

### CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. Their representations are made in order that the Justices of the Supreme Court and/or the Justices of the Court of Appeals may evaluate possible disqualification or recusal.

1. Alvin Robinson - Appellant
2. Edward J. Currie, Jr. - Attorney for Appellees  
William W. McKinley, Jr. - Attorney for Appellees
3. Mahalie Nelson - Appellee
4. Hill City Oil Company, Inc. - Appellee
5. Honorable Bobby DeLaughter, Hinds County Circuit Court Judge
6. John R. Reeves, Attorney for Appellant

  
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WILLIAM W. McKINLEY, JR.

**2007-CA-00320**

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### **STATEMENT OF THE ISSUES**

1. The Trial Court Properly Granted Summary Judgment in Favor of the Appellees as the Appellees are Immune Pursuant to the Qualified Privilege for Communications with Law Enforcement for the Legitimate Purpose of Bringing a Thief to Justice and Did Not Institute Criminal Proceedings Against Robinson.

## STATEMENT OF FACTS

On the morning of July 17, 2001, a customer at the Jubilee Chevron, Denise Bell, inadvertently left her wallet on the cashier's counter. (R. 123, 240). Ms. Bell left the store and subsequently realized she was missing her wallet and returned to retrieve it. Her wallet was no longer there. (R. 342-343). Mahalie Nelson, the cashier, did not see anyone take the wallet and was not aware that it had been stolen. (R. 123,342). However, Ms. Bell, Mahalie Nelson and two other employees of the Jubilee Chevron reviewed the store's surveillance video tape which depicted Ms. Bell's wallet on the counter and an African-American male taking it. (R. 342-343, 359-360). Mahalie Nelson indicated that she thought she recognized the man as a regular customer, but did not know his name. (R. 117-118). One of the Jubilee employees replied, "Call the police," and Ms. Bell, the customer, did so. (R. 361-362). Madison Police Officer Dennis Davenport was dispatched and arrived at the store at noon. (R. 124). After receiving this information from these witnesses, Officer Davenport instructed Mahalie Nelson that "when this guy from this video comes back in this store, you need to call the Police Department. We need to question him about the wallet." ( R. 124). The police department also took the videotapes in question. (R. 110-111).

The following day, the individual Mahalie Nelson thought was the individual depicted in the video tape entered the store. (R. 124). As Ms. Nelson testified, she hesitated about calling the police, but did so as instructed by Officer Davenport, saying to herself, "Well, if he didn't get it, he can prove that he didn't." (R. 124). Ms. Nelson informed the police dispatcher, "the guy that was in the store from the video tape has entered the store, regarding the wallet that was taken from the store here yesterday." ( R. 124). Nelson told

the dispatcher that "the man had dreadlocks, had exited the store and was in the back of a blue Ford truck." (R. 124). On July 18, 2001, pursuant to the complaint filed by the victim, Alvin Robinson was arrested and charged with grand larceny by the Madison Police Department. (R. 241). The arrest and charge was for the theft of a wallet belonging to Denise Bell from the Jubilee Chevron on July 17, 2001. (R. 323). Alvin Robinson was indicted for grand larceny, as a habitual offender.<sup>1</sup> (R. 280 - 284). The evidence which formed the basis of the grand jury's indictment included the complaint of Denise Bell, the statement of Mahalie Nelson, officer identification that they believed Robinson to be the man on the video tape, along with the Assistant District Attorney's comparison of Mr. Robinson and the man depicted on the video tape. (R. 365-366). Subsequently, the Circuit Court of Madison County approved the prosecution's entry of a *nolle prosequi*. (R. 372).

The Appellant subsequently filed the civil action against Nelson and her employer, Hill City, asserting liability on malicious prosecution, false imprisonment, intentional infliction of emotional distress, negligence and gross negligence.

