IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHN JOHNSON — APPELLANT

VS. — NO. 2005-KA-0661

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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IN THE COURT OF APPEALS OF MISSISSIPPI

JOHN JOHNSON **APPELLANT**

VERSUS **NO. 2005-KA-00661-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

John Johnson was convicted in the Circuit Court of Sunflower County on a charge of armed robbery and was sentenced to a term of 30 years in the custody of the Mississippi Department of Corrections. (C.P.30-31) Aggrieved by the judgment rendered against him, Johnson has perfected an appeal to this Court.

Substantive Facts

On January 7, 2003, Leroy Dandridge was working at Hack's Produce in Drew, an establishment which sold produce and maintained "poker machines" in a separate room in the back. Mr. Dandridge was in the store with Terry Thurman and a Mr. Henry when "a robbery occurred there." According to Mr. Dandridge, "[T]wo young men came in and ... one of them asked where they uncle at." Mr. Dandridge recognized the speaker, "[a] little short guy," as the nephew of James Johnson, who sold hamburgers and pork chops out

of his truck in the parking lot of the produce store. Mr. Dandridge told the young man that he had not seen his uncle that day. The young man then asked whether his uncle had left some wine at the store. Mr. Dandridge replied that he had not, but told him that he was welcome to sample the homemade wine in the refrigerator. The young man "turned to get it." Immediately thereafter, he held a pistol on Mr. Dandridge and asked for his money. Mr. Dandridge took from his pocket $270, which belonged to "the guy that owned the place," and handed it to the robber. (T.76-80)

While the other man was "just standing there," the man brandishing the gun told Mr. Dandridge "to go back in the back and open up the other machine." According to Mr. Dandridge, the robber's confederate "told him, said, man, come on let's go; say, you got– you done got what you came for." Having repeated his demand for Mr. Dandridge to "open the other machine up," the robber told Mr. Thurman and Mr. Henry "to get on the floor." After the machines were opened, the robber ordered Mr. Thurman, Mr. Henry and Mr. Dandridge to "go back in the front room" and told "the other one to pull a phone cord. And they pulled a phone cord and then they went out the door and attempted to lock it from the outside with a key." Ultimately, the robber and his accomplice left the scene in "a gray looking car." (T.80-82)

Mr. Dandridge reported the robbery to his "bossman," and to the police. He identified the robber, in his words, as "a friend of my nephew that I had seen a couple of times." He also advised the authorities that the man with the gun was he nephew of his friend James Johnson. (T.84)

At trial, when asked whether he recognized the man who had wielded the gun and demanded money, Mr. Dandridge pointed to the defendant and said, "Kind of look like him

right there." When asked, "Did he look different on that day?" Mr. Dandridge answered, "Had a lot of hair on his head." (T.85)

Burner Smith, the Chief of Police for the city of Drew, testified that Mr. Dandridge reported the armed robbery to his department on January 8, 2003. (T.97) Asked to recount the descriptions of the perpetrators provided by the victim, Chief Smith testified as follows:

> One of the fellows was described as being heavy-set about approximately five-eleven to six-one. Real clean-cut kid, possibly ex-military because he was wearing some ... military dog tags around his neck on a chain.
>
> * * * * *
>
> And the second subject ... according to Mr. Dandridge, he said, hey, I know this kid; his last name is Johnson. His uncle would come out to the place and set up in his Winnebago and he ... could cook hot food and stuff... from out of the Winnebago. He said, "John Johnson I believe his name is."
>
> (T.98-99)

Mr. Dandridge also informed Chief Smith that the subjects had left the premises in a "gray primer covered older model Buick." (T.98)

Acting on information provided by Mr. Dandridge, Chief Smith began looking for the two suspects. Johnson and his accomplice, Curtis McIntosh, were apprehended in a vehicle matching Mr. Dandridge's description. According to Chief Smith, "Curtis McIntosh was the driver, and as Mr. Dandridge gave me a description of him, he still wearing the dog tags around his neck, you know." John Johnson was in the front seat.[1] A fully-loaded 9-

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millimeter Luger was recovered from underneath the passenger side of the front seat. (T.97-103)

The defendant was taken into custody, photographed, and given the *Miranda* warnings, which he waived. Chief Smith testified that when the defendant realized he was charged with armed robbery, he asked, "Armed robbery of what?" Chief Smith informed him, "Hack's Produce." The defendant inquired, "Out on the highway?" The officer answered, "Yeah." The defendant then stated, "I can't be charged with robbing a gambling joint. ... It ain't nothing but a gambling house." (T.104-110)

