IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2006-KA-00518-COA

CHARLES PATRICK GRAHAM — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

ORIGINAL BRIEF OF APPELLANT
APPEALED FROM THE FORREST COUNTY CIRCUIT COURT

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CERTIFICATE OF INTERESTED PARTIES

I, the undersigned counsel for the Appellant, do hereby certify that the following 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 disqualifications or recusal.

Appellant:	Charles Patrick Graham
Appellate Counsel:	Hon. Jonathan M. Farris
District Attorney:	Hon. Jon Mark Weathers
Assist. District Attorney:	Hon. Ben Saucier
Appellee Counsel:	Hon. Jim Hood
Trial Judge:	Hon. Judge Robert Helfrich

Respectfully submitted this the 8th day of November, A.D. 2006.

JONATHAN M. FARRIS

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STATEMENT OF THE CASE

On November 16, 2005 the Forrest County Grand Jury returned an indictment charging the Appellant with two counts of simple assault on a police officer. C.P.- 6. On March 14, 2006 the Appellant was tried and found guilty of both two counts of simple assault on a police officer. The trial court sentenced the Appellant to serve five (5) years on each count in the custody of the Mississippi Department of Corrections with the sentences to run consecutive to one another. C.P.- 43. On March 16, 2006 the Appellant timely filed his motion for judgment not withstanding the verdict and/or in the alternative a motion for new trial which the trial court denied. C.P.- 46, 50. On March 23, 2006 the Appellant filed a notice of appeal. C.P.-52. It is from the Jury's verdict and the trial court's refusal to grant Defendant's motion for J. N.O.V. and/or in the alternative a motion for new trial that this appeal is prosecuted.

STATEMENT OF THE FACTS

On October 3, 2005 at approximately 2:00 p.m. the Appellant was released from the Forrest County Regional Jail. At 6:00 p.m. on the same day the Appellant, who was barefooted, returned to the front entrance of the law enforcement complex housing the Forrest County Regional jail to find the front doors locked. After discovering the front doors locked the Appellant contacted the control room of the jail through an intercom system and requested he be let in so he could retrieve his personal property. Said property being his shoes. R.-93. Unfortunately, the jail was in the process of a shift change and could not accommodate the Appellant. The Appellant was instructed to return after shift change and an officer would assist him. R.-84. Unfortunately, the Appellant became angry and kicked the front doors breaking the lock. R.-86, 105. After the lock was broken the Appellant entered the building and proceeded toward the unlocked entrance to the jail located some seventy five (75) feet away from the front entrance of the law enforcement complex. R.-82.

As the Appellant made entry into the building and proceeded toward the jail entrance he walked past the main desk of the Forrest County Sheriff's Department. Seated at the front desk was Deputy Orlando Dantzler who observed the Appellant. Deputy Dantzler attempted to stop the Appellant through verbal commands but was unsuccessful. R.-113. Thereafter, Dantzler pursued the Appellant in an effort to place him under arrest but could not catch up to him. R.-95, 114.

After the Appellant came through the first entry door of the jail he was prohibited from going any further by a second entry door controlled by an electronic lock from the jail control room. R-88. At this point Deputy Dantzler caught up to the Appellant and attempted to place him under arrest but the Appellant resisted the arrest. R.-95, 96, 106-07,114. Officer Dantzler and

Jailer John Simmons subdued the Appellant and took him into custody in the jail. R-95. By all accounts the Appellant did not direct any threats or engage in any physical confrontation toward Dantzler or Simmons until they were in the process of attempting to place the Appellant under Arrest. (R.-95, 96, 130, 131, 138).

SUMMARY OF THE ARGUMENT

The trial court committed reversible error when the court allowed the State to make a substantive amendment to the indictment. Trial courts may amend the indictment to correct defects as to form but defects as to substance must be corrected by the grand jury. *Spears v. State*, 2005 WL 2496091 (Miss. Ct. App. 2005) citing *Mitchell v. State*, 739 So.2d 402,404, (Miss. Ct. App. 2004). The amendment at issue in this case is clearly one of substance which can only be made by the grand jury and not the trial court. As such reversible error was committed warranting reversal of the Appellant's convictions. See Issue I.

