

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. 2006-TS-01265

ORA JACKSON WEEKS

APPELLANT

V.

MONTRIEL WEEKS, SR.

APPELLEE

APPELLEE'S BRIEF

BENNIE L. RICHARD
MSB NO. [REDACTED]
RICHARD LAW FIRM, PLLC
207 MAIN STREET
POST OFFICE BOX 1404
GREENVILLE, MS 38702
(662) 332-4040

ATTORNEY FOR APPELLEE
MONTRIEL WEEKS, SR.

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. 2006-TS-01265

ORA JACKSON WEEKS

APPELLANT

V.

MONTRIEL WEEKS, SR.

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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

- | | | | |
|-----|--|---|---|
| (1) | Ora Jackson Weeks
Indianola, MS | - | Appellant |
| (2) | Montriel Weeks, Sr.
Indianola, MS | - | Appellee |
| (3) | Alsee McDaniel, Esq.
P.O. Box 858
Greenville, MS 38702 | - | Attorney for Appellant |
| (4) | Bennie L. Richard, Esq.
P.O. Box 1404
Greenville, MS 38702 | - | Attorney for Appellee |
| (5) | Hon. Jane R. Weathersby
P.O. Drawer 1380
Indianola, MS 38751 | - | Chancellor
9 th Chancery District |

SO CERTIFIED this the 25th day of September 2007.



BENNIE L. RICHARD

MSB NO. 10743

RICHARD LAW FIRM, PLLC

207 MAIN STREET

POST OFFICE BOX 1404

GREENVILLE, MS 38702

(662) 332-4040

ATTORNEY FOR APPELLEE

MONTRIEL WEEKS, SR.

TABLE OF CONTENTS

I. CERTIFICATE OF INTERESTED PARTIES	i-ii
I. TABLE OF CONTENTS	iii
II. TABLE OF AUTHORITIES	iv
III. STATEMENT OF THE ISSUES	v
IV. STATEMENT OF THE CASE	1
V. SUMMARY OF ARGUMENT	9
VI. ARGUMENT	10
VII. CONCLUSION	18
VIII. CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

<u>CASE AUTHORITY</u>	<u>PAGE (S)</u>
<i>Albright v. Albright,</i> 437 So.2d 1003 (Miss.1983)	12
<i>Bower v. Bower,</i> 758 So.2d 405 (Miss.2000)	17
<i>Carr v. Carr,</i> 487 So. 2d 1120 (Miss.1985)	16
<i>Cheek v. Ricker,</i> 431 So.2d 1139 (Miss.1983)	16
<i>Copeland v. Copeland,</i> 2004 WL 2903690 (Miss. Dec. 16, 2004)	15,16
<i>Fuselier v. State,</i> 702 So.2d 388 (Miss.1997)	17
<i>K-Mart Corp v. Hardy,</i> 735 So.2d 975 (Miss.1999)	16,17
<i>Richardson v. Richardson,</i> 790 So.2d 239 (Miss.Ct.App.2001)	15
<i>Roberson v. Roberson,</i> 814 So.2d 183 (Miss.Ct.App.2002)	11
<i>Stark v. Anderson,</i> 748 So. 2d 838 (Miss.Ct.App.1999)	15
<i>Sturgis v. Sturgis,</i> 792 So.2d 1020 (Miss.Ct.App.2001)	11
<i>Wright v. Stanley,</i> 700 So.2d 274 (Miss.1997)	11
<i>Wright v. Thompson,</i> 822 So. 2d 1125 (Miss.Ct.App.2002)	14
 <u>STATUTES, RULES, ETC.</u>	
<i>Miss. Code Ann. § 93-5-24</i>	15

STATEMENT OF THE ISSUES

I. THE CHANCELLOR'S FINDINGS MUST BE AFFIRMED AS IT WAS NEITHER MANIFESTLY WRONG, AN ABUSE OF DISCRETION OR APPLICATION OF AN ERRONEOUS LEGAL STANDARD.

II. THE CHANCELLOR'S ADMISSION AND CONSIDERATION OF TREMAINE EARVIN'S PRIOR CRIMINAL HISTORY WAS HARMLESS ERROR, IF ANY, AS IT DID NOT AFFECT THE OUTCOME OF THE CUSTODY AWARD.