On cross-examination Chief Smith went on to testify that at some point, "Mr. Dandridge did pick those subjects [Johnson and McIntosh] out of that photo lineup." (T.114)

McIntosh testified that the morning of January 7, 2003, he drove his 1986 "prime gray" Buick Century to register for classes at Mississippi Delta Community College. John Johnson accompanied him, although Johnson did not enrol at the college. After registration, McIntosh and Johnson returned to Drew and "rode around a little while." When Johnson said that he was getting hungry, they went to Hack's Produce, where Johnson's uncle routinely sold "burgers and stuff." However, "his uncle wasn't there" at this time. (T.118-19) When asked what happened next, McIntosh testified as follows:

> Well, we walked up to the door and went in. John asked me to go out and get his cigarettes. I went back to the car to go get his cigarettes, and him and Mr. Dandridge walk back out with– they were talking, just hanging at the door kind of talking. They turned back around and went back in. I went

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[1]Chief Smith identified the defendant as the front seat passenger, but testified that Johnson looked "considerably different" at trial. In January 2003, Johnson wore his "hair ... more so in a Afro type setting ... " (T.101)

> in behind them. John pulled out a pistol and he was just asking for money, you know, waving it around making threats.
>
> (T.119)

According to McIntosh, Johnson "pointed it [the gun] at Mr. Dandridge and he asked him to give him money." Mr. Dandridge "got a set of keys and he told him that he was going to open up the machines to give him the money out of the machine." Johnson then "moved everybody [Mr. Dandridge and two other men] to the next room" and where the gambling machines were located. Johnson then forced the two other men to lie down on the floor while Mr. Dandridge "got all the money out of the machines" and gave it to Johnson. When Johnson "started [to] ask the other guys did they have any money," McIntosh told him to "leave the guys alone" because he had gotten "what he came for." At that point Johnson directed McIntosh "to go pull the phone out of the wall," and McIntosh complied "[b]ecause ...he had the gun." Finally, Johnson "turned around" and said, "let's go." Holding Mr. Dandridge's "set of keys," Johnson "started trying to lock ... the front door, but he couldn't find the key." He told McIntosh to lock the door, and the two men departed. McIntosh "dropped him off uptown" and then went home. (T.121-22)

McIntosh identified the gun seized from the car as the weapon used in the robbery. He also testified that he had been unaware that Johnson was armed. (T.120)

Asked whether he saw John Johnson in the courtroom that day, McIntosh identified the defendant. When the prosecutor inquired whether Johnson "looked different on that day," McIntosh answered, "His hair wasn't braided up." (T.124)

The defense rested without presenting evidence.

SUMMARY OF THE ARGUMENT

The verdict is based on legally sufficient proof and is not contrary to the overwhelming weight of the evidence.

Johnson's challenge to the state's final closing argument is procedurally barred. Alternatively, the state contends this proposition lacks substantive merit as well.

Furthermore, any arguable error with respect to the admission of Mr. Dandridge's pretrial identification of Johnson was invited and therefore not reversible. This evidence was brought out by the defense on cross-examination of Chief Smith.

The trial court properly allowed the state the amend the indictment to conform to the proof that the money taken in the armed robbery was the property of Billy Hack, doing business as Hack's Produce. This was an amendment of form rather than substance.

The fifth issue presented is procedurally barred by Johnson's failure to raise a speedy trial issue in the court below.

Johnson cannot show on this record that his trial counsel rendered constitutionally ineffective assistance.

Finally, Johnson's invocation of the cumulative error doctrine is procedurally barred and substantively meritless.

PROPOSITION ONE:

THE VERDICTS IS BASED ON LEGALLY SUFFICIENT PROOF AND IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Johnson's first issue is "Whether the verdict of Jury was against overwhelming weight of evidence." He goes on to argue additionally that the trial court erred in overruling his motion for directed verdict ant that he is entitled to be discharged. (Brief for Appellant 8-12) The state will treat this argument as a challenge to the sufficiency and weight of the evidence undergirding the verdict. See *May v. State,* 460 So.2d 778, 780 (Miss.1984).

To prevail on the argument that the evidence is legally insufficient, Johnson he must satisfy the formidable standard of review set out below:

> In reviewing the sufficiency of the evidence, the standard of review is quite limited. *Clayton v. State*, 652 So.2d 720, 724 (Miss.1995). All of the evidence is to be considered in the light most consistent with the verdict. *Id*. The prosecution is given the benefit of "all favorable inferences that may reasonably be drawn from the evidence." *Id*. This Court will not reverse unless the evidence with respect to one or more of the elements of the offense charged is such that reasonable and fairminded jurors could only find the accused not guilty. *McClain v. State*, 625 So.2d 774, 778 (Miss.1993).
>
> *Brown v. State*, 796 So.2d 223, 225 (Miss.2001).

