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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN A. WILLIAMS — APPELLANT

VS. — NO. 2006-KA-0418

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VERSUS **NO. 2006-KA-0418-SCT**

STATE OF MISSISSIPPI **APPELLEE**

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STATEMENT OF THE CASE

Procedural History

John A. Williams was convicted in the Circuit of the First Judicial District of Itawamba County on one count of manufacture of marijuana in the amount of more than 30 grams and one count of possession of a firearm by a convicted felon. He was sentenced to terms of imprisonment of 15 years and three years, respectively, to be served concurrently. (C.P.44-46) Aggrieved by the judgment rendered against him, Williams has perfected an appeal to this Court.

Substantive Facts

In March 2005, Chris Graham was working in his "land surveying and [t[imber cruising" business in Itawamba County. He and his partner "were doing a land survey ... up north of Tremont east of Highway 23 around Briarcreek." While they were working around "on an old homeplace," Mr. Graham noticed "some red cups" hidden "in behind

some limbs and stuff. Had some types of plants growing in it." Having decided that it was unwise to linger here, Mr. Graham returned to Fulton and "called the sheriff's office and talked to Chris Umphress" about what he had discovered. Late that afternoon, Mr. Graham accompanied Agent Umphress to the location and showed him the red cups. (T.61-64)

Agent Umphress testified that on March 30, 2005, Mr. Grahaman notified him that "some unusual plants" were growing in the Tremont area. Agent Umphress and Agent Brian Rushing "met with Mr. Graham and ... traveled out to that location" where Mr. Graham showed them the plants. At that point, the agents "made a decision to set up surveillance on these plants. And then for approximately the next two months" the agents were continually "surveilling these plants in an attempt to determine who actually had put the plants out there to manufacture the marijuana." (T.73-74)

The surveillance system consisted of "a ground hog system, which is a waterproof camera case that the only part that protrudes out of the case is a camera lens on a wire." This system also had "the accessory of having a wireless motion detector." The agents set up the system "in the woods in a covert manner covered up and where it couldn't be detected with the lens on the marijuana plants." They returned "every three days to change the tape and the batteries in the system." On April 27, when they monitored the tape, they "saw that it had recorded someone tending the plants." This first videotape "showed a person bending over tending to the plants," but the gardener's face was not visible. The tape did capture his two dogs, a white German shepherd and a cocker spaniel. (T.74-76)

Having already invested "tons of time" and energy in conducting this surveillance, the agents decided to continue it until they could make a positive identification. On June

6, they "went back in to check the tapes and the battery and that kind of thing." They found "Mr. Williams," the defendant, "there at the tree tending the plants." (T.80)

Conducting "a little bit of mobile surveillance," the agents discovered the German shepherd and the cocker spaniel at Williams' residence at 215 Providence Road. They did not "rush right in," but decided to continue the video surveillance to try to obtain "a positive identification of the person that was actually tending the marijuana plants." (T.83)

About a month later, they retrieved a tape which showed the suspect's face. Upon viewing the tape, Agent David Sheffield immediately identified the man as John Williams. Agent Umfress was reasonably sure of the man's identity as well. But "just to make sure," he asked a neighbor of Williams to look at the tape. This man "immediately identified the man in that video as being John Williams." (T.84)

Asked to explain "the next step," Agent Umphress testified as follows:

> We at that point made a decision that, number one, while the surveillance was going on some of the plants had been planted out in the woods, and we had found those. They had taken them out of the cups and planted them there in the woods where they could get a little bit of sun and be close to a source of water. But some of the plants we were not able to locate, so we felt like at that point that possibly Mr. Williams might have some of those marijuana plants at his home as well as the cultivation tools or whatever else might be necessary to take care of those. And at that point we decided to apply for a search warrant for Mr. Williams' house at 215 Providence Road.
>
> (T.84-85)

In the meantime, the agents seized the marijuana plants that were growing in the woods. (T.88)