STATEMENT OF THE CASE

1. The parties were married on March 18, 2004 and were separated on June 30, 2005. On or about October 18, 2005, the parties filed a joint petition for an irreconcilable difference divorce. Two children were born during the marriage: Montriell Weeks, Jr., a male, born May 1, 2001 (age 4, at the time of the marital separation); and, Marquira Weeks, a female, born June 6, 2004 (age 2, at the time of the marital separation).

2. This action was an irreconcilable difference divorce with child custody to be determined by the Court. However, the extraordinary facts and events surrounding the Appellant's adulterous conduct which occurred during the marriage and after the parties' separation were inextricably and directly related to the *Albright* factors the lower court was required to consider.

3. Most of the evidence presented at trial by Mr. Weeks was necessitated by Ora Weeks' blatant refusal to be truthful. In fact, the trial Court repeatedly cautioned and admonished Ms. Weeks throughout trial regarding her lack of candor, refusal to provide meaningful response

during examination, and combative demeanor. In fact, at the conclusion of trial, the court noted on the record Ms. Weeks' attempt to deceive the Court regarding her romantic relationship and living arrangement with Mr. Tremain Earvin (her paramour) saying it would have been to Ms. Weeks' advantage to be "open and honest about it." (Tr. Vol. 3, p. 321).

Ms. Weeks Began Having An Adulterous Affair With Tremaine Earvin And Told Her Husband, Children, Extended Family, And The Community That Mr. Earvin Was Her Half-brother and/or God-brother So He Could Surreptitiously Become a Part of Their Family Unit

4. From the onset of her trial testimony, Ms. Weeks denied any sexual or romantic involvement with Mr. Earvin (Tr. Vol. 1, pp.121-22) or that Earvin currently or had ever lived with her.

5. While the parties were married and living together as husband and wife, Ms. Weeks told Mr. Weeks, her children, extended family and her local community that Mr. Earvin was her recently discovered half-brother and/or god-brother. (Tr. Vol. 1, p. 139; Tr. Vol. 2, pp.269-71). For approximately five (5) months, Mr. Earvin would regularly visit the parties' in the marital home to socialize, get

his hair braided, attend a barbeque, and play video games with the parties and their two minor children. (Id.)

Earvin even bought the parties' minor children shoes while the parties lived as husband and wife. (Tr. Vol. 2, pp. 67; 165-7)

6. Ms. Weeks' mother was told by family members that Earvin was Ms. Weeks' play-brother (Tr. Vol. 1, pp. 93-4) and was later told that Ms. Weeks and Earvin were biological half-siblings who shared the same father. (Tr. Vol. 1, pp. 97-8; p. 100).

7. Ms. Weeks' mother testified that based upon her common sense and observation she eventually determined that Ms. Weeks and Earvin were not play-siblings but rather were involved in a dating relationship under the guise of half-siblings. (Tr. Vol. 1, pp. 95-6). Mr. Earvin had surreptitiously become a part of the parties' "family."

**Immediately After the Separation of the Parties, Ms. Weeks
Allowed Tremaine Earvin to Move Into the Former Marital
Home with the Parties' Minor Children**

8. Ms. Weeks denied that Mr. Earvin had ever lived or even spent a night at her home; she claimed Earvin had only been at her home past midnight on one occasion. (Tr. Vol. 1, pp.125-6).

9. Ms. Weeks' neighbor, Purvis Modley, who lived in the apartment below her, testified that he first noticed Mr. Earvin coming and going as frequently as other tenants who lived at the apartment complex immediately after the parties' separation. (Tr. Vol. 2, p. 200-9). Mr. Modley began to regularly notice both of Mr. Earvin's vehicles at Ms. Weeks' apartment overnight and Ms. Weeks regularly driving one of his vehicles. (Tr. Vol. 2, pp. 206-8).

10. Ms. Weeks' mother testified that Earvin would be at Ms. Weeks' home when she was not there and would sometimes be the only adult at home with the parties' minor daughter. (Tr. Vol. 1, pp. 96-7).