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<sup>1</sup>Alvin Robinson had previously been convicted of the crime of possession of cocaine on August 3, 1992 and sentenced to 10 years and the crime of aggravated assault on July 18, 1984 for which he was sentenced to 5 years.

## SUMMARY OF THE ARGUMENT

The central issue in this appeal of this case revisits the question "are citizens protected by a qualified privilege for statements made to a law enforcement officer investigating a criminal complaint, filed by someone else?" *Downtown Grill, Inc. v. Connell*, 721 So. 2d 1113 (Miss. 1998). As both the Mississippi Supreme Court and the Mississippi Court of Appeals have repeatedly ruled, "a citizen has a privilege to start the criminal law into action by complaints to the proper officials so long as one acts either in good faith, i.e., for a legitimate purpose, or with reasonable grounds to believe that the person proceeded against may be guilty of the offense charged." *Id.*; *Benjamin v. Hooper Electronic Supply Co., Inc.*, 568 So.2d 1182, 1887 (Miss. 1990); *Bester v. Clark*, NO. 2006-CA-00168-COA at ¶ 10, (rehearing denied September 4, 2007).

In the present case, the Plaintiff conceded to the trial court that "there is no evidence whatever that even hints that Nelson was doing anything other than pursuing a legitimate purpose - attempting to bring a thief to justice." (R. 292). There is no genuine issue of material fact but that Mahalie Nelson is protected by the qualified privilege for her communications with law enforcement in which she identified Robinson as the man she believed was depicted on the surveillance videotape which captured the crime. The trial court's decision granting summary judgment should be affirmed, on all claims, as Robinson presented no proof to pierce the qualified privilege of the Appellees.

In addition, there is no evidence to support Robinson's contention that Appellees instituted proceedings against him. It is uncontested that the Complainant was the victim of the crime who had her wallet stolen, not the owners of the business where the crime



took place. Finally, there is no dispute that the Appellees never arrested and detained Robinson. Instead, it is undisputed that Robinson was arrested and jailed, on the first occasion, by the Ridgeland police. The first period of detention, lasting one day, is also barred by the statute of limitations. The second period of imprisonment, following Robinson's indictment, was by virtue of legal process duly issued by a court or other official with jurisdiction for which no claim of false imprisonment may lie. *King v. Weaver Pants Corp.*, 127 So. 2d 718, 719 (Miss. 1930).

For these reasons, the judgment below should be affirmed.

## **ARGUMENT**

As a prefatory matter it should be noted that the Appellant has not appealed from the grant of summary judgment by the trial court on the claim of defamation. It is settled precedent that issues on which a party fails to expend any discussion or citation of authority are not reviewed by this Court. *AmSouth Bank v. Gupta*, 838 So.2d 205, 209 (Miss. 2002). Thus the claim of defamation is one that is not before the Court on appeal and may not be raised in reply by the Appellant. Moreover, the reasons why the defamation claim is meritless and has not been raised on appeal are set forth by the trial court's Memorandum Opinion and Order, which are adopted herein by reference.

### **I. Standard of Review**

An appeal from a grant of summary judgment by the trial court is reviewed *de novo*. *Oaks v. Sellers*, 953 So.2d 1077, 1080 (Miss. 2007); *Russell v. Orr*, 700 So.2d 619, 622 (Miss.1997); *Richmond v. Benchmark Constr. Corp.*, 692 So.2d 60, 61 (Miss.1997); *Northern Elec. Co. v. Phillips*, 660 So.2d 1278, 1281 (Miss.1995). Rule 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment shall be granted by a court if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that *there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.*" M.R.C.P. 56(c) (emphasis added).

The moving party has the burden of demonstrating that there is no genuine issue of material fact, while the non-moving party should be given the benefit of every reasonable doubt. *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss.1990). "Issues of fact sufficient

to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." *Id.* Of course, the mere "presence of fact issues in the record does not *per se* entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense ... the existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact." *Simmons v. Thompson Mach. of Miss., Inc.*, 631 So.2d 798, 801 (Miss.1994).