The trial court committed reversible error when the court granted the State's instruction S-1A which was an incorrect statement of the law. Instruction S-1A unfairly lessened the state's burden of proof as to the element of physical menace. Therefore it should not have been given and by doing so the trial court committed reversible error. This court may reverse where the instructions actually given, when taken as a whole, do not fairly announce the law and create an injustice. *Randolph v. State*, 924 So.2d 636 (Miss. Ct. App. 2006). See Issue II.

The trial court committed reversible error when the court refused defense instructions, D-4, D-5, D-6, D-7 and D-8. By refusing these instructions the trial court precluded the jury from being instructed on the lesser included offense of resisting arrest which was also the Appellant's defense theory. By doing so the trial court committed error justifying a new trial for the Appellant. See Issue III.

The trial court erred in refusing to grant a peremptory instruction and further erred in overruling Appellant's motion for directed verdict and motion for J.N.O.V./ new trial.. A request for Preemptory instruction and a Motion for Directed Verdict challenge the legal sufficiency of the evidence. *Mclain v. State, 625 So. 2d 774, 778 (Miss. 1993); Noe v. State, 616 So. 2d 298, 301 (Miss 1993); Strong v. State, 600 So.2d 199, 201 (Miss. 1992).* This Court is required to review the evidence and rule on the sufficiency of the evidence as of the time the last challenge was made to the trial court. *Mclain v. State, 625 So. 2d at 778.* The evidence presented by the State in this case was insufficient to support a conviction. No reasonable fair minded jury could find this Appellant guilty of the indicted offenses based on the evidence presented by the State. It is well within this Court's authority to disturb the verdict and render a judgment of Not Guilty or in the alternative order a new trial. See Issue IV.

The cumulative effect of the errors committed by the trial court were of such a prejudicial effect that the Appellant was prevented and deprived from receiving a fair trial. As such the Appellant's conviction should be reversed and a new trial ordered. See Issue V.

ARGUMENT

ISSUE NO. I

The trial court committed reversible error when the court allowed the State to make a substantive amendment to the indictment.

On November 16, 2005 the Appellant was indicted and charged with two counts of simple assault on a police officer. C.P.-9. Counts I and II of the Appellant's indictment read as follows:

COUNT I

. . . in Forrest County, Mississippi, on or about October 03, 2005, did unlawfully, feloniously and willfully attempt by physical menace to put Orlando Dantzler, in fear of imminent serious bodily harm by ***arming himself with a pen and bottle of bleach while*** kicking, hitting, and threatening Orlando Dantzler, when the said Orlando Dantzler, at the time in question, was a law enforcement officer employed by the Forrest County, Mississippi Sheriff s Office and acting within the scope of his duty and office, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT II

. . . in Forrest County, Mississippi, on or about October 03,2005, did unlawfully, feloniously and willfully attempt by physical menace to put John Simmons, in fear of imminent serious bodily harm by ***arming himself with a pen and bottle of bleach while*** kicking, hitting, and threatening John Simmons, when the said John Simmons, at the time in question, was a law enforcement officer employed by the Forrest County, Mississippi Sheriffs Office and acting within the scope of his duty and office, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

On the morning of the Appellant's trial the State moved to amend the indictment to delete the phrase ***"arming himself with a pen and bottle of bleach while"*** from both counts of the indictment. C.P.-12, R.- 2. As justification and explanation for the amendment the State represented to the court that the phrase was included in both counts of the indictment as a result of a scrivener's error. R.-3. However the State offered no proof or testimony in support of their explanation even though the prosecutor that presented and signed the indictment was present and participating in Appellant's trial at the time the State moved for the amendment. R.- 2-6, 8. Despite the objection of the Appellant the trial court granted the State's motion and allowed the amendment as requested by the State. R.- 6. In support of the decision to allow the amendment the circuit judge did not find the phrase in the indictment that was being deleted to be a scrivener's error but instead ruled as follows:

> THE COURT: I'm going to allow the amendment. I don't think the amendment had any affect on the charging language. I mean, we're not adding anything. We're simply deleting something. We're deleting "arming himself with a pen and a bottle of bleach." The charging portion of the indictment remains completely the same. And that is what is being deleted,"arming himself with a pen and a bottle of bleach"? R.- 6.