11. In fact, after the parties' separation, Mr. Earvin would be present at Ms. Weeks' apartment (the former

marital home) and would physically carry Mr. Weeks' minor daughter to him on each occasion that Mr. Weeks exercised weekend visitation. (Tr. Vol. 2, pp. 249-50). Mr. Earvin would also be present at Ms. Weeks' home on each occasion Mr. Weeks would return his daughter. *Id.*

Though Ms. Weeks was Awarded Temporary Custody Of The Minor Children, The Children Were Separated with The Parties' Minor Son Living With Ms. Weeks' Mother

12. The parties' minor child, Montriell Weeks, Jr., lived with Ms. Weeks' mother after the parties' separation. Montriell, Jr., would consistently stay with his maternal grandmother (Barbara Walker) throughout the week and weekends, except for the weekends that Mr. Weeks exercised his weekend visitation. (Tr. Vol. 1, pp. 91-2, 140-2). Mr. Weeks never picked his son up from Ms. Weeks' house when exercising his weekend visitation; instead he always would pick him up at Ms. Weeks' mother's house. (Tr. Vol. 2, pp. 249-50). After the separation, the parties' minor daughter continued to live with Ms. Weeks and her live-in boyfriend, Mr. Earvin.

**Tremaine Earvin Attacked Ms. Weeks in the Former Marital
Home With The Parties' Minor Daughter Present**

13. Ms. Weeks acknowledged filing a police incident report stating that on January 22, 2006, Earvin committed an act of domestic violence against her by striking her in the temple with a closed fist causing blood to run from her head and causing her to fall. (Tr. Vol. 1, p. 127-9; Exhibit Vol. 34-7). Ms. Weeks required medical attention for her injuries. (Id.) At the time of the attack, the parties' minor daughter was present in the home.

14. When Indianola Police Officer Bennie Milton responded to the scene, Ms. Weeks' sister informed the officer that Tremaine Earvin was the Appellant's boyfriend. (Tr. Vol. 1, p.62). Ms. Weeks also told Officer Milton and filed an incident report noting that she and Tremaine Earvin were in a "current dating relationship." (Tr. Vol. 1, pp. 66-7; Exhibit Vol. 34-7).

15. Prior to the January 22, 2006 attack, Mr. Weeks was aware of Mr. Earvin's reputation of beating on women. (Tr. Vol. 2, p. 248).

**At Trial Appellant Denied Her Relationship With Earvin And
Blamed Mr. Weeks For The Attack**

16. At trial, Ms. Weeks continued to deny any dating relationship with Earvin. In fact, she blamed herself and Mr. Weeks for the attack explaining that, prior to the attack, Mr. Weeks told her information about Earvin and another woman which caused her to confront Earvin and "hit him first." (Tr. Vol. 1, pp. 119-20; 152-4). Incredibly, Ms. Weeks assessed no blame to Earvin for an attack which required medical attention, law enforcement response and occurred with her small daughter present.

**The Parties' Minor Children Were Adversely Affected Due to
Appellant's Involvement with Earvin**

17. The parties' minor son regularly referred to Mr. Earvin as his "uncle" and believed that his mother and "uncle" were "going together." (Tr. Vol. 1, pp. 259-60, 267).

18. Mr. Earvin had whipped the parties' minor son and would regularly holler at him and hit him. (*Id.*) On two separate occasions, the parties' minor daughter behaved in

a manner indicating fear of Earvin. (Tr. Vol. 1, pp.252-3).

After The Separation, Mr. Weeks Moved Into a Stable Home Environment with a Strong Family Support System

19. After the marital separation, Mr. Weeks moved back home with his parents in a three bedroom home with front and back yards, and stable home environment. (Tr. Vol. 2, pp. 273-4).

20. Mr. Weeks' parents own and operate a daycare which is licensed with the State of Mississippi with three full-time certified employees. (Tr. Vol. 2, pp. 181-2). Mr. Weeks' father testified that he and his wife had been and remained able and willing to financially support their grandchildren and had already set-up a college fund for them and would continue to support them as needed during and after the divorce, including allowing the children to be reunited by both of them staying with him until Mr. Weeks completed college. (Tr. Vol. 2, pp.181-3).

SUMMARY OF ARGUMENT

21. The Appellant challenges the lower court's custody award on two grounds, claiming: 1) the award of custody was clearly erroneous and an abuse of discretion; and, 2) the court erred in admitting and considering the prior criminal history of Tremaine Earvin.