This rigorous standard applies to the claim that the defendant is entitled to a new trial:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182(¶8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201

> (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182. "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss. Ct. App. 2001).
>
> *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss. App. 2004),

It bears repeating that "[a]ll evidence must be reviewed in the light most consistent with the verdict and the State must be given all reasonable inferences from the evidence." *Smith v. State*, 904 So.2d 1217, 1219 (Miss. App. 2004). Furthermore, "[t]he jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity." *Noe v. State*, 616 So.2d 298, 303 (Miss.1993). Essentially, the jury is charged with evaluating the credibility of the witnesses and making the pertinent factual determinations. *Guyton v. State*, 962 So.2d 722, 727 (Miss. App. 2007). The jury "may believe or disbelieve, accept or reject the utterances of any witness." *Banks v. State*, 782 So.2d 1237, 1243 (Miss.2001).

In this case, "[t]here was not a great deal of evidence for the fact finder to weigh since the defendant did not testify." *White v. State*, 722 So.2d 1242, 1247 (Miss.1998). Indeed, Johnson's failure to take the stand or to put on any evidence left the jury free to give "full effect" to "the testimony of the witnesses against him." *Rush v. State*, 301 So.2d 297, 300 (Miss.1974).

The state contends the evidence and the reasonable inferences flowing therefrom support the trial court's submission of this case to the jury and refusal to disturb its verdict. First, McIntosh's testimony established that Johnson was guilty of armed robbery.

Because that testimony was not unreasonable, improbable, self-contradictory or substantially impeached, it would have been sufficient to support a verdict, even if it had been uncorroborated. *Hendrix v. State*, 957 So.2d 1023, 1028 (Miss.2007). Moreover, as the assistant district attorney argued in final closing,

> Curtis McIntosh's testimony dovetails with the actual facts that Leroy Dandridge gave you. Phone line was cut or pulled out, however you want to look at it. The defendant's there with the gun. He asks for his uncle, asks for some wine. There's not a description in this statement by Dandridge because he knew this man. How did he know him? He'd been in there a couple of times. How do with know he's been in there a couple of times? "You can't charge me with robbing a gambling place." He's been there.
>
> (T.150-51)

McIntosh's testimony was amply corroborated by that of Mr. Dandridge.

It follows that Mr. Dandridge's testimony was corroborated by that of McIntosh, as well as Chief Smith's testimony. Thus, the somewhat dubious nature of Mr. Dandridge's in-court identification of the defendant is not fatal to the state's case. See *Bogard v. State*, 233 So.2d 102, 105 (Miss.) (a positive identification of a suspect is not required if other proof is sufficient to support the verdict). In any case, Mr. Dandridge consistently identified the man wielding the gun as James Johnson's nephew, a young man with whom he was acquainted. He gave an accurate description of the assailant and his companion to the police, and identified Johnson's photograph to Chief Smith. Mr. Dandridge's hesitancy with making a positive identification at trial was easily explained by the fact that Johnson had drastically changed his hair style between the time of the robbery and the day of trial. At bottom, the credibility of this testimony, as well as all of the other evidence presented, was properly assessed by the jury.

Robbery, but are unable to sentence him to life imprisonment."

OR

* * * * *

"We, the Jury, find the defendant not guilty."

(C.P.21)

During final closing argument, the assistant district attorney stated in pertinent part, "I'm not asking you to sentence him to life. I don't think this is one of those cases that really merits a life sentence, but it is serious." (T.151) Johnson now contends this argument requires reversal of his conviction.

The initial flaw in this proposition is that it is unpreserved for review. The defendant's failure to object bars consideration of this issue on appeal. *Rubenstein v. State*, 941 So.2d 735, 779 (Miss.2006); *Moore v. State*, 938 So.2d 1254, 1265 (Miss.2006), citing *Thorson v. State*, 895 So.2d 85, 112 (Miss.2004); *Rushing v. State*, 711 So.2d 450, 455 (Miss.1998).

Solely in the alternative, the state submits that it is inconceivable that this argument prejudiced the defense. The prosecutor was authorized to implore the jury to sentence Johnson to life imprisonment, but she expressly declined to do so. Johnson should not be heard to complain about an argument which could have done nothing but benefit him.

