IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLARENCE ARRINGTON **APPELLANT**

V. **NO. 2010-KA-0259-COA**

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 disqualifications or recusal.

1. State of Mississippi
2. Clarence Arrington, Appellant
3. Honorable Anthony J. Buckley, District Attorney
4. Honorable Billy Joe Landrum, Circuit Court Judge

This the 12th day of May, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

FEDERAL RULES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLARENCE ARRINGTON — APPELLANT

V. — NO. 2010-KA-0259-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

I. **THE TRIAL COURT AND/OR TRIAL COUNSEL DEPRIVED ARRINGTON OF HIS CONSTITUTIONAL RIGHT TO TESTIFY.**

II. **THE STATE FAILED TO ESTABLISH THAT ARRINGTON WAS A HABITUAL OFFENDER UNDER MISSISSIPPI CODE ANNOTATED SECTION 99-19-81.**

III. **THE INDICTMENT WAS FATALLY DEFECTIVE, AS IT FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF THE CRIME, AND THE TRIAL COURT COMMITTED PLAIN ERROR IN GRANTING INSTRUCTION S-1, WHICH CONSTITUTED AN IMPERMISSIBLE CONSTRUCTIVE AMENDMENT TO THE INDICTMENT.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Jones County, Mississippi, and a judgment of conviction for felony escape entered against Clarence Arrington. (C.P. 24, 27-30, R.E. 3 - 6). The

trial court adjudged Arrington a habitual offender under Mississippi Code Annotated Section 99-19-81 and sentenced him to serve a term of five (5) years in the custody of the Mississippi Department of Corrections. (Tr.75-78, C.P. 27-29, R.E. 4 - 6). The trial court denied Arrington's motion for JNOV or, in the alternative, motion for a new trial. (C.P. 31-33, R.E. 8 - 10). Arrington is presently incarcerated and now appeals to this Honorable Court for relief.

STATEMENT OF THE FACTS

On January 3, 2008, Officer Jim Thornhill of the Laurel Police Department was working in the booking area of the police station when Officer David Marshall, also of the Laurel Police Department, brought Clarence Arrington inside. (Tr. 36-38). According to Officer Thornhill, "[Arrington] had been brought up for a bond hearing." (Tr. 36).

Officer Thornhill opened the doors to the "sally port" or "security area" to let Arrington step outside of the booking area to smoke a cigarette. (Tr. 36-37).[1] Arrington and Officer Marshall walked out to the sally port area, and Arrington stepped onto the landing or loading dock at the top of a set of stairs. (Tr. 39). According to Officer Thornhill, Officer Marshall turned to talk to him with his back to Arrington, and Arrington "looked to his left and then headed down the stairs." (Tr. 39). Officer Thornhill called dispatch and provided information to go out to the officers on patrol in the area. (Tr. 40). Officer Thornhill testified that Arrington was wearing a horizontal, striped pullover shirt and jeans at the time. (Tr. 40-41).

Officer Vince Williams of the Laural Police Department was on the third floor of the Laural Police Department when he received a dispatch reporting that Arrington had left the police station and was running toward Maple Street wearing a yellow and black striped shirt. (Tr. 44). Officer

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[1] From the record, it appears that the "sally port" or "security area"is essentially a large garage. (See, Tr. 37, 43).

Williams went to Maple Street and saw a white male walking down the railroad tracks; he asked the man if he had seen a black male wearing a yellow and black striped shirt, and the man said "yeah, he just ran towards South Fourth." (Tr. 45).

Officer Williams and Sergeant Mark Brewer then went to South Fourth and was patrolling the area on foot when he saw Arrington standing in the back yard a residence at 213 Elm Street. (Tr. 45). According to Officer Williams, he ran toward Arrington, and Arrington "ducked back around the house, [and] went under the carport." (Tr. 45). The owner of the residence was standing outside the house; Officer Williams asked him if he knew Arrington, and he said he did. (Tr. 45-46). The owner also gave consent to search his house. (Tr. 46). Inside the house, the officers found Arrington hiding in a living room closet. (Tr. 46). Arrington exited the closet upon the officers' orders, and he was taken into custody. (Tr. 46).

