IN THE COURT OF APPEALS OF THE

STATE OF MISSISSIPPI

JAMES MICHAEL STRICKLAND — APPELLANT

VERSUS — NO. 2006-KA-01573

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF LOWNDES COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

RESPECTFULLY SUBMITTED,

JAMES MICHAEL STRICKLAND

BY: _____
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPELLANT'S ISSUE NUMBER ONE:

APPELLANT'S ISSUE NUMBER TWO:

APPELLANT'S ISSUE NUMBER THREE:

STATEMENT OF ISSUES

COMES NOW the Appellant, JAMES MICHAEL STRICKLAND, by and through counsel, and files this, his Statement of Issues, respectfully showing as follows:

ISSUE NUMBER ONE:

THE LOWER COURT ERRED IN ALLOWING THE STATE TO STRIKE BLACK JURORS OFF THE VENIRE PANEL WITHOUT VALID RACE-NEUTRAL REASONS.

ISSUE NUMBER TWO:

THE LOWER COURT ERRED IN ALLOWING APPELLANT'S PRIOR CONVICTION FOR THEFT OF PROPERTY TO BE USED BY THE STATE FOR IMPEACHMENT PURPOSES.

ISSUE NUMBER THREE:

THAT APPELLANT'S INSTRUCTION D-2 SHOULD HAVE BEEN GIVEN.

RESPECTFULLY SUBMITTED,

JAMES MICHAEL STRICKLAND,
APPELLANT

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STATEMENT OF THE CASE

JAMES MICHAEL STRICKLAND, the Appellant herein and referred hereafter as "Strickland", was arrested and charged for the offense of Armed Robbery on the 10th day of May, 2000 in Lowndes County, Mississippi.

He was subsequently indicted on said charge by the Grand Jury of Lowndes County, Mississippi for the aforementioned charge on August 18, 2000. (C.P. Page 27)

Strickland was tried on August 28-29, 2006 in the Circuit Court of Lowndes County, Mississippi and the jury found Strickland guilty of the crime of Armed Robbery. (R. Pages 231)

Strickland was sentenced on August 29, 2005 and was given 30 years to serve with the Mississippi Department of Corrections as a habitual offender. (R. Pages 258-260)

Strickland filed his Motion for JNOV or in the Alternative a New Trial on August 31, 2006 and the lower court denied Strickland's Motion for JNOV or in the Alternative a New Trial on August 31, 2006. (C.P. Pages 142-144)

Strickland requested a bail hearing that was set on September 1, 2006 (C. P. Page 145)and denied by the lower court on November 7, 2006.

Strickland filed and perfected his appeal to this Court on September 15, 2006.

STATEMENT OF THE FACTS

At trial his trial, James Michael Strickland, hereinafter referred to as "Strickland", objected when seven of the eleven of the State's peremptory strikes were against members of the black race. Strickland moved for a Batson Hearing because of these strikes, however the lower court held that there was not sufficient evidence to show that the State was exercising its peremptory challenges in a racial manner. Strickland made a continuing objection. (R. Pages 67-69)

On May 10, 2000, in Lowndes County, Mississippi, Amy Wright, hereinafter referred to as "Wright" was working as a night clerk at Penny Ridge Grocery. The store was owned by Cecil McGahey. (R. Page 83)

A small silver car pulled up with five people in it, three men and two women. Two of the men entered the store and went to the beer cooler. (R. Page 85) Wright identified Strickland as one of the two men. (R. Page 87)

Wright asked for I.D. of both men when they attempted to purchase beer. (R. Page 90) Wright testified that Strickland picked up her purse and held it and said that she would give them the beer now. The younger man slapped Wright and pulled a gun on her. (R. Page 92)

The younger man began to beat on the cash register while he continued to point the gun at Wright. (R. Page 93)

Wright alleged that Strickland told the gun man to "just shoot the bitch", and Wright claimed he told the gun man to do this approximately six times. (R. Page 95)

The men left with the cash register, one six pack of beer and Wright's purse. (R. Page 97)

On cross-examination Wright admitted that she would not talk to Strickland's Attorney because she did not want to help Strickland in any way and that she was very emotionally tied to this case. (R. Page 102)

That the two men appeared not to have "slept in days" and that Strickland, other than hold her purse while she was trying to get it back, never physically touched Wright. (R. Page 105) Both men left the store together.