For these reasons, the state respectfully submits Johnson's second proposition should be denied.

PROPOSITION FOUR:

THE TRIAL COURT PROPERLY ALLOWED THE STATE TO AMEND THE INDICTMENT

The indictment returned against Johnson charged in pertinent part that he had taken money belonging to Leroy Dandridge. (C.P.7) At trial, Mr. Dandridge testified that while he had actual possession of the money in question, it was the property of "the guy that owned the place," Billy Hack. (T.80) At the conclusion of its case, the state moved to amend the indictment "to reflect the true owner of the property stolen as Billy Hack, doing business as Hack Produce, to conform to the proof that was presented." The defense objected, arguing that this was a matter of substance rather than form. (T.131) Thereafter, the following was taken:

> MS. BRIDGES: Your Honor, I believe this is done on a routine basis where the proof shows one thing and the indictment has alleged– the gist of the crime is the robbery itself, not the ownership of the money, and I believe the State has proven that.
>
> THE COURT: Well, I think it should be allowed, because I don't think that it goes to notice of who was robbed. Because proving ownership of the money is not an element of the crime of robbery.
>
> (T.132)

The state contends the trial court properly accepted the state's argument. "An indictment may be amended to conform with the proof at trial. Miss. Code Ann. § 99-17-13 (Rev.2000). However, the change can only be one of form not substance and not prejudice the defendant." *Hampton v. State*, 815 So.2d 429, 431 (Miss. App. 2002). It is well-settled that amendments such as the one at issue here go to form rather than substance and are therefore allowed. *Id.; Hall v. State*, 785 So.2d 302 (Miss. App. 2001)

(amendment changing name of owner of property taken in armed robbery was one of form not substance and therefore was proper); *Evans v. State*, 499 So.2d 781, 784-85 (Miss.1986).

Johnson's fourth proposition has no merit.

PROPOSITION FIVE:

JOHNSON'S FIFTH PROPOSITION IS PROCEDURALLY BARRED

Johnson asserts next that he was tried in violation of his statutory right to speedy trial. MISS. CODE. Ann. § 99-17-1 (1972) (as amended). He goes on to cite *Barker v. Wingo*, 407 U.S. 514 (1972), for the proposition that his constitutional right to speedy trial also was violated.

Neither of these issues was presented in any form in the court below. Clearly, Johnson "is procedurally barred from arguing that his statutory right to a speedy trial was violated because he did not raise this issue at the trial level." *Smiley v. State*, 798 So.2d 584, 587 (Miss. App. 2001). Accord, *Walker v. State*, 823 So.2d 557, 567 (Miss. App. 2002); *Fulgham v. State*, 770 So.2d 1021, 1023 (Miss. App. 2000).[4]

Furthermore, since Johnson also failed to raise the constitutional issue below, the only *Barker* factor which he may satisfy is the length of the delay.[5] Because this Court is

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[4]Moreover, the record does not show the date of arraignment. Even if this issue were not barred, the state submits Johnson has presented an insufficient record for assessment of this alleged violation. See *McDonald v. State*, 807 So.2d 447, 451 (Miss. App. 2001)

required "to review all four Barker factors together," it "cannot conduct such evaluation" on this record. *Scott v. State*, 829 So.2d 688, 691-92 (Miss. App. 2002).

For these reasons, Johnson's fifth issue is procedurally barred.

PROPOSITION SIX:

JOHNSON CANNOT ESTABLISH ON THIS RECORD THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Johnson contends additionally that his trial counsel rendered constitutionally ineffective assistance. He faces formidable hurdles, summarized below:

> The Mississippi Supreme Court has adopted the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) in determining whether a claim of ineffective assistance of counsel should prevail. . . . *Rankin v. State*, 636 So.2d 652, 656 (Miss.1994) enunciates the application of *Strickland*:
>
> > The *Strickland* test requires a showing that counsel's performance was sufficiently deficient to constitute prejudice to the defense. . . . **The defendant has the burden of proof on both prongs. A strong but rebuttable presumption, that counsel's performance falls within the wide range of reasonable professional assistance, exists. . . . The defendant must show that but for his attorney's errors, there is a reasonable probability that he would have received a different result in the trial court. . . .**
> >
> > Viewed from the totality of the circumstances, this Court must determine whether counsel's performance was both deficient and prejudicial. . . . Scrutiny of counsel's performance by this Court must be deferential. . . . If the defendant raises questions

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[5]The record does not show that Johnson asserted his right to speedy trial, and he admits that he failed to do so. (Brief for Appellant 21) Upon proper analysis, this factor would weigh against him.