When the circuit judge deleted the phrase ***"arming himself with a pen and bottle of bleach while"*** he changed the substantive elements of the offense as charged by the grand jury and in essence committed reversible error. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either the prosecuting attorney or the trial judge. *Stirone v" United States*, 361 U.S. 212 (1960). As the Supreme Court stated in *Stirone*:

> "If it lies within the province of a court to change the charging words of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and with which the constitution says no person shall be held to answer, may be frittered away until its value is almost destroyed." *Stirone*, 361 U.S. at 216.

An indictment returned by the grand jury cannot be amended to change the substantive charging words except by the grand jury. *Id.* Trial courts may amend the indictment to correct defects as to form but defects as to substance must be corrected by the grand jury. *Spears v. State*, 2005 WL 2496091 (Miss.Ct.App. 2005) citing *Mitchell v. State*, 739 So.2d 402,404, (Miss. Ct. App. 2004). An amendment is one of form if the amendment is immaterial to the merits of the case and the defense will not be prejudiced by the amendment. *Pool v. State*. 764 So.2d. 440 (Miss. 2000). The test for whether an amendment will prejudice the defense is whether the defense as it originally stood would be equally available after the amendment is made. Id.

When the grand jury returned the Appellant's indictment containing the phrase "arming

himself with a pen and bottle of bleach . . ." the State was obligated to prove those facts beyond a reasonable doubt. Due process requires the State to prove each element of the offense as charged in the indictment by the grand jury beyond a reasonable doubt. *Hennington v. State*, 702 So.2d 403 (Miss. 1997). To allow the State to delete this language from the indictment defeats the essential substantive elements of the offense as charged by the grand jury and in the process omits one of the defenses otherwise available to the Defendant. Said defense being that the Defendant did not have a pen or bottle of bleach on the date of this alleged incident.

The amendment at issue in this case is clearly one of substance which can only be made by the grand jury and not the trial court. As such reversible error was committed warranting reversal of the Appellant's convictions.

ISSUE NO. II

The trial court committed reversible error when the court granted instruction S-1A.

At trial the state offered instruction S-1A to define the phrase "physical menace" as used in Counts I and II of the Appellant's indictment. The court, over the objection of the Appellant and without any supporting authority, accepted instruction S-1A as a correct statement of the law. R.-176-78. Instruction S-1A read as follows:

> "You are instructed on phase "physical menace" as used in other instructions means: a threat; or a declaration of a disposition to inflict immediate injury on another." C.P.- 27.

The definition of "physical menace" as found in state's instruction S-1A allowed the jury to find physical menace present when nothing more than threatening words are spoken which is in direct conflict with the holdings of this court. In *McDonald v. State*, 784 So. 2d 261, 270 (Miss.Ct.App. 2001) this court defined "physical menace" to mean "physical action that is intended to create fear of immediate bodily harm". In essence the *McDonald* court found

physical menace to demand something more than words. *Id.* at 267.

Instruction S-1A was an incorrect statement of the law and had the effect of unfairly lessening the state's burden of proof as to the element of physical menace. Therefore it should not have been given and by doing so the trial court committed reversible error. This court may reverse where the instructions actually given, when taken as a whole, do not fairly announce the law and create an injustice. *Randolph v. State*, 924 So.2d 636 (Miss. Ct. App. 2006).

ISSUE NO. III

The trial court committed reversible error by refusing instructions, D-4, D-5, D-6, D-7 and D-8.