Donnie Elkin, a Columbus City Police man testified that he received a 911 notification of the robbery at Penny Ridge and the car description. (R. Page 117) He saw such a car and turn around to check it out and as he pursued the car in question he saw a cash register tossed out. (R. Page 119)

The police stopped the car after a chase, (R. Page 124) and Strickland was in the car when it was stopped. (R. Page 129)

Rhonda Sanders, a city of Columbus Police Officer testified that she was the one who located the cash register. (R. Page 130)

Harold Pounders, a private citizen saw what later was determined to be a holster for a small pistol, thrown from the car. (R. Page 137)

Kevin Petrie, a Lowndes County Sheriff Department Investigator testified that he recovered from the car a six-pack of beer and personal items that were Wright's. (R. Page 141)

The State rested its case in chief and Strickland made a Motion for a Directed Verdict, which was denied by the lower court. (R. Pages 149-150)

A Peterson Hearing was held by the lower court which allowed, over objection, a prior conviction of Strickland that was over ten years prior to his trial in the lower court in the case sub judice.

Strickland testified in his defense that he was with four other individuals on the day in question and that they had gone to Penny Ridge Grocery. (R. Page 175)

His brother had given Jonathan Burnett a small .22 caliber pistol that was not loaded. (R. Page 176)

They had gone to Penny Ridge to purchase some beer and Strickland and Burnett went into the store. (R. Pages 177-179)

Strickland and Wright argued over I.D. to purchase the beer and Burnett reached across and slapped Wright and pulled the gun and that Strickland had no idea what Burnett was going to do. (R. Pages 180-181)

Strickland admitted that he had grabbed Wright's purse and that he took it when they left, and that he was in the rear passenger area of the vehicle. (R. Page 182)

On Cross-Examination Strickland testified that he had given a different version of what happened to the police so that they would

give him a bond. (R. Page 183)

Strickland denied telling Burnett to shoot Wright and that he had told Burnett to put the gun away. (R. Pages 186-187)

Strickland told Burnett to bring the cash register so that they could leave. (R. Page 188) Strickland admitted that he had been in trouble before and was freaked out by Burnett's actions and just wanted to leave. (R. Page 190)

On Re-Direct Examination Strickland testified that he had no control over the other four persons in the car and that he did not intend to rob anyone and that he was "scared to death" of what was happening. (R. Pages 196)

Strickland admitted that he had been drinking all day that day and that he had not directed any obscenity toward Wright. (R. Page 198)

Strickland rested his case. (R. Page 200)

The State rested it's case finally. (R. Page 200)

The lower court refused Strickland's Instruction D-2 over his objection which provided a lesser charge of robbery for the jury to consider. (R. Pages 200-207)

The jury convicted Strickland on the charge of Armed Robbery, (R. Page 231) but failed to unanimously agree on a life sentence. (R. Page 253)

On August 29, 2006 the lower court sentenced Strickland to thirty (30) years with the Mississippi Department of Corrections. (R. Pages 258)

Strickland's motion for new trial or in the alterative a JNOV was denied and he has appealed claiming serious and fatal errors committed by the lower court that requires reversal of his conviction.

SUMMARY OF ARGUMENT

ISSUE NUMBER ONE:

THE LOWER COURT ERRED IN ALLOWING THE STATE TO STRIKE BLACK JURORS OFF THE VENIRE PANEL WITHOUT VALID RACE-NEUTRAL REASONS.

Strickland bases his argument here on the fact that the State struck seven black venire panel members without valid race-neutral reasons and the lower court failed to make independent inquiry into the reasons for the State strikes.

ISSUE NUMBER TWO:

THE LOWER COURT ERRED IN ALLOWING APPELLANT'S PRIOR CONVICTION FOR THEFT OF PROPERTY TO BE USED BY THE STATE FOR IMPEACHMENT PURPOSES.