> of fact regarding either deficiency of counsel's conduct or prejudice to the defense, he is entitled to an evidentiary hearing. . . . Where this Court determines defendant's counsel was constitutionally ineffective, the appropriate remedy is to reverse and remand for a new trial.
>
> **In short, a convicted defendant's claim that counsel's assistance was so defective as to require reversal has two components to comply with *Strickland.* First, he must show that counsel's performance was deficient, that he made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that counsel's errors deprived him of a fair trial with reliable results.**
>
> (emphasis added) *Colenburg v. State*, 735 So.2d 1099, 1102-03 (Miss. App. 1999).

Because this point is raised for the first time on direct appeal, Johnson defendant encounters an additional obstacle: the pertinent question

> **is not whether trial counsel was or was not ineffective but whether the trial judge, as a matter of law, had a duty to declare a mistrial or to order a new trial, sua sponte on the basis of trial counsel's performance.** "Inadequacy of counsel" refers to representation that is so lacking in competence that the trial judge has the duty to correct it so as to prevent a mockery of justice. *Parham v. State*, 229 So.2d 582, 583 (Miss.1969). **To reason otherwise would be to cast the appellate court in the role of a finder of fact; it does not sit to resolve factual inquiries.** *Malone v. State*, 486 So.2d 367, 369 n. 2 (Miss.1986). *Read [v. State*, 430 So.2d 832 (Miss.1983)] clearly articulates that the method that the issue of a trial counsel's effectiveness can be susceptible to review by an appellate court requires that **the counsel's effectiveness, or lack thereof, be discernable from the four corners of the trial record. This is to say that if this Court can determine from the record that counsel was ineffective, then it should have been apparent to the presiding judge, who had the duty, under *Parham*, to declare a mistrial or order a new trial sua sponte.**

(emphasis added) *Colenburg*, 735 So.2d at 1102.

Accord, *Passman v.* State, 937 So.2d 17 (Miss. App. 2006); *Jenkins v. State*, 912 So.2d 165, 173 (Miss. App. 2005); *Walker v. State*, 823 So.2d 557, 563 (Miss. App. 2002); *Estes v. State*, 782 So.2d 1244, 1248-49 (Miss. App. 2000).

While Johnson alleges several unprofessional lapses, he has not shown that his trial counsel's overall performance mandated the declaration of a mistrial *sua sponte*. It follows that he cannot establish on this record that his trial counsel was constitutionally ineffective.[6] Because he has not shouldered the particular burden that he faces on direct appeal, his fourth proposition should be denied without prejudice to the raising of this issue in a motion for post-conviction collateral relief. *Passman*, supra.

PROPOSITION SEVEN:

JOHNSON'S INVOCATION OF THE CUMULATIVE ERROR DOCTRINE IS PROCEDURALLY BARRED AND SUBSTANTIVELY MERITLESS

Johnson finally contends that cumulative error requires the reversal of the judgment rendered against him. He did not present this argument at any time in the trial court and may not raise it for the first time on appeal. *Maldonado v. State*, 796 So.2d 247, 260-61 (Miss.2001); *Gibson v. State*, 731 So.2d 1087, 1098 (Miss.1998). His seventh proposition is procedurally barred.

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[6]Although no further discussion should be required, the state submits for the sake of argument that Johnson plainly cannot show on this record that his counsel was ineffective in failing to argue that his right to speedy trial had been violated. Because this argument was not made below, there is not a sufficient record upon which to decide it at this point. This is precisely the sort of claim which must be decided in post-conviction proceedings rather than on direct appeal.

In the alternative, the state incorporates its arguments under Propositions One through Six in asserting that the lack of merit in Johnson's other arguments demonstrates the futility of his final proposition. *Gibson*, 731 So.2d at 1098; *Doss v.* State, 709 So.2d 369, 400 (Miss.1997); *Chase v. State*, 645 So.2d 829, 861 (Miss.1994). See also *Brown v. State*, 682 So.2d 340, 356 (Miss.1996) ("twenty times zero equals zero"). Johnson's invocation of the cumulative error doctrine lacks substantive merit as well.

CONCLUSION

The state respectfully submits that the arguments presented by Johnson have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable W. Ashley Hines
Circuit Court Judge
P. O. Box 1315
Greenville, MS 38702-1315

Honorable Joyce I. Chiles
District Attorney
P. O. Box 426
Greenville, MS 38702

John Johnson, #108496
Unit 29-J, Bed 96
Parchman, MS 38738

This the 9th day of November, 2007.

DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680