At trial, the State admitted into evidence a writ of arrest for Arrington issued on January 3, 2008 for the charge of grand larceny through the testimony of Investigator Kevin Flynn of the Laural Police Department. (Tr. 50-52, Ex. S-1). Investigator Flynn also testified that he made a DVD of surveillance video which was admitted into evidence; the DVD shows several different camera angles of a man in a yellow and black striped shirt running away from the police station. (Tr. 53-56, Ex. S-2).

The State presented evidence of the above-mentioned facts and then rested its case, at which time, the defense moved for a directed verdict that the trial court overruled. (Tr. 56-58). Trial counsel then put Arrington on the stand for Voir Dire outside the jury's presence. (Tr. 58). Arrington stated that trial counsel had advised him as to his right to testify, that it is his (Arrington's) decision, that he would be subject to cross-examination if he chose to testify, and, if he chose not to testify, the jury would be instructed that it could not hold that fact against him. (Tr.

58-59). Trial counsel then asked Arrington if he wanted to testify, and Arrington said, "Yes , sir." (Tr. 59). The following exchange then occurred:

THE COURT: Okay.

[PROSECUTOR]: He does?

[TRIAL COUNSEL]: Yes

[PROSECUTOR]: Your Honor, I think [defense counsel] needs to advise him that he's going to be subject to cross-examination, and . . . if he opens the door I will cross-examine him on [his prior conviction] and the particular underlying offense if he starts to allude into it, if he opens the door.

THE COURT: Does he understand that?

[TRIAL COUNSEL]: Clarence, you understand that if you say anything about the charge of grand larceny where you're accused [of] stealing a TV or grand larceny where you're accused of stealing air conditioner compressors, if you mention any of those, the State can cross-examine you about the fact that you're charged with those offenses?

[DEFENDANT]: Yes, sir.

[TRIAL COUNSEL]: And they can also cross-examine you about your prior felony convictions if you mention them in your testimony?

[DEFENDANT]: Yes, sir, I understand.

[TRIAL COUNSEL]: And with all that in mind you still want to testify?

[DEFENDANT]: Yes.

THE COURT: All right. Bring the jury out. You may step down. Are you going to have anymore witnesses, [trial counsel]?

[TRIAL COUNSEL]: Your Honor, I don't believe I will.

THE COURT: I'm just trying to get a time frame here.

[TRIAL COUNSEL]: Your Honor, we've reconsidered, and he's not going to testify. We'll call Johnny Lee Roberts.

(Tr. 59-61).

The defense planned to call Johnny Lee Roberts to testify that Arrington was assaulted by an officer when he was arrested. (Tr. 61, 71-74). However, the State objected, arguing that Roberts' testimony happened after the escape and was, therefore, irrelevant. (Tr. 61). The trial court sustained the State's objection, and the defense rested. (Tr. 62, 74).

At the conclusion of trial, the jury found Arrington guilty of felony escape. (Tr. 24). He was sentenced as a habitual offender under Mississippi Code Annotated Section 99-19-81 and ordered to serve a term of five (5) years in the custody of the Mississippi Department of Corrections. (Tr. 76-78, C.P. 27-29, R.E. 4 - 6).

SUMMARY OF THE ARGUMENT

The trial court and/or trial counsel deprived Arrington of his constitutional right to testify in his own behalf. Arrington repeatedly, and clearly asserted that he wished to exercise his right testify in his own defense. In light of Arrington's repeated unambiguous expressions of his desire to testify, trial counsel's announcement that the defense would rest and the trial court's acquiescence in trial counsel's announcement without further on-the-record questioning of Arrington to leave no doubt that he, in fact, wished to waive his right to testify violated the Mississippi Supreme Court's instruction(s) in *Culberson v. State*, 412 So.2d 1184, 1186-87 (Miss.1982). Accordingly, Arrington is entitled to a new trial.