At trial the Appellant's theory of defense was that he was guilty of the lesser included offense of resisting arrest instead of simple assault on a police officer. In conjunction with his defense theory the Appellant offered the following instructions to the court:

> JURY INSTRUCTION D-4
>
> The Court instructs the jury that you may find Charles Patrick Graham guilty of the lesser included offense of Resisting Arrest. A person is guilty of the crime of resisting arrest if by force, violence, or threats, or in any other manner he resists his lawful arrest.
>
> JURY INSTRUCTION D-5
>
> The Court instructs the jury that If you find from the evidence in this case beyond a reasonable doubt that on or about October 3, 2005 in Forrest County, Mississippi that Charles Patrick Graham resisted or obstructed his arrest by Forrest County Deputy Orlando Dantzler by kicking, hitting, and threatening then Charles Patrick Graham is guilty of resisting arrest and it is your sworn duty to so find. If the State has failed to prove any one or more the above listed elements beyond a reasonable doubt, then you shall find Charles Patrick Graham not guilty of Resisting Arrest.
>
> JURY INSTRUCTION D-6
>
> The Court instructs the jury that If you find from the evidence in this case beyond a reasonable doubt that on or about October 3, 2005 in Forrest County, Mississippi that Charles Patrick Graham resisted or obstructed his arrest by Forrest County Jailer John Simmons by kicking, hitting, and threatening then Charles Patrick Graham is guilty of resisting arrest and it is your sworn duty to so find. If the State has failed to prove any one or more the above listed elements beyond a reasonable doubt, then you shall find Charles Patrick Graham not guilty of Resisting Arrest.

JURY INSTRUCTION D-7

Any verdict you return must be unanimous, it must be written on a separate sheet of paper, it need not be signed, and it must be in one of the following forms.

1. If you find Charles Patrick Graham guilty of resisting arrest by Forrest County Deputy Orlando Dantzler then your verdict shall be: "WE THE JURY FIND THE DEFENDANT CHARLES PATRICK GRAHAM GUILTY OF RESISTING ARREST, COUNT I".

2. If you find Charles Patrick Graham not guilty of Resisting Arrest on Forrest County Deputy Orlando Dantzler then your verdict shall be: "WE THE JURY FIND THE DEFENDANT CHARLES PATRICK GRAHAM NOT GUILTY OF RESISTING ARREST, COUNT I".

JURY INSTRUCTION D-8

Any verdict you return must be unanimous, it must be written on a separate sheet of paper, it need not be signed, and it must be in one of the following forms.

1. If you find Charles Patrick Graham guilty of resisting arrest by Forrest County Jailer John Simmons then your verdict shall be: "WE THE JURY FIND THE DEFENDANT CHARLES PATRICK GRAHAM GUILTY OF RESISTING ARREST, COUNT II".

2. If you find Charles Patrick Graham not guilty of Resisting Arrest on Forrest County Deputy John Simmons then your verdict shall be: "WE THE JURY FIND THE DEFENDANT CHARLES PATRICK GRAHAM NOT GUILTY OF RESISTING ARREST, COUNT II".

The trial court refused each of the aforementioned instructions finding that neither the facts or the law warranted granting the instructions. R.-171-76.

By refusing the Appellant's instructions the trial court precluded the jury from being instructed on the lesser included offense of resisting arrest which was also the Appellant's defense theory. In doing so the trial court committed reversible error.

A lesser-included offense instruction is required "where a reasonable juror could not on the evidence exclude the lesser-included offense beyond a reasonable doubt." *Ramsey v. State*, 2006 WL 2947847 (Miss. Ct. App.2006) citing *Mackbee v. State*, 575 So.2d 16, 23 (Miss.1990). Whether a lesser offense instruction should be given turns on whether there exists an evidentiary

basis for it. *Ramsey v. State*, 2006 WL 2947847 (Miss. Ct. App.2006) citing *Hutchinson v. State*, 594 So.2d 17, 20 (Miss.1992).

In accordance with *Walker v. State*, 913 So.2d 198 (Miss. 2005) the Appellant would direct the court to the following testimony introduced at trial that supported the Appellant's request for the lesser included instructions of resisting arrest:

Testimony of State's Witness Robert Clark, R-95.

Q. But by your testimony, no hitting, kicking, or threatening happened until after Officer Dantzler grabbed him?

A. Right. Whenever they brought him in the jail, that's when I witnessed him resisting.

Testimony of State' s Witness Orlando Dantzler, R-114-115

Q. No physical altercation took place between you and Charles Graham until you approached him to stop him from going into the jail?

A. Yes.

Q. And at that point you were going to place him under arrest because, one, he came through the jail's front doors, broke the law, right?