The evidence must be viewed in the light most favorable to the non-moving party. See *Northern Electric Co.*, 660 So.2d at 1281; *Russell*, 700 So.2d at 622; *Richmond*, 692 So.2d at 61; *Simmons*, 631 So.2d at 802; *Tucker*, 558 So.2d at 872. To avoid summary judgment, the non-moving party must establish a genuine issue of material fact within the means allowable under the Rule. *Richmond*, 692 So.2d at 61 (citing *Lyle v. Mladinich*, 584 So.2d 397, 398 (Miss.1991)). "If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed. Otherwise the decision is affirmed." *Richmond*, 692 So.2d at 61; *Oaks v. Sellers*, 953 So.2d 1077, 1080 (Miss. 2007).

**II. Robinson Has Presented No Proof to Support His Claim of Malicious Prosecution.**

As an initial matter, the only citation of authority presented by the Appellant to the court in support of his argument is one case setting forth the elements of the claim of malicious prosecution. As the Court is well-aware, the Court is not obligated to address any issues where an Appellant fails cite authority in support of reversal, but also acts as a waiver of the issue. *Varvaris v. Perreault*, 813 So.2d 750 (Miss. Ct. App. 2001).

Procedural bar aside, Robinson does not contend that there are any disputed issues of material fact. Indeed, Robinson contends that the same record on which Mahalie Nelson and the Jubilee Chevron were granted summary judgment, instead contains facts which prove that Nelson and the Jubilee Chevron are liable to him. Due to the fact that Robinson has failed to make a *prima facie* showing of liability, this Court should affirm the judgment below.

All parties agree that Robinson must present a *prima facie* case of evidence supporting all six elements on the claim of malicious prosecution for this Court to reverse.

Robinson must prove:

1. the institution of a proceeding;
2. by, or at the insistence of the Defendant;
3. the termination of such proceeding in the Plaintiff's favor;
4. malice in instituting the proceedings;
5. want of probable cause for the proceeding; and
6. the suffering of the injury or damage as a result of the prosecution.

*Croft v. Grand Casino Tunica, Inc.*, 910 So. 2d 66 (Miss. App. 2005). All six of these elements must be proven by Robinson by a preponderance of the evidence. *Van v. Grand Casinos of Mississippi, Inc.*, 724 So. 2d 889 (Miss. 1998).

Claims of malicious prosecution suits are not favored because their tendency is to discourage prosecution of a crime as they expose the prosecutor to civil suits. *Croft*, 910 So. 2d 66. This is true because the love of justice may not always be strong enough to induce individuals to commence prosecution when, if they fail, they may be subjected to

expense of litigation. *Id.*

The record below demonstrates that the Robinson did not meet his burden of proof to demonstrate that the Appellees instigated the criminal proceeding against Robinson. It is uncontested that the victim of the crime was the Complainant who filed charges. In addition, all of Mahalie Nelson's actions were privileged communications with law enforcement officers taken for the legitimate purpose of bring a lawbreaker to justice - a point that Robinson concedes is a legitimate purpose. (R. 292).

**A. All of Mahalie Nelson's Communications with Law Enforcement Are Privileged as They Were Made for the Legitimate Purpose of Bringing a Thief to Justice, a Point Conceded by the Plaintiff Below**

In addition to the fact that Ms. Nelson did not institute, nor insist, on any action being taken against Robinson, Nelson's action were made for the legitimate purpose of attempting to bring a wrongdoer to justice . Under black letter Mississippi law, "a citizen has a privilege to start the criminal law into action by complaints to the proper officials so long as one acts either in good faith, i.e, for a legitimate purpose, or with reasonable grounds to believe that the person proceeded against may be guilty of the offense charged." *Benjamin v. Hooper Electronic Supply Co., Inc.*, 568 So.2d 1182, 1887 (Miss. 1990); *Bester v. Clark*, No. 2006-CA-00168-COA at ¶ 10, (rehearing denied September 4, 2007); *Downtown Grill, Inc. v. Connell*, 721 So. 2d 1113, 1117 (Miss. 1998).