The State failed to prove beyond a reasonable doubt that Arrington was a habitual offender under Mississippi Code Annotated Section 99-19-81. Copies of Arrington's alleged prior convictions were not admitted into evidence as an exhibit at the sentencing hearing. Consequently, under this Court's holding in *Vince v. State*, 844 So. 2d 510, 517-18 (¶¶22-26) (Miss. Ct. App. 2003), Arrington is entitled to have his sentence vacated; the judgment finding him a habitual

offender reversed and rendered, and his case remanded for re-sentencing as a non-habitual.

Additionally, the indictment failed to allege an essential fact/element of the offense; namely, that the confinement or custody from which Arrington allegedly escaped was pursuant to a felony arrest or conviction. Therefore, the indictment was fatally defective. Further, the trial court impermissibly constructively amended the indictment to include the missing element by granting Instruction S-1. Accordingly, Arrington is entitled to have this Court reverse and render the conviction and sentence entered against him or, alternatively, reverse his conviction and sentence and remand this case for a new trial.

ARGUMENT

I. THE TRIAL COURT AND/OR TRIAL COUNSEL DEPRIVED ARRINGTON OF HIS CONSTITUTIONAL RIGHT TO TESTIFY.

The Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article 3, Section 26 of the Mississippi Constitution of 1890 guarantee a criminal defendant the right to testify in his own defense.[2] The denial of a defendant's right to testify on his own behalf "is a constitutional violation regardless of whether the denial is a result of a refusal by the court or a refusal by the accused's counsel to allow the accused to testify." *Dizon v. State*, 749 So. 2d 996, 999 (¶12) (Miss. 1999) (citing *Culberson v. State*, 412 So. 2d 1184, 1186 (Miss. 1982)).

In *Culberson v. State*, the Mississippi Supreme Court instructed that:

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[2]Article 3, Section 26 of the Mississippi Constitution provides in part:

> In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself....

> [I]n any case where a defendant does not testify, before the case is submitted to the jury, the defendant should be called before the court out of the presence of the jury, and advised of his right to testify. If the defendant states he does not wish to testify, he may not be forced to take the stand; however, if he states that he wants to testify he should be permitted to do so. *A record should be made of this so that no question about defendant's waiver of his right to testify should ever arise in the future.*

Culberson v. State, 412 So. 2d 1184, 1186-87 (Miss. 1982) (emphasis added).

In this case, the record made leaves a question as to whether Arrington waived his right to testify. Arrington repeatedly stated to the trial court on the record that he wished to exercise his constitutional right to testify in his own defense. (Tr. 59-61). The only indication that Arrington did not, in fact, wish to testify came from his trial attorney: "Your Honor, we've reconsidered, and he's not going to testify." (Tr. 61).

When trial counsel announced that Arrington did not want to testify, the trial court should have followed the Mississippi Supreme Court's holding in *Culberson* and questioned Arrington on the record again to leave no question as to whether he, in fact, had a change of heart and decided to waive the right to testify that he previously asserted numerous times.

Despite Arrington's repeated assertions of his right to testify, the trial court, without any further inquiry or discussion on the subject, accepted trial counsel's claim that Arrington did not wish to testify. In light of Arrington's repeated on-the-record assertions that he wished to exercise his constitution right to testify, the trial court's acceptance of trial counsel's announcement without further on-the-record questioning of Arrington violated *Culberson* as well as Arrington's right to testify. Consequently, this Court should reverse and remand the conviction and sentence entered by the trial court.

II. THE STATE FAILED TO ESTABLISH THAT ARRINGTON WAS A HABITUAL OFFENDER UNDER MISSISSIPPI CODE ANNOTATED SECTION 99-19-81.

Prior to trial, the State filed a motion to amend the indictment to charge Arrington as a Habitual offender under Mississippi Code Annotated Section 99-19-81. (C.P. 7-15). At the sentencing hearing, the trial court addressed the State's motion, and the State attempted to establish Arrington's habitual status by referring to two copies of Arrington's alleged prior conviction that were attached to the State's motion to amend the indictment. (Tr. 75-76, C.P. 7-15). However, these copies were not admitted into evidence as an exhibit at the sentencing hearing nor are they listed as such in the court reporter's official transcript. As explained below, the State, therefore, presented insufficient evidence to establish beyond a reasonable doubt that Arrington was a habitual offender under Section 99-19-81.

Although, no challenge or objection was made at trial, this Court may review issues as plain error where a fundamental right of the defendant has been impacted. *Jefferson v. State*, 958 S0. 2d 1276, 1281 (¶15) (Miss. Ct. App. 2007) (citing *Moore v. State*, 755 So. 2d 1276, 1279 (¶ 9) (Miss. Ct. App.2000)). A defendant has "a fundamental right to be free from an illegal sentence." *Clark v. State*, 960 So. 2d 521, 524 (¶9) (Miss. Ct. App. 2006) (citing *Sneed v. State*, 722 So. 2d 1255, 1257 (¶11) (Miss. 1998)).

In order to sentence a defendant as a habitual offender under section 99-19-81, the State bears the burden of proving all of the section's elements beyond a reasonable doubt. *Vince v. State*, 844 So. 2d 510, 517 (¶22) (Miss. Ct. App. 2003). Two of the essential elements the State must prove under Section 99-19-81 are that the defendant "shall have been convicted twice previously of any felony" for which the defendant "shall have been sentenced to separate terms of one (1) year or more." Miss. Code Ann. § 99-19-81.

In the instant case, the State presented insufficient evidence to establish the above-listed elements; in fact, the State presented no evidence. The alleged prior convictions were not offered

or admitted into evidence; they are not listed as such in the court reporter's official transcript; and they were not included as exhibit in the appellate record.

This Court's opinion in *Vince v. State*, 844 So. 2d 510, 517-18 (¶¶22-26) (Miss. Ct. App. 2003), is controlling of this issue. In *Vince*, the State sought to prove that the defendant therein was a habitual offender under Section 99-19-81, by producing "an NCIC compilation of a defendant's criminal history" at the sentencing hearing. *Vince*, 844 So. 2d. at 517 (¶¶21-22). The court in *Vince* held that the State failed to establish the defendant's habitual status beyond a reasonable doubt because the NCIC document was not admitted as (nor did it appear as) an exhibit, and it was not listed as such in the court reporter's official transcript. *Id.* at 517 (¶22). Accordingly, this Court vacated Vince's sentence, reversed and rendered the judgment finding him a habitual offender, and remanded the case for the sole purpose of re-sentencing. *Id.* at 517 (¶22), 519 (¶30).

The instant case is closely analogous to *Vince*. As in *Vince*, the State attempted to establish the defendant's habitual status by referring to documents that were not offered as or admitted into evidence at the sentencing hearing. Further, as in Vince, the documents are not listed as exhibits in the court reporter's official transcript, and they were not included in the appellate record as an exhibit. Consequently, the State failed to prove beyond a reasonable doubt that Arrington was a habitual offender under Section 99-19-81, and this Court, pursuant to *Vince*, should vacate his sentence as to his habitual status, reverse and render the judgment finding him a habitual offender, and remand this case for re-sentencing.

III. THE INDICTMENT WAS FATALLY DEFECTIVE, AS IT FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF THE CRIME, AND THE TRIAL COURT COMMITTED PLAIN ERROR IN GRANTING INSTRUCTION S-1, WHICH CONSTITUTED AN IMPERMISSIBLE CONSTRUCTIVE AMENDMENT TO THE INDICTMENT.

As explained in more detail below, Arrington was convicted of felony escape, an essential

fact/element of which is that the confinement or custody from which the defendant escaped was by virtue of a felony arrest or conviction. The indictment did not contain a definite allegation or statement that the confinement or custody from which Arrington escaped was pursuant to a felony arrest or conviction. Accordingly, the indictment failed to allege an essential fact/element of the offense, and it was, therefore, fatally defective. Further, the trial court impermissibly constructively amended the indictment to include the missing element by granting Instruction S-1.

From the outset it should be noted that this issue was not raised at the trial level. However, as this Court has noted, "the omission in the indictment of an essential element of the crime charged is not waived by failure to demur." *Short v. State*, 990 So. 2d 818, 819 (¶3) (Miss. Ct. App. 2008) (quoting *Durr v. State*, 446 So. 2d 1016, 1017 (Miss. 1984)). Therefore, this issue is not procedurally barred.

"The question of whether an indictment is fatally defective is an issue of law and deserves a relatively broad standard of review by this court." *Spears v. State*, 942 So. 2d 772, 773 (¶5) (Miss. 2006) (quoting *Peterson v. State*, 671 So. 2d 647, 652 (Miss. 1996) (superceded by statute). "Questions of law are reviewed de novo." *Perryman v. State*, 16 So. 3d 41, 44 (¶8) (Miss. Ct. App. 2009) (citation omitted).

To be sufficient, an indictment "must set forth the constituent elements of a criminal offense. Each and every material fact and essential ingredient of the offense must be with precision and certainty set forth. . . ." *Durr v. State*, 446 So. 2d 1016, 1017 (Miss. 1984) (quoting *Burchfield v. State*, 277 So. 2d 623, 625 (Miss. 1973)); see also *Belk v. State*, 8 So. 3d 272, 274 (9) (Miss. Ct. App. 2009) ("It is imperative that an indictment contain the essential elements of the crime with which the accused is charged.") (citing *McCollum v. State*, 785 So. 2d 279, 283 (¶11) (Miss. 2001)). To this end, Uniform Circuit and County Court Rule 7.06 requires the State to draft an indictment

including a "definite written statement of the essential facts constituting the offense charged. . . ." U.R.C.C.C 7.06.

Arrington was convicted of felony escape under Mississippi Code Annotated Section 97-9-49, which provides in pertinent part:

> (1) (a) Whoever escapes or attempts by force or violence to escape from any jail in which he is confined, or from any custody under or by virtue of any process issued under the laws of the State of Mississippi by any court or judge, or from the custody of a sheriff or other peace officer pursuant to lawful arrest, shall, upon conviction, if the confinement or custody is by virtue of an arrest on a charge of felony, or conviction of a felony, be punished by imprisonment in the penitentiary not exceeding five (5) years to commence at the expiration of his former sentence, or, if the confinement or custody is by virtue of an arrest of or charge for or conviction of a misdemeanor, be punished by imprisonment in the county jail not exceeding one (1) year to commence at the expiration of the sentence which the court has imposed or which may be imposed for the crime for which he is charged.

Miss. Code Ann. §97-9-49(1)(a) (Rev. 2006).

Thus, whether an escape under Section 97-9-49 is a felony or a misdemeanor turns on whether the confinement or custody from which the defendant escaped was by virtue of an arrest or conviction for a felony or a misdemeanor. Under Section 97-9-49, one is not guilty of felony escape unless the confinement or custody from which he or she escapes is by virtue of a felony arrest or conviction. *See Jones v. State*, 974 So. 2d 250, 252 (¶8) (Miss. Ct. App. 2007) ("To convict Jones of the crime of attempted felony escape in violation of Mississippi Code Annotated section 97-9-49(1) (Rev.2006), the prosecution had to prove that Jones was confined or was in custody by virtue of an arrest on a charge of felony or conviction of a felony. . . .").

The indictment in the instant case charged as follows:

> **CLARENCE ARRINGTON**
>
> in said County, District and State, on or about the 3rd day of January, 2008 A.D., did willfully, unlawfully and feloniously, escape from the Laural Police Department, in which he was confined and in lawful custody, in violation of Section 97-9-49.

> the conduct described above is in violation of MCA Section 97-9-49, constituting the crime of Escape, and is at all times against the peace and dignity of the State of Mississippi.

(C.P. 3).

Absent from this language is a specific allegation that Arrington's confinement or custody was the result of an arrest or conviction for a felony. Although the indictment uses the word "feloniously," it does not contain the necessary certain/definite allegation that Arrington's confinement or custody was the result of an arrest or conviction for a felony. Accordingly, the indictment against Arrington failed to allege an essential fact/element of the offense of felony escape and was, therefore, fatally defective.

Further, the trial court committed plain reversible error in granting Instruction S-1, because doing so amounted to a constructive amendment of the indictment, which is per se reversible error.

"It has been the law since 1858 that the court has no power to amend an indictment as to the matter of substance without the concurrence of the grand jury by whom it was found, although amendments as to mere informalities may be made by the court." *Quick v. State*, 569 So. 2d 1197, 1199 (Miss. 1990) (citing *McGuire v. State*, 35 Miss. 366 (1858)).

The Mississippi Supreme Court has held that:

> A constructive amendment of the indictment occurs when the proof and instructions broaden the grounds upon which the defendant may be found guilty of the offense charged so that the defendant may be convicted without proof of the elements alleged by the grand jury in its indictment.

Bell v. State, 725 So. 2d 836, 855-56 (¶58) (Miss. 1998), (citing *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811 (1985)). *Bell* also instructed that :

> A constructive amendment of an indictment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged. . . . In such cases, reversal is automatic because the defendant may have been convicted on a ground not charged in the indictment. . . ."

Bell v. State, 725 So. 2d 836, 855-56 (¶58) (Miss. 1998) (quoting *United States v. Adams*, 778 F.2d 1117, 1123 (5th Cir. 1985)).

While courts may amend an indictment to correct defects as to form, defects of substance must be corrected by the grand jury." *Spears v. State*, 942 So. 2d 772, 774 (¶6) (Miss. 2006) (quoting *Evans v. State*, 813 So. 2d 724, 728 (¶21) (Miss. 2002)). In this regard, "[i]t is well settled . . . that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case." *Spears*, 942 So. 2d at 774 (¶6) (quoting *Miller v. State*, 740 So. 2d 858, 862 (¶13) (Miss. 1999)).

As explained above, Arrington's indictment for escape did not allege the essential fact/element that the confinement or custody from which he escaped was pursuant to a felony arrest or conviction. Notwithstanding, the trial court granted Instruction S-1, which read in pertinent part as follows:

> If you find from the evidence in this case beyond a reasonable doubt that:
>
> 1. CLARENCE ARRINGTON, on or about the 3rd day of January, 2008, in the Second Judicial District of Jones County, Mississippi;
>
> 2. Did willfully escape, *by virtue of an arrest warrant charging him with Grand Larceny, a felony*, issued by City Court Judge Cecelia Arnold, from the custody of the Laural Police Department, in which he was confined.
>
> then you shall find the defendant, CLARENCE ARRINGTON, guilty of Felony Escape as charged.

(C.P. 20) (emphasis added).

Thus, the indictment did not charge that Arrington escaped from custody pursuant to a felony arrest or conviction; however, Instruction S-1 permitted the jury to convict Arrington if it found that

he escaped under such circumstances. Therefore, Instruction S-1 permitted the jury to convict Arrington on a factual basis that effectively modified, or rather added, an essential element of the offense not charged in the indictment by the grand jury. Consequently, Instruction S-1 constituted an impermissible constructive amendment to the indictment, and the trial court committed reversible error in granting it.

Accordingly, Arrington submits that he is entitled to have this Court reverse and render the judgment of conviction and sentence entered against him or, alternatively, reverse his conviction and sentence and remand this case for a new trial.

CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, Arrington respectfully requests that this honorable Court reverse the conviction and sentence entered in the trial court and render a judgment of acquittal in his favor or, alternatively, reverse his conviction and sentence and remand this case for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

Hunter N Aikens, MS Bar #[redacted]
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Clarence Arrington, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 14th day of May, 2010.

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