A. Uh-huh (affirmative response).

Q. Two, he's screaming through the halls using profanity, right?

A. Yes.

Q. Three, he failed to comply with the verbal commands of a law enforcement officer, right?

A. Yes.

Q. And he entered the front door of the jail without authorization?

A. Correct.

Q. All four of those things are in violation of the law that you're sworn to uphold and protect; is that right?

A. Correct.

Testimony of State' s Witness Orlando Dantzler, R.-119

Q. And when you went to arrest Mr. Graham, he resisted you with force, violence, and threats, correct?

A. Correct.

Testimony of State's Witness John Simmons, R.-128

Q. What physically happened to you from the defendant's hands and feet?

A. During the handcuffing, he was kicking. He kicked me several times in the lower legs and in the knees. He was also kicking Officer Dantzler in the lower legs and knees trying to push us away from him after he was being told he was arrested.

Testimony of State's Witness John Simmons, R.-130-31

Q. You don't put somebody in handcuffs unless you're going to arrest them, right?

A. Correct.

Q. My client started fussing and fighting with y'all while y'all were in the process of handcuffing him; isn't that right?

A. Correct.

Q. And y'all were in the process of arresting him?

A. Correct.

Q. The fact of the matter is y'all were just arresting him. Y'all didn't know what you were arresting him for. You knew he was in the jail unlawfully. You knew he was screaming profanity. You knew he came in through the jail unlawfully. And y'all were trying to stop him and take him into custody and would figure out what charges to put on him later; isn't that true?

A. Well, sir, I don't do the arresting. I only do the aftermath. The deputy actually places the charges on him.

Q. But at that point in time y'all were arresting him for something?

A. I was assisting the deputy, the road deputy.

Q. Well, you just testified that y'all were handcuffing him in the process of --

A. Correct, I was assisting that officer --

Q. -- arresting him.

A. -- in the process of arresting him.

Q. Y'all were giving him verbal commands to comply, right?

A. Correct.

Q. To take him into custody, right?

A. Correct.

Q. Which taking into custody precipitates arrest, correct?

A. Correct.

Q. At that point when y'all were attempting to take him into custody is when this physical altercation started?

A. Correct.

Testimony of State's Witness Chad Hudson, R.-154

A. When I arrived, at the time they were still placing him in handcuffs.

Q. And arresting him?

A. At that time they were, yes.

Q. And he was resisting?

A. Yes.

As this court can see there was ample testimonial evidence introduced at trial to justify the trial court instructing the jury on the lesser included offense of resisting arrest. As set forth above each officer testified that no threats or physical altercation occurred until the officers were in the process of arresting the Appellant. *Davis v. State*, 2005 W.L. 2739882

(Miss. Ct. App. 2005) (citing *Odem v. State*, 881 So.2d 940 (Miss. Ct. App. 2004) (holding resisting arrest is a lesser included offense of simple assault when the defendant is being arrested when the incident occurs.). "Common sense dictates that if someone resists too strongly it becomes assault and therefor, resisting arrest is clearly a lesser included instruction of simple assault of simple assault on an officer." *Clayborne v. State*, 739 So.2d 495 (Miss. Ct. App. 1999) citing *Murrell v. State*, 655 So.2d 881 (Miss. 1995) (holding that resisting arrest is a lesser included offense of assault on an officer).

Not only should the trial court have instructed the jury on resisting arrest as a lesser included offense but also because it was the defendant's theory of the case. The trial court is required to instruct the jury on the defendant's theory of the case even if the evidence that supports the theory is weak, inconsistent, or of doubtful credibility. *Smith v. State*, 907 So.2d 389 (Miss. Ct. App.2005) (citing *Ellis v. State*, 778 So.2d 114, 118 (Miss.2000) (citing Giles v. State, 650 So.2d 846, 854 (Miss.1995) and *Manuel v. State*, 667 So.2d 590, 593 (Miss. 1995).

The trial court was obligated to grant Appellant's instructions D-4, D-5, D-6, D-7 and D-8. The failure of the trial court to do so was reversible error. The Appellant's conviction should be overturned and a new trial ordered.