This bedrock principle is firmly established in Mississippi law based on the still vibrant principle that great societal value exists in having both law enforcement and private citizens enlisted in halting and prosecuting crime. As the Mississippi Supreme Court eloquently stated almost a century ago, public policy dictates that citizens should not be

put in fear of cooperating with law enforcement, for "[in] the practical administration of the criminal law, if a prosecution cannot be put under way until a complete case has been made out, the present criticism of . . . a lax enforcement of the law will be as a spring zephyr to a tropical hurricane." *Vicksburg S. & P. R. Co. v. Porterfield*, 103 Miss. 585, 60 So. 652 (1913). The mere fact that Nelson admits, after the prosecution dismissed the felony indictment against Robinson, that she no longer believes that Robison is the individual who actually stole the wallet only shows her good faith. During the investigation and earlier identification of Robinson, Nelson only stated that the individual on Jubilee Chevron's video surveillance equipment looked like Robinson. If the public policy tenets of protecting individuals who cooperate with law enforcement are not upheld, the court would deliver a clear sign that citizens, including Mahalie Nelson, assist law enforcement at their own peril. Further, where Robinson has sued Jubilee Chevron for vicarious liability of Nelson's acts, this Court would, in effect, give an incentive to every employer in the state not to cooperate in crimes perpetrated on a business' clients for fear of civil prosecution. This disincentive could even extend to the point of terminating employees for assisting in investigating a crime. The mere fact that the suspicions may ultimately be proven unfounded is the very basis for the qualified privilege. Mistaken identification is not sufficient to prove malice. *Downtown Grill, Inc. v. Connell*, 721 So. 2d 1113, 1116 (Miss. 1998).

The undisputed testimony reveals that all of Ms. Nelson's conduct and communications were in accordance with the basic precept contacting law enforcement for the valid purpose of bring a criminal to justice, and, *ipso facto*, made in good faith. Indeed, at the oral argument below, Robinson conceded that "there is no evidence

whatever that even hints that Nelson was doing anything other than pursuing a legitimate purpose - attempting to bring a thief to justice." (R. 292). Ms. Nelson only made a good faith effort to assist the Police Department. Robinson has offered no evidence that Ms. Nelson, or her employers, in any way acted with malice when Ms. Nelson informed the police that she believed she knew the identify of the man depicted on the videotape.

Indeed, before any crime was reported, the victim, Mrs. Bell, Nelson and two other employees reviewed a videotape to see if Mrs. Bell's wallet had been stolen before Mrs. Bell reported the crime. The videotape was provided to the police. (R. 254). On July 18, Ms. Nelson did speak with Madison Police Department, and she is the only employee of Jubilee to have done so. Ms. Nelson acted in good faith and informed the Police Department that she believed the man depicted on the videotape resembled a man that had been visiting Jubilee. (R. 276.) Police personnel then instructed Ms. Nelson to contact them when the man again visited the Jubilee Chevron so that the police could question the individual. (R. 276). The record reveals that the day following the theft, Robinson returned to the store and Ms. Nelson did as she had been told by the Madison Police - she contacted them. (R. 26). For these reasons, no genuine issue of material fact exists upon which Robinson may prevail on a claim of malicious prosecution. This Court should affirm the decision below granting Nelson and Jubilee Chevron's Motion for Summary Judgment and denying the Appellant's Motion for same.

**B. Neither Mahalie Nelson Nor Jubilee Chevron Instigated the Criminal Proceeding**

As demonstrated by the record, and found by the trial court,<sup>1</sup> Robinson utterly fails to show any support for the second element of a malicious prosecution claim - that Robinson was prosