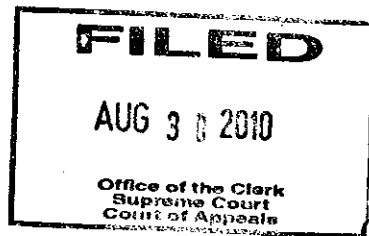




IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STEPHEN POWELL

APPELLANT



VS.

CASE NO. 2009-KA-01414

STATE OF MISSISSIPPI

APPELLEE

REPLY BRIEF OF APPELLANT

Appeal From The Circuit Court Of Panola County, Mississippi

ORAL ARGUMENT REQUESTED

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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 the Court of Appeals and the Supreme Court may evaluate possible disqualification or recusal:

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Post Office Box 2448
Oxford, Mississippi

Hon. James (Jay) Hale
Hon. Rhonda Amist
Assistant District Attorney
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Hon. Andrew C. Baker
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Hon. Helen Kelly
Hon. Mona Pittman
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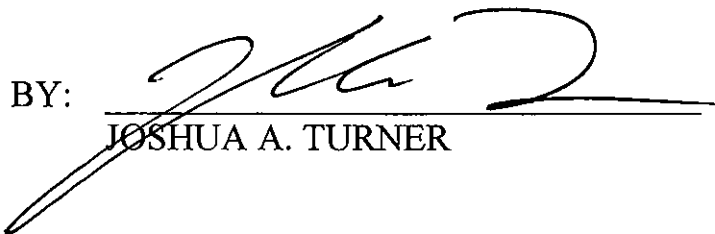
Hon. Charles Maris Jr.
Hon. Jim Hood
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Jackson, Mississippi 39205-0220

Stephen Powell
Mississippi Department of Corrections

Candace McKenzie
Mississippi Department of Corrections

Respectfully submitted, this the 30th day of August, 2010.

STEPHEN POWELL/APPELLANT

BY: 
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STATEMENT REGARDING ORAL ARGUMENT

Mr. Grose requests that this Court allow oral argument to help resolve the issues of his case. Oral Argument is permitted pursuant to M.R.A.P. 34 and needed to help the understanding of Mr. Powell's appeal.

STATEMENT OF THE ISSUES

- I. The State Provides No Authority To Support That The Trial Court's Comments To The Jury Coexist With *Sharplin***
- II. The State's Argument That A Mistrial Was Not Warranted Is Not Supported By Any Case-law With The Same Facts**
- III. Conclusion**

SUMMARY OF THE ARGUMENT

Mr. Powell adopts the summary of the arguments set forth in his principal brief to this Court.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

Mr. Powell adopts the Statement of the Case And Factual Background as set forth in his principal brief herein.

ARGUMENT

I. The State Provides No Authority To Support That The Trial Court's Comments To The Jury Coexist With *Sharplin*

The State's brief first cites to *McDonald v. State*, 881 So.2d 895 (Miss. Ct. App. 2004) to support that the trial court did not err in its comments to the jury. However, McDonald actually supports the argument of Mr. Powell. The *McDonald* Court held that, "[i]f a trial judge believes there is a possibility that a jury might reach a verdict, he may return the jury for further deliberations by simply instruction the jury to continue its deliberations or he may give the *Sharplin* instruction." *Id.* at 1142.

In Mr. Powell's case, the trial court did neither of these things. The language that was delivered by the trial court is incorporated in the principal brief of Mr. Powell and it is quoted by the State on page five (5) of its brief to this Court.

All case law that is considered a descendant of *Sharplin* holds that one of two things are allowed by the trial court when a jury is not unanimous in a criminal case:

1. The trial court can instruct the jury to “continue its’ deliberations” or;
2. The trial court can read the *Sharplin* instruction.

These are the only two options. There are no other words of wisdom that are to be offered a jury, for fear that it will taint or prejudice their respective decisions. In the present case, neither of these two options were exercised. The comments by the Court coerced the jury verdict. Though undersigned does not believe that the trial court intentionally coerced the jurors, they were coerced nonetheless. The Court sent the jury to deliberate three times; after the jury told the trial court twice that they were not unanimous. Before the jury was sent to deliberate a third time, neither of the above two required phrases were delivered to the twelve jurors. Instead, the judge told the jurors:

I’m not suggesting anyone change their mind or anything, but I just want you to go back and reconvene and I have got to know whether it’s a split decision or whether it’s a unanimous decision. I just want you all to go back there and huddle up and send me another note when you are ready to come back out, and I’ll do the same thing again and see if the results are the same.

Trial Tr. p. 377.

It is undisputed by the State that these were the words of the trial court. A

plain reading of the above quoted language clearly indicates that Judge Baker neither told the jury to “continue deliberations” nor did he read the *Sharplin* instruction.

The State then cites *Jones v. State*, 993 So.2d 386 (Miss. Ct. App. 2008) for support of argument. Yet the facts in *Jones* are nothing like the facts in the case at hand. In *Jones*, the jury foreman announced that the split in the jurors was eleven (11) to one (1). The trial court asked the jury foreman if further deliberations might help after the jury had time to sleep. The foreman indicated that additional time would be helpful. After the jury was excused the trial court instructed them not to discuss the case with anyone. When the jury reconvened the next morning, the trial court read the *Sharplin* instruction to them. They subsequently returned a guilty verdict. *Id.*

In Mr. Powell’s case, when the jury returned the second time, announcing that it had a unanimous verdict, all twelve of the jurors were polled. At this time, everyone knew that ten people voted to convict and two did not. It was no secret as to the split and how the split votes were cast. At this time, the trial court did not read the *Sharplin* instruction, nor did the trial court inquire if further deliberations would help.

The trial court erred in its comments to the jury and the State cannot produce any authority to support the actions of the trial court. As such, this Court must

reverse and remand Mr. Powell's conviction.

II. The State's Argument That A Mistrial Was Not Warranted Is Not Supported By Any Case-law With The Same Facts

Mr. Powell agrees to the standard of review cited by the State in its Brief to this Court. The disagreement arises in the application.

Mr. Powell's counsel asked the Court to declare a mistrial after the jury returned the second time. There was an announcement that the jury had a unanimous verdict, but it was clear after polling them that two jurors did not agree. Judge Baker then spoke to the jury and told them to "huddle up" and characterized the scenario as a "misread." It was at this time that the Hon. Helen Kelly moved for a mistrial.

A mistrial became necessary when the jury was polled and the Court and all members in the courtroom learned that the jury was split ten to two in favor of conviction. The Court neither read the *Sharplin* instruction nor told the jury to continue their deliberations. At this time, the proceedings became suggestive and prejudicial to Mr. Powell. The purity of the jury was no longer in tact and the only proper relief, is a to grant a mistrial.

Under the circumstances, the State produced no authority to contradict the arguments in Mr. Powell's principal brief to this Court. In short, Mr. Powell's

charges should be reversed and remanded for a new trial in light of the trial court's error in failing to grant a mistrial.

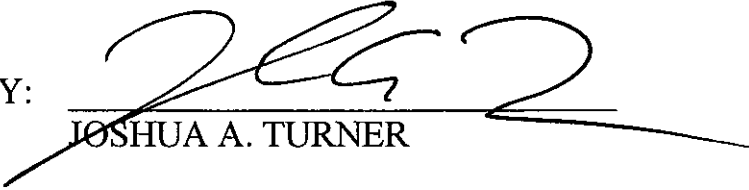
III. Conclusion

The Appellant respectfully asks that this Court review his points of error herein and reverse his convictions and that this Court reverse and remand this case for a new trial in light of the individual and/or cumulative errors herein.

Respectfully submitted, this the 30th day of August, 2010.

STEPHEN POWELL

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CERTIFICATE OF SERVICE

This is to certify that I, Joshua A. Turner, have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing *Reply Brief of Appellant Stephen Powell* to the following:

Hon. Charles Maris Jr.
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Hon. Andrew C. Baker
Panola County Circuit Court Judge
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Charleston, Mississippi 38921-0368

Hon. Helen Kelly
Kelly Law Firm
P.O. Box 1631
Batesville, Mississippi 38606-1631

This the 30th day of August, 2010.

A large, stylized handwritten signature in black ink, appearing to read 'JAT' followed by a long horizontal stroke.

JOSHUA A. TURNER