After they obtained the search warrant, Agent Umphress and several other agents went to 215 Providence Road, where they found Williams. Agent Umphress advised him

of his rights. Williams said "that the marijuana that was found inside his house belonged to him and that ... his wife did not know anything about him growing marijuana." He also told the agents that there were "two marijuana plants growing behind the barn beside a pile of tires." Agents found and seized the plants in this location. They also found marijuana in a Tupperware bowl inside the kitchen cabinet, as well as in a film canister. (T.87-90)

While they were conducting the search, Agent Umphress found a firearm in a nightstand drawer in the master bedroom, on "what appeared to be the masculine side of the room ..." The weapon, which was "in reach of ... that side of the bed," was discovered among "masculine" items such as a fixed blade knife and a metal box which contained "literature ... for growing marijuana." (T.91-93)

The next day, Agent Umphress again gave Williams the *Miranda* warnings and him to read a printed statement of those warnings. Williams signed a waiver of his rights, said that "he did not want a lawyer at that time" and said that he would speak to Agent Umphress and answer questions. (T.94)

The state proved that the defendant had been convicted of the felony of aggravated assault. (T.95-96, 123-24)

On cross-examination; Agent Umphress testified that during the execution of the search warrant, the defendant's wife had claimed ownership of the guns in the master bedroom. "Agent Moses gave her a magazine from the firearm and asked her to load it, in which time she couldn't. She didn't know how to load the magazine on the weapon." (T.108)

Expert testimony established that the plant material in question was marijuana weighing 39.4 grams. (T.114-15)

The trial court sustained Williams' objection to the state's closing argument and admonished the jury. This action was sufficient to prevent prejudice, and Williams failed to request any other relief.

The defense rested without presenting evidence. (T.131)

SUMMARY OF THE ARGUMENT

Williams' challenge to the sufficiency and weight of the evidence has no merit. Rather, the proof is ample to support the jury's findings.

Furthermore, Williams' failure to challenge certain jurors is fatal to his second argument. He cannot make this claim for the first time on appeal.

Moreover, the trial court did not err in admitting the second surveillance tape into evidence. The court effectively sustained the sole objection to this tape, leaving Williams no basis for complaint on appeal.

Additionally, Williams' failure to object to certain remarks of the trial judge bars consideration of that issue on appeal.

For all that is shown by the record, Williams received the *Miranda* warnings prior to questioning. His fifth proposition has no merit.

Finally, Williams cannot show on this record that his trial counsel was constitutionally ineffective.

PROPOSITION ONE:

WILLIAMS IS NOT ENTITLED TO A JUDGMENT OF ACQUITTAL OR A NEW TRIAL

Williams first contends that the evidence is legally insufficient to sustain the verdicts, and alternatively that the verdicts are contrary to the overwhelming weight of the evidence. To prevail on the contention that he is entitled to a judgment of acquittal, Williams faces

the following formidable standard of review:

> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.
>
> *Manning v. State*, 735 So.2d 323, 333 (Miss.1999), quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

With regard to the alternative argument, that he is entitled to a new trial, the state submits Williams must meet the stringent standard of review summarized as follows:

> In determining whether a jury verdict is against the overwhelming weight of the evidence, this 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 (Miss.1998) (collecting authorities). 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. *Id.*
>
> *Montana v. State*, 822 So.2d 954, 967-68 (Miss.2002).

Here, "[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, the defense presented no evidence whatsoever.

Incorporating by reference the facts set out under the Statement of Substantive Facts, the state submits the trial court did not abuse its discretion in submitting this case to the jury and refusing to overturn its verdicts. The evidence is not such that reasonable jurors could have returned no verdict other than not guilty, or such that to allow it to stand would be to sanction an unconscionable injustice. Rather, the proof amply supports the jury's finding that the defendant wilfully and intentionally grew, cultivated and manufactured more than 30 grams of marijuana, and that, having been convicted of a felony, he possessed a deadly weapon. After having conducted surveillance of the marijuana plants growing in the woods, agents obtained a warrant to search Williams' residence. When the warrant was executed, Williams readily admitted that the marijuana in the house belonged to him, and directed them to two other plants growing behind the barn. Furthermore, from the location of the firearm, a reasonable juror well could have inferred that Williams was in constructive possession of it, i.e., that he had dominion and control over it. *Coffey v. State*, 928 So.2d 215 (Miss. App.2006).