ISSUE NO. IV.

The trial court erred in refusing to grant a directed verdict, a peremptory instruction and erred in denying appellant's motion for J.N.O.V. and the alternative a Motion for a New Trial.

The trial court erred in refusing to grant a Appellant's motion for directed verdict, request for a peremptory instruction and in denying Appellant's motion for J.N.O.V. and in the alternative motion for new trial. A request for peremptory instruction and a motion for J.N.O.V.

challenges the legal sufficiency of the evidence. *Mclain v. State,* 625 So. 2d 774, 778 (Miss. 1993)*; Noe v. State, 616* So. 2d 298, 301 (Miss 1993); *Strong v. State,* 600 So.2d 199, 201 (Miss. 1992). This Court is required to review the evidence and a ruling on it's sufficiency as of the time the last challenge was made to the trial court. *Mclain v. State,* 625 So. 2d at 778. The last challenge to the sufficiency of the evidence was Appellant's motion for J.N.O.V.

The standard of review is that all evidence is viewed in the light most favorable to the State, which also receives the benefit of any favorable inferences which may be reasonably draw from the evidence. *Mclain v. State,* 625 So. at 778. All credible evidence consistent with the guilty verdict is accepted as true, with issues of weight and credibility resolved by the jury. *Mclain v. State,* 625 So. 2d at 778. This Court can . . . reverse where a reasonable fair-minded juror could . . . find the accused not guilty. *Mclain v. State,* 625 So. 2d at 778*; Harvison v. State,* 492 So. 2d 365, 370 (Miss. 1986); *Fisher v. State,* 481 So. 2d. 203, 212 (Miss 1985).

At trial the State failed to present sufficient evidence to prove the Appellant willfully attempted by physical menace to put Officer Dantzler and Officer Simmons in fear of imminent serious bodily harm. As set forth previously the testimony clearly showed that the Appellant was resisting arrest and not attempting to assault these officers. By all accounts neither one of these officers suffered any serious bodily harm or injuries. The evidence was so deficient that reasonable jurors could not have found the Appellant guilty of simple assault of a police officer.

ISSUE V.
The cumulative and prejudicial effect of the errors committed by the trial court prevented the Defendant from receiving a fair trial.

"Individual errors not reversible in themselves may combine with other errors to make up reversible error." *Wilborn v. State,* 608 So.2d 703, 705 (Miss. 1992). The question that must be asked in these instances is whether the defendant was deprived of a fundamentally fair and

impartial trial as a result of the cumulative effect of all the errors that were committed at trial. *Id.* Each of the aforementioned issues raised by Appellant when considered together rise to the level of reversible error. The cumulative effect of the errors raised by the Appellant herein were of such a prejudicial effect that the Appellant was prevented and deprived from receiving a fair trial. As such the Appellant's conviction should be reversed and a new trial ordered.

CONCLUSION

Based on the aforementioned assignments of error the Appellant's conviction should be reversed and rendered and/or in the alternative a new trial ordered.

Respectfully submitted,

Charles Graham, Appellant

BY: _____
JONATHAN M. FARRIS
Attorney for Appellant/Defendant

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date mailed by United States Mail postage pre-paid or hand delivered a true and correct copy of the brief on behalf of the Appellant to the Supreme Court Clerk, Mrs. Betty Sephton, Post Office Box 249, Jackson, MS 39205; to the Honorable Jim Hood, Attorney General, Post Office Box 220, Jackson, MS 39205; to the Honorable John Mark Weathers, Forrest County District Attorney, Hattiesburg, MS 39401(Via Hand Delivery); to the Honorable Judge Robert Helfrich, Forrest County Circuit Court Judge, Hattiesburg, MS 39401.

DATED this, the 8th day of November, A.D., 2006.

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CERTIFICATE OF FILING

I, the undersigned, do hereby certify that I have this date mailed by United States Mail postage pre-paid the original brief on behalf of the appellant along with three true and correct copies of the same for filing to the Clerk of the Supreme Court of Mississippi at Post Office Box 249, Jackson, MS 39205.

DATED this, the 8th day of November, A.D., 2006.

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