22. The Appellant's first issue of appeal is without merit insofar as the court thoroughly considered the totality of the circumstances and made express findings of fact on the record addressing each Albright factor. In sum, the court determined that **the following Albright factors favored neither party or were inapplicable:** age, health and sex of the children; continuing care of the children prior to separation; physical and mental health and age of the parents; emotional ties of the parents and the children; and, the preference of a child at age 12 (not applicable). (Tr. Vol. 3, pp.320-3). While noting that neither party was "model," the Court expressly determined that **the remaining Albright factors favored Mr. Weeks, namely:** willingness and capacity to provide primary childcare for both children; moral fitness; stability of home environment; and other relevant factors. (Id.)

23. Even had the court not admitted or considered Earvin's prior criminal record, overwhelming evidence existed which favored custody to Mr. Weeks. As noted on the record, the court's paramount concern was the children's best interest and not the Appellee's adulterous conduct with Mr. Earvin. The admission and consideration of Earvin's criminal record, at worst, was harmless error.

LEGAL ARGUMENT

STANDARD OF REVIEW

24. The standard of review in child custody cases is well-established. These matters fall within the sound discretion of the chancellor. *Sturgis v. Sturgis*, 792 So.2d 1020, 1023 (Miss.Ct.App.2001). Therefore, when this Court reviews an award of child custody, the decision of the chancellor will be affirmed unless the decision is manifestly wrong, clearly erroneous, or the chancellor applied an erroneous legal standard. *Roberson v. Roberson*, 814 So.2d 183, 184 (Miss.Ct.App.2002). The chancellor's decision must be supported by substantial evidence in the record. Id. If there is substantial evidence in the record to support the Chancellor's findings of fact, no matter what contrary evidence there may also be, this Court will uphold the Chancellor. *Wright v. Stanley*, 700 So. 2d at 280 (Miss. 1997).

I. THE CHANCELLOR'S FINDINGS MUST BE AFFIRMED AS IT WAS NEITHER MANIFESTLY WRONG, AN ABUSE OF DISCRETION OR APPLICATION OF AN ERRONEOUS LEGAL STANDARD.

25. The Chancellor's decision awarding custody was proper and in accord with *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983).

26. Contrary to the Appellant's assertion that the Court's custody award was based solely or primarily upon Ms. Weeks' adulterous conduct and the character of her live-in paramour, the Court made specific findings of fact on the record addressing each *Albright* factor, stating:

The Court has listened carefully to testimony over two days and has reviewed the *Albright* factors. We have two young children, male and female. The Court finds that the **continuity of care** prior to separation was approximately equal between Mr. and Mrs. Weeks. I find that the **parenting skills** are in favor of Mr. Weeks in that Mrs. Weeks has other priorities. I find that Mrs. Weeks even though she is working two jobs, she also has time for extra curricular activities not related to the children. The father is not working at this time, but is pursuing his education. The parents are of approximate equal **age**. The children are in good **health** as well as the parents. The Court finds that the children have probably **emotional ties** to both mother and father. As far as the **moral fitness**, the Court cannot find that Mrs. Ora Weeks is morally fit to have the children, nor that her home is morally fit. The Court has reached the conclusion by the evidence and testimony presented here today that Mrs. Weeks has more than a friend relationship with Mr. Earvin and in fact they have a sexual

relationship. She has played games with her family. She has played games with her husband. And for two days she's tried to play games with this Court when in fact it would have been to her advantage to be open and honest about it. Two things pop into my mind when I try to place these children, and it's safety and stability. Those were the primary issues over these two days that I've been thinking about. These two young children desire and deserve to be safe and live in a stable environment and I do not think they have been living in a safe nor a stable environment with Mrs. Weeks. But in fact I don't think they've been staying with Mrs. Weeks that much. In fact she has testified that the son lives with the grandmother and although she says it's for reasons of school, she then testified that the school called her and she could have placed him in school down here, but she didn't. The man that we've been here about for two days, Mr. Tremaine Earvin, has a criminal record and in fact more than one of the charges involves domestic violence and one of the charges is a domestic violence charge by Mrs. Ora Weeks. And yet when she was on the stand, she was in denial that Mr. Tremaine Earvin had done anything to her and in fact tried to turn it around and say that it was Mr. Weeks' fault that Tremaine Earvin attacked her. The court took a special notice that she has had her young daughter live in the apartment with her and Mr. Earvin. She has allowed this boyfriend to stand in the place of a father and she has done what this Court calls getting the cart before the horse. She has gotten involved with somebody before she has gotten divorced. That is the reason we have been here for almost two days hearing about Mr. Tremaine Earvin. If Mrs. Ora Weeks had spent as much time being a mother to her children as she has spent being a girlfriend to Mr. Tremaine Earvin, we would not have been here for two days. This Court does not look favorably on any parent involving someone of the opposite sex in the lives of their children before they are divorced especially someone with a violent past. There are articles almost every day in the Clarion Ledger about boyfriends abusing and hurting

children of the girlfriend in the home. The paternal grandfather has testified that he and his wife will help Mr. Weeks with the children, are supportive of Mr. Weeks while he is obtaining his college degree and in fact Mr. Weeks will be a Senior next year and he is looking for a job at this time. This Court will not penalize him because he does not have a job at the present time because his family is supportive. His family owns a day-care that the children can attend. This Court finds it is in the best interest of these children for them to be together and to be in the custody of their father and, therefore, Mr. Montrie Weeks is awarded custody.

(Tr. Vol. 3, pp.320-3).

NOTE: [The Chancellor's Findings of Fact and Conclusions of Law, entered on or about February 1, 2007, was inadvertently omitted from the record on appeal. On this date, undersigned has submitted an agreed motion pursuant to M.R.A.P. 10 (e) seeking leave for the clerk's office to supplement the record of appeal to include said Findings of Fact and Conclusions of Law. For the reasons aforesated, Appellee provides the Findings of Fact and Conclusions of Law in "Appellee's (Proposed) Supplemental Record Excerpt" and cites portions of said document by page number as indicated within that pleading].

27. The Chancellor, in her Findings of Facts and Conclusion of Law, addressed the totality of circumstances presented at trial with reference to applicable case authority, noting:

Consistent with Mississippi authority, this trial court looked unfavorably upon Ms. Weeks' volatile relationship and home environment with Mr. Earvin. *Wright v. Thompson*, 822 So.2d 1125, 1128 (Miss.Ct. App. 2002) (evidence of violence in the

home was, in part, reason for denying custody; *Richardson v. Richardson*, 790 So.2d 239,242-43 (Miss.Ct. App. 2001) (mother lived for two years with abusive boyfriend); *Stark v. Anderson*, 748 So.2d 838,842-43 (Miss.Ct. App. 1999) (child afraid of step-father).

Appellee's [Proposed] Supplemental Record Excerpt at 8.

Mississippi law recognizes a rebuttable presumption that custody should not be granted to a parent with a history of family violence which includes a single incident resulting in serious bodily injury. See, *Miss.Code Ann. §93-5-24 9(a)*. Moreover, the trial court is required to consider whether the perpetrator of violence has committed further acts of domestic violence. *§93-5-24 (9) (a)(iii)(6)*.

Id. at 9.

Conversely, this court found that Mr. Weeks could provide a more stable and healthy home environment that would serve the children's best interest. The existence of extended family that can provide daycare is a factor that weighs in favor of custody. *Copeland v. Copeland*, 2004 WL 2903690 (Miss. Dec 16, 2004).

Id. at 9.

28. The Appellant overstates the weight given by the court involving her adulterous conduct and conveniently minimizes the totality of the circumstances presented at trial. In fact, the Court specifically acknowledged that adultery, cohabitation or sexual conduct, alone, is not a reason to deny custody unless adverse impact upon the children is demonstrated, saying:

A parent's adultery, cohabitation or other sexual conduct is not, alone, a reason to deny custody. However, where such conduct is shown to have an adverse impact on a child, the trial court is empowered to deny custody to that parent. *Carr v. Carr*, 480 So. 2d 1120, 1123 (Miss. 1985); *Copeland v. Copeland*, 2004 WL 2903690 (Miss. Dec. 16, 2004). This Court finds that the conduct of Ms. Weeks, namely: 1) cohabitating with a violent acquaintance; 2) causing the children psychological confusion, and 3) allowing the children, without good cause, to be raised separately are acts which caused and will continue to cause an adverse impact upon them.