No basis exsits for disturbing the jury's verdicts. Williams' first proposition should be denied.

PROPOSITION TWO:

WILLIAMS' SECOND PROPOSITION IS PROCEDURALLY BARRED AND SUBSTANTIVELY MERITLESS

Williams next asserts, without pinpointing any particular error on the part of the court, that the service of jurors William Webb, Patricia Loague and David Clayton deprived him of a fair trial. The "short answer" to this proposition is that Williams "waived the point" when he failed to challenge these jurors either for cause or peremptorily. (T.49-50) *Jaco v. State*, 574 So.2d 625, 634 (Miss.1990). Williams cannot be heard to challenge the

composition of the jury after he failed to challenge it in any way.

In the alternative, solely for the sake of argument, the state points out that each of the jurors in question indicated that they could be fair and impartial, that the fact of these acquaintances would not affect their decision in this case. (T.7, 14-15, 25-28) The court would have been well within its discretion in denying challenges for cause to these jurors, had such challenges been made. The trial court enjoys broad discretion to determine whether a prospective juror can be impartial. *Duncan v. State*, 939 So.2d 772, 778 (Miss.2006). The Supreme Court in *Duncan* elaborated that

> [t]o the extent that any juror, because of his relationship to one of the parties, his occupation, his past experience, or whatever, would normally lean in favor of one of the parties, or be biased against the other, or one's claim or the other's defense in the lawsuit, to this extent, of course, his ability to be fair and impartial is impaired. It should also be borne in mind that jurors take their oaths and responsibilities seriously, and when a prospective juror assures the court that, despite the circumstance that raises some question as to his qualification, this will not affect his verdict, this promise is entitled to considerable deference. Harding v. Estate of Harding, 185 So.2d 452, 456 (Miss.1966); Howell v. State, 107 Miss. 568, 573, 65 So. 641, 642 (1914).
>
> 939 So.2d at 779, quoting *Scott v. Ball*, 595 So.2d 848, 850 (Miss.1992).

In any case, Williams has waived this point by failing to challenge these jurors. His second proposition has no merit.

PROPOSITION THREE:

THE TRIAL COURT DID NOT ERR IN ADMITTING STATE'S EXHIBIT 2, THE SECOND SURVEILLANCE TAPE, INTO EVIDENCE

Williams argues next that the trial court erred in admitting State's Exhibit 2, the surveillance tape which depicted the face of the man tending the marijuana plants. While

laying the predicate for the admission of this tape, the prosecutor asked Agent Umphress whether it had been "cued up ... to the time that the defendant was out there tending the plants." There was no objection to this questioning. When the prosecutor offered the videotape for admission into evidence, the following was taken:

> THE COURT: Any objection, Ms. Benson?
>
> MS. BENSON: No, but I do object to again telling them that they will see this gentleman in the picture, whereas they must determine whose picture it is.
>
> THE COURT: Jury, I trust that that it is understood that you are viewing this video making your own factual determinations that, in fact, this indeed is or is not the defendant. That's your determination to make. Any other objection?
>
> MS. BENSON: No, Your Honor.
>
> THE COURT: It will be received.
>
> (T.80-81)

This excerpt demonstrates that the court did all that the defense requested. Defense counsel stated she had no objection to the admission of the videotape, but that she did object to the jury's being told that the man on the tape was the defendant. The court then instructed the jurors that the identity of the person tending the plants was a factual issue to be determined by them.[1] The defense made no further objection.

The court effectively sustained the defendant's only objection to this exhibit and instructed the jury accordingly. No other objections are properly before this Court. *White*

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[1]Of course, the jury is presumed to have followed this instruction. *Lee v. State*, 937 So.2d 781, 785 (Miss. App. 2003),

v. State, 809 So.2d 776, 779 (Miss.App.2002), citing *Thornhill v. State*, 561 So.2d 1025, 1029 (Miss.1989) ("i]t is elementary that different grounds than the objections presented to the trial court cannot be presented for the first time on appeal"). Williams' third proposition should be denied.