Strickland bases his argument here on the fact that his prior conviction was over fifteen years old and therefore was outside the statutory time limit of ten years and that the lower court failed to properly apply the 5 Peterson Factors and the admission of Strickland's prior conviction probative value was outweighed by its prejudicial effect.

ISSUE NUMBER THREE:

THAT APPELLANT'S INSTRUCTION D-2 SHOULD HAVE BEEN GIVEN.

Strickland bases his argument here on fact that the denial of his Instruction D-2 denied him a fair trial. That the facts in his

case merited the granting of D-2, which was a lesser included offense instruction, in that there was evidentiary proof in support thereof and that applicable Mississippi law provided sufficient support for the granting of a lesser included offense instruction in the case sub judice. That even if the aforementioned did not apply, that the Doctrine of Lesser non-included Offenses applied, whereby due to the vast disparity in maximum sentences Strickland was entitled to present the jury a less severe sentence option.

ARGUMENT:

ISSUE NUMBER ONE:

THE LOWER COURT ERRED IN ALLOWING THE STATE TO STRIKE BLACK JURORS OFF THE VENIRE PANEL WITHOUT VALID RACE-NEUTRAL REASONS.

In the instant case the State, using eleven strikes, struck seven black venire panel members on the venire list, the Appellant objected and the lower court ruled that there was not sufficient evidence to show that the State was exercising its peremptory challenges in a racial manner. (R. Pages 67-69) The lower court did not even require the State to provide any "race-neutral" reasons for these seven strikes.

Strickland respectfully submits that the State must give "race-neutral" reasons that are sufficient to meet the requirements of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and the State's actions were meant merely to remove blacks from the jury pool and not for legitimate reasons.

In Batson the United States Supreme Court articulated the elements necessary to establish a prima facie case of purposeful racial discrimination in the use of peremptory strikes utilized during jury selection. A defendant must show must show:

1. That he is a member of a "cognizable racial group";

2. That the prosecutor has exercised peremptory challenges toward the elimination of veniremen of his race, and

3. That facts and circumstances infer that the prosecutor

used his peremptory challenges for the purpose of striking minorities.

Appellant respectfully submits that at his trial he had shown that a prima facie case of purposeful discrimination existed, specifically, that the State used peremptory challenges on black jurors in such a manner that gave rise to an inference of purposeful racial discrimination, meeting the second and third elements of Batson and the first element has been eliminated by the Unites States Supreme Court in the case of Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) where the Supreme Court held that a criminal defendant may object to racial exclusions of jurors by peremptory challenges whether or not the defendant and the excluded jurors are of the same race.

Having met his initial huddle the lower court was mandated to direct the State to provide "race-neutral" reasons for it's strikes, however the lower court failed to follow this mandate.

As required by our law the lower court was under an affirmative duty to "...make an on-the-record, factual determination, of the merits of the reasons cited by the State for its use of peremptory challenges against potential jurors." Hatten v. State, 628 So.2d 294, 298 (Miss.1993), in the instant case that was not done.

In Puckett v. State, (Miss. 1999) 1999 WL 161310, (Miss. 1999)citing Hatten this Court stated:

> "...although the trial judge then ruled on each challenged juror, the trial judge did not make an on-the-record factual determination as to his ruling or independent inquiry concerning each juror as required by Hatten v. State, 628 So.2d 294 (Miss.1993).

Respectfully the lower court did not follow the dictates of this Court and failed to follow the proper procedures to insure the State was fairly presenting "race-neutral" reasons for striking the aforementioned jurors.

Appellant respectfully submits, based on the aforementioned law that the lower court in the instant case committed reversible error in allowing the State to improperly strike Black venire members without being directed to provide proper race-neutral reasons.

Strickland was not entitled to a perfect trial, but he was entitled to a fair one which include's having a jury of his peers and not one where the State was allowed to strike potential jurors merely because of the color of their skin and by being denied such he is now entitled to have his conviction reversed.

ISSUE NUMBER TWO:

THE LOWER COURT ERRED IN ALLOWING APPELLANT'S PRIOR CONVICTION FOR THEFT OF PROPERTY TO BE USED BY THE STATE FOR IMPEACHMENT PURPOSES.

Impeachment of a witness in the State of Mississippi is controlled by Rule 609 of the Mississippi Rules of Evidence which states in part:

609 IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

> **(a) General Rule.** For the purpose of attacking the credibility of a witness, (1)evidence that (A) a nonparty witness has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and (B) a party has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the party; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
>
> **(b) Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, Whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect.

In the instant case the State sought permission of the lower court to use Appellant's March 12, 1993 conviction for theft of property, 2nd Degree, for impeachment purposes, to which Strickland objected citing that said conviction was over ten years old,

however the lower court allowed said conviction in even though Strickland had served only one year and had been released. (R. Pages 152-62, R.E. Pages 20-30)

Under Rule 609(a) crimes are divided into two types: felony-grade convictions, which may be used for impeachment purposes, provided the lower court first makes an on-the-record determination using the five factors as outlined in Peterson v. State, 518 So.2d 632 (Miss.1987), that the probative value of the prior conviction outweighs the prejudicial effects before the witness may be impeached.

And the second type concerns crimes involving dishonesty or a false statement, whether felonies or misdemeanors.

"The phrase "dishonesty or false statement" in 609(a)(2) means crimes such as perjury or subornation of perjury, false statement, fraud, embezzlement, false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." (Comment Rule 609) (R. Page 239, R.E. Page 30)

Felony theft is not a crime "involving dishonesty or false statement." Coursey v. Broadhurst, 888 F.2d 338, 342 (5th Cir.1989). This Court in Blackman v. State, 659 So.2d 583,(Miss. 1995) adopted this holding, stating:

> "While there is a split of authority on the question whether theft crimes such as larceny and shoplifting should be categorized as crimen falsi,

historically they have not been and this Court has adopted the majority view that they are not." (At Page 585)

Since Strickland's theft conviction could not come in "automatically" under Rule 609 (a)(2) as a crimen falsi type crime the time limit of ten years as provided under Rule 609 (b) was in effect. The State recognized that Strickland's theft conviction and service of sentence was outside the ten year limit, and that while the State had no case authority for allowing this conviction in, the lower court still allowed the conviction in for impeachment purposes.

The lower court based it decision to allow the conviction in on the sentence, not the conviction date or the release from confinement, which was only a year. (R. Pages 152-62, R.E. Pages 20-30) The lower court had to make a on the record determination of admissibility under Rule 609 (a)(1) as required by Peterson.

However, the State first has a threshold burden of establishing prima facie that the prior conviction has probative value. Johnson v. Fargo, 604 So.2d 306 (Miss.1992)

The balancing test of Rule 609(a)(1), as elaborated upon in Peterson, involves the consideration of factors which originated in a federal case, Gordon v. United States, 383 F.2d 936 (D.C.Cir.1967)

The five Peterson factors are as follows:

(1) The impeachment value of the prior crime.

(2) The point in time of the conviction and the witness' subsequent history.

(3) The similarity between the past crime and the charged crime.

(4) The importance of the defendant's testimony.

(5) The centrality of the credibility issue.

An on-the-record determination, applying these five factors is required of a 609 (a)(1) type crime. There must be a showing that the probative value of the prior conviction outweighs the prejudicial effects in order to properly admit evidence of the conviction.

In the instant case the lower court held that Strickland's prior conviction would be used for impeachment purposes stating:

> "I have, in fact, gone over the Peterson factors; that is, the impeachment value of the prior crime, the point in time between the conviction and his subsequent history, the similarity between the past crime and the charged crime, the importance of his testimony, and the centrality of the credibility issue. I find that all of these factors weigh in favor of allowing impeachment with this particular crime and not the other two, which has been marked as State's Exhibit A and State's Exhibit B. Your eloquent argument on B to the contrary." (R. Page 161, R.E. Page 29)

Respectfully Appellant would submit that the lower court evaluation process of the five Peterson factors to the facts of the instant case were in error. Reviewing each factor in turn it is obvious that allowing the State to impeach with Strickland's prior theft conviction was error.

I. The impeachment value of the prior crime.

At trial Appellant was being tried for the crime of armed

robbery, the impeaching crime was theft. This crime has little, if any, impeachment value. Accordingly this factor weighs against the admissibility of the conviction.

II. The point in time of the conviction and the witness' subsequent history.

At trial the lower court allowed this conviction even though it occurred well out of the ten year limit as specified in Rule 609. The offense had occurred over 13 years prior to the trial in the instant case. This was not a "fresh" crime. Accordingly, this factor weighs against the admissibility of the conviction.

III. The similarity between the past crime and the charged crime.

There is none, so this factor weighs in favor of admissibility of the conviction.

IV. The importance of the defendant's testimony.

Strickland was the only witness in his defense. Rule 609(a)(1) aids in the search for truth by insuring that important testimony from defendants on trial will not be excluded because they fear the prejudicial effect that a previous conviction might have on the jury. The importance of Strickland's testimony weighs against the admissibility of the conviction.

V. The centrality of the credibility issue.

Since Appellant's defense either stands or falls based on his credibility, the evidence which bears on his credibility is of the utmost importance. The nature of Stricklan's defense heightens the importance of his credibility since in this case, he is the

only witness who can establish his defense. The importance of his credibility to the particular facts of this case weigh in favor of the admissibility of his prior conviction, but only to the extent, if any, that his prior conviction reflects adversely on his credibility, and since theft is not a crime of dishonesty, it has no reflection on his credibility.

Strickland would submit that Peterson and all subsequent cases would dictate that the prejudicial effect of allowing his impeachment with his prior conviction for theft far outweighed its probative value and "[w]here admission of evidence of a prior conviction is manifestly prejudicial, this Court will reverse and remand or remand for a finding pursuant to M.R.E. 609(a)(1) if none has been made. Jordan v. State, 592 So.2d 522, 523 (Miss.1991) Respectfully, manifest prejudice occurred and demand reversal.

The State had a very strong case and this prior offense of Strickland was not necessary and in the interest of fairness the lower court should have stepped in to prevent this highly prejudicial, and not probative, conviction from being presented to the jury. Where Strickland had to admit to the conviction when he testified.

The State here is seeking only to prejudice Strickland and not engage in proper impeachment. This conduct is improper and demands reversal.

ISSUE NUMBER THREE:

THAT APPELLANT'S INSTRUCTION D-2 SHOULD HAVE BEEN GIVEN.

Strickland submits that his jury instruction D-2 should have been given and the refusal to do so by the lower court denied the jury proper legal instruction.

Instruction Defendants D-2 reads as follows:

> "THE COURT INSTRUCTS THE JURY that if you find from the evidence, beyond a reasonable doubt, that the Defendant, JAMES MICHAEL STRICKLAND, did not commit the crime of armed robbery on May 10, 2000 at the Penny Ridge Grocery, but instead you find beyond a reasonable doubt that he did feloniously take the personal property of Amy Wright, to-wit her purse, in her presence and off her person and against her will, by violence to her person or by putting her in fear of some immediate injury to her person, you shall find him guilty of the lesser included offense of robbery.
>
> (C.P. Page 122)(R.E. Page 31)

In Howell v. State, 860.2d 704 (Miss.2003) the Mississippi Supreme Court set the standard of review for the granting or denial of jury instruction, stating:

> "[T]he instructions are to be read together as a whole, with no one instruction to be read alone or taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case." (At page 761)

Here the lower court denied Strickland's instruction that represented a major part of his defense, a defense that consisted of his involvement in the alleged armed robbery was at worse robbery when he took Wright's purse from the scene and that he had no direct involvement in the actions of Burnett who committed the

armed robbery without Strickland's help or consent.

Strickland has a threshold question that must be addressed and answered. In Davis v. State, 684 So.2d 643 (Miss.1996) the following rule was established:

> "If a 'rational' or a reasonable jury could find [the defendant] not guilty of the principal offense charged in the indictment yet guilty of the lesser-included offense,' then the lesser included offense instruction should be granted. A lesser included offense instruction is warranted only where there is an evidentiary basis for it." (At Pages 656-657)

In the case sub judice, Strickland was a spectator to Burnett's armed robbery and his only crime was to take Wright's purse by use of physical force while the armed robbery was occurring, which constitutes robbery.

Obviously, to be granted a lesser included offense instruction there must be a lesser included offense to the main charged crime. In Sanders V. State, 479 So.2d 1097 (Miss.1985), the Mississippi Supreme Court created the test to establish whether one crime was a lesser included crime of another:

> "[I]n order to authorize [a lesser-included-offense] instruction the more serious offense must include all the elements of the lesser offense, that is, it is impossible to commit the greater offense without at the same time committing the lesser included offense." (At Page 1108)

There can be no question that robbery is a lesser included offense to armed robbery applying the Sanders Test.

The lower court based it denial of Defendant's D-2 on the alleged fact that the purse of Wright was not shown to be taken after the display of the weapon by Burnett and therefore the lesser

included offense instruction be denied. (R. Page 206)(R.E. Page 34)

Unfortunately the aforementioned is an incorrect assumption and not supported by the law. "...[A]n accused is entitled to have an instruction on his theory of the case if there is foundation in evidence, even though the evidence might be weak, insufficient, inconsistent, or of doubtful credibility, and even though the sole testimony in support of the defense is the defendant's own testimony." Welch v. State, 566 So.2d 680, 684 (Miss.1990)

Strickland was not acting in common purpose with Burnett in the armed robbery and was therefore entitled to his instruction of a lesser included offense for consideration by the jury, which then would have to decide whether or not that sufficient proof had been presented to support a verdict of guilty of robbery instead of armed robbery.

The lower court took an all or nothing position, saying that "[Strickland]'s either guilty of armed robbery or nothing". (R. Page 206, R. E. Page 34) He deserved his lesser included offense because of the likelihood that the jury was placed in a position of finding him guilty due to no other option that would have met the fact situation.

Strickland would also argue that the Doctrine of Lesser, Non-Included Offense could be applied due to the enormous disparity in maximum punishments. In Griffin v. State, 533 So.2d 444 (Miss.1988), the Mississippi Supreme Court pronounced the

aforementioned doctrine whereby an instruction would be given on "...an offense that is not included within the charged offense but which arose out of the same operative facts, was the enormous disparity in maximum punishments in the two potential offenses in that case." (At Page 447) Here the maximum sentence for armed robbery is 3 years to life in prison, which as a habitual offender Strickland was facing without benefit of parol or early release, while the maximum sentence for the robbery was a maximum of 15 years with no minimum sentence.

Strickland's Jury Instruction D-2 should have been granted and the denial by the lower court constituted reversible error. Strickland was entitled to present his theory of the case to the jury as long as there is some evidentiary basis, "even if the evidence is insufficient or of doubtful credibility," Craig v. State, 660 So.2d 1298, 1301 and even though the sole testimony in support of the defense is the defendant's own testimony." Welch v. State, 566 So.2d 680, 684 (Miss.1990).

CONCLUSION

Based upon the errors committed by the Circuit Court of Lowndes County, Mississippi this Court should reverse and render the conviction of Appellant, JAMES MICHAEL STRICKLAND, or in the alternative, reverse and remand with Appellant being granted a new trial.

CERTIFICATE OF SERVICE

I, MOSE LEE SUDDUTH, JR., Attorney for Appellant, JAMES MICHAEL STRICKLAND, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the following:

BRIEF OF APPELLANT

to the following at their usual office addresses:

Honorable Lee J. Howard, Circuit Judge

Honorable Forrest Allgood, District Attorney

Honorable Billy Gore, Assistant Attorney General

SO CERTIFIED on this the 4th day of March, A. D., 2007

MOSE LEE SUDDUTH, JR.
ATTORNEY FOR APPELLANT