Appellee's [Proposed] Supplemental Record Excerpt at 10.

See further, Cheek v. Ricker, 431 So. 2d 1139, 1144 (Miss.1983) (Cohabitation is relevant only to the extent it can be shown to affect the child adversely).

II. THE CHANCELLOR'S ADMISSION AND CONSIDERATION OF TREMAINE EARVIN'S PRIOR CRIMINAL HISTORY WAS HARMLESS ERROR, IF ANY, AS IT DID NOT AFFECT THE OUTCOME OF THE CUSTODY AWARD.

29. The standard of review for the admission of or refusal to admit evidence is well settled. " '[A]dmission or suppression of evidence is within the discretion of the trial judge and will not be reversed absent an abuse of that discretion.' " *K-Mart Corp. v. Hardy*, 735 So.2d 975, 983 (Miss.1999). For a case to be reversed on the

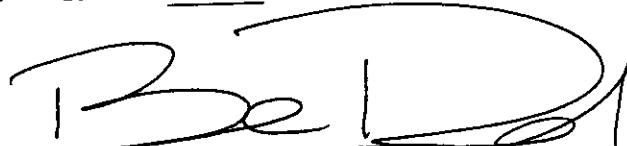
admission of evidence, "it must result in prejudice and harm or adversely affect a substantial right of a party." *K-Mart Corp. v. Hardy*, 735 So.2d at 983 (citing *Hansen v. State*, 592 So.2d 114 (Miss.1991)). "To apply the harmless error analysis ... this Court must determine whether the weight of the evidence against [the defendant] is sufficient to outweigh the harm done by allowing admission of [the] evidence." *Fuselier v. State*, 702 So.2d 388, 391 (Miss.1997).

30. The issue of the admission of Earvin's prior criminal warrants little discussion as it did not affect the outcome of the trial court's custody award. Even absent Earvin's prior history, the court had substantial evidence, as contemplated by *Albright* (discussed *infra*), to award custody to Mr. Weeks. See, *Bower v. Bower*, 758 So.2d 405, 415 (Miss. 2000) (While finding that certain documents in a child custody case should not have been admitted into evidence because they were not properly authenticated as the party who sought their admission was not involved in their preparation or had personal knowledge of their accuracy, the Mississippi Supreme Court determined it was harmless error as it did not adversely affect any right of the aggrieved party).

CONCLUSION

31. The Chancellor's award of custody to Mr. Montriel Weeks should be affirmed.

RESPECTFULLY SUBMITTED, this the 25th day of
September, 2007.



BENNIE L. RICHARD
MSB NO. [REDACTED]
RICHARD LAW FIRM, PLLC
207 MAIN STREET
POST OFFICE BOX 1404
GREENVILLE, MS 38702
(662) 332-4040

ATTORNEY FOR APPELLEE
MONTRIEL WEEKS, SR.

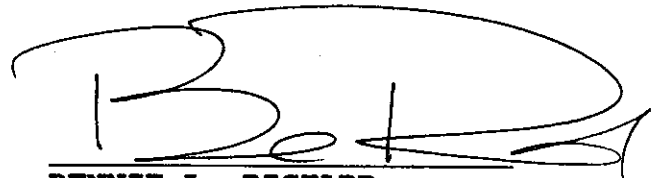
CERTIFICATE OF SERVICE

I, **Bennie L. Richard**, certify that I have served a copy of the Appellee's Brief by regular U.S. Mail, postage prepaid, addressed to the following interested persons:

**Alsee McDaniel, Esq.
P.O. Box 858
Greenville, MS 38702-0858**

**Hon Jane R. Weathersby
Chancellor, 9th Chancery District
P.O. Drawer 1380
Indianola, MS 38751**

This the 25th day of September, 2007.



BENNIE L. RICHARD
MSB NO. [REDACTED]
RICHARD LAW FIRM, PLLC
207 MAIN STREET
POST OFFICE BOX 1404
GREENVILLE, MS 38702
(662) 332-4040

**ATTORNEY FOR APPELLEE
MONTRIEL WEEKS, SR.**