PROPOSITION FOUR:

WILLIAMS' CHALLENGE TO REMARKS OF THE TRIAL JUDGE IS PROCEDURALLY BARRED

Williams' fourth issue is "whether the court erred in mentioning to the jury that the defendant had been previously convicted of a felony offense." (Brief for Appellant 23) The remarks in question were made at the beginning of trial, while the court was reading the indictments to the venire. (T.6) The defense did not object to this reading, and may not do so for the first time here. *Shelton v. State*, 445 So.2d 844, 846 (Miss.1984). Williams' fourth proposition plainly lacks merit.

PROPOSITION FIVE:

WILLIAMS' FIFTH PROPOSITION HAS NO BASIS IN THE RECORD AND IS PROCEDURALLY BARRED

Under his fifth proposition, Williams contends for the first time that his constitutional rights were violated by the agents' questioning him at his residence without administering the *Miranda* warnings. The state counters that this

On direct examination, Agent Umphress testified unequivocally that when he encountered Williams at his residence, he advised him of his rights prior to talking with him. Agent Umphress went on to testify that Williams acknowledged that he understood his rights before he made any admissions. (T.87, 94-95) This is ample proof of the administration of the *Miranda* warnings. Furthermore, there is nothing in the record to

show otherwise. Because the defense declined to file a motion to suppress the statements, no suppression hearing was conducted. The defendant's failure to put on any proof of this claim leaves Agent Umphress' testimony completely unrebutted. Morever, the defense did not object to the admission of the statements on this or any other ground. (T.87-88)

The appellate courts may act only on the basis of the official record. *Smith v. State*, 942 So.2d 308, 319 (Miss. App. 2006), citing *Saucier v. State*, 328 So.2d 355, 357 (Miss.1976). Because nothing in the record supports Williams' argument, it is not properly before this Court. *Howard v. State*, 853 So.2d 781, 797 (Miss.2003) (there was "absolutely no substantiation in the record" to support appellant's assertion that officers failed to read him his *Miranda* warnings). Furthermore, "constitutional questions not asserted at the trial level are deemed waived." *Pinkey v. State*, 757 So.2d 297, 299 (Miss.1976), quoted in *Smith*, 942 So.2d at 319. For these reasons, Williams' fifth proposition should be denied.

PROPOSITION SIX:

WILLIAMS' SIXTH PROPOSITION IS PROCEDURALLY BARRED; IN THE ALTERNATIVE, THE STATE SUBMITS THE COURT'S INSTRUCTION CURED ANY ARGUABLE HARM FROM THE PROSECUTOR'S CLOSING ARGUMENT

Williams asserts additionally that certain comments by the prosecutor during closing argument prejudiced his right to a fair trial. This argument implicates the following excerpt from the record:

> [MR. DANIELS:] So how do you believe beyond a reasonable doubt turning to the gun, this Smith & Wesson, how do you believe beyond a reasonable doubt that this pistol was his? Well, one reason is it was found in or at the nightstand on what appears to have been his side of the bed, but also because that's exactly what kind of pistol he shot Mark Lentz with. That's one reason we know beyond a reasonable

doubt–

MS. BENSON: Objection, Your Honor. Nothing has been brought out that he shot whoever.

MR. DANIELS: Your Honor, it's been stipulated in the evidence.

MR. BENSON: Only that he pled to assault.

MR. DANIELS: It's an exhibit stipulated to.

MS. BENSON: Only the assault.

THE COURT: Let me see, Mr. Daniels.

MS. BENSON: Aggravated assault.

THE COURT: Mr. Daniels, let me see it. Ladies and gentlemen of the jury, I'm going to instruct you to disregard the statement that's been made by Mr. Daniels. You will see when you return to the jury room that State's Exhibit No. 5 in the indictment involving this case in 1992, the aggravated assault, that the weapon that is used is a 9-millimeter Smith & Wesson pistol. You have heard testimony in this trial that this gun is a Smith & Wesson 9-millimeter pistol. It's referred to in this indictment by a particular serial number. There's been no proof in this case that it's one and the same gun.

Thank you. You may proceed.

BY MR. DANIELS: And I did not mean to represent that that is the same gun, but it is a Smith & Wesson pistol ....

(T.162-63)

As shown by the foregoing excerpt, the trial court effectively sustained the defendant's objection to this comments and instructed the jury to disregard them. No further action was requested. The state submits that the court's admonition, which the jury is presumed to have followed, was sufficient to remove any prejudice flowing from the prosecutor's remarks. *Lee v. State*, 937 So.2d 781, 785 (Miss.App.2003), citing *Williams*

v. State, 684 So.2d 1179, 1209 (Miss.1996); *Roundtree v. State*, 568 So.2d 1173, 1177 (Miss.1990). The defense failed to move for a mistrial after the court took this corrective action. See *Lockridge v. State*, 768 So.2d 331, 340 (Miss.App.2000). It follows that the trial judge did all that was requested of her; indeed, she did more.[2] *Robinson v. State*, 858 So.2d 887 (Miss. App. 2003). Williams' sixth proposition should be denied.

PROPOSITION SEVEN:

WILLIAMS HAS FAILED TO DEMONSTRATE THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE

Williams argues additionally that he was denied his constitutional right to effective assistance of counsel at trial. He faces formidable hurdles, summarized follows:

> 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*:

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[2]The court also granted Instruction C-1, which stated in pertinent part the following:

> Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. Any argument, statement or remark having no basis in the evidence should be disregarded by you.
>
> (C.P.22)

It is well settled that reversal is not required when such instruction is given. E.g., *Burns v. State*, 729 So.2d 203, 229 (Miss.1998); *Ormond v. State*, 599 So.2d 951, 961 (Miss.1998).

> 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 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, the 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, *Clayton v. State*, 946 So.2d 796 (Miss.796, 803 (Miss.App.2006); *Madison v.* State, 923 So.2d 252 (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). The defendant has not shown that his lawyer's performance was so deplorable as to require the court to declare a mistrial on its own motion.

Williams first cites *Old Chief v. United States*, 519 U.S. 172 (1997), for the proposition that first that his trial counsel was ineffective in failing to requested a bifurcated trial separating the issues of possession and the prior felony. Interpreting the Federal Rules of Evidence, *Old Chief* held that a district court abuses its discretion when it rejects a defendant's offer to admit to evidence of a prior conviction and instead admits the full record of a prior judgment of conviction, when the identity of nature of the prior offenses

raises the risk of prejudice to the defense. 519 So.2d at 174. The case does *not* hold that a defendant is entitled to a bifurcated proceeding; indeed, "the majority of the federal courts have ... rejected such an entitlement." *Rigby v. State*, 826 So.2d 964, 702 (Miss.2002), and cases cited therein. It follows that Williams' trial counsel cannot be faulted for failing to make a request which properly would have been denied. *Rigby*, 826 So.2d at 702. In the absence of an unprofessional lapse, Williams' first claim fails.

Williams second claim is that his trial counsel was ineffective in failing to investigate the case, call witnesses and present a defense during trial. He cannot satisfy either prong of the *Strickland* standard on this record. Therefore, this claim should be denied at this juncture. *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990).

Finally, Williams claims his counsel was ineffective in failing to ask that the trial judge be recused because of a conflict of interest. This argument is based totally on alleged facts outside this record and therefore cannot be decided on direct appeal.

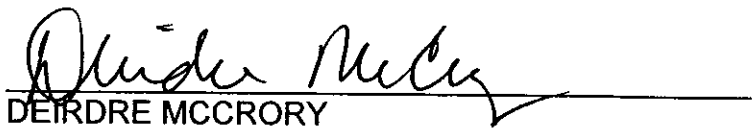
For these reasons, the arguments made in Williams' Supplemental Brief should be denied on direct appeal.

CONCLUSION

The state respectfully submits the arguments presented by Williams are without merit. Accordingly, the judgment entered against him should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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:

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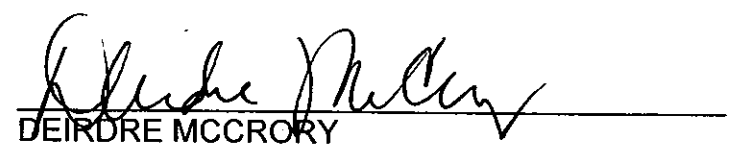
This the 23rd day of April, 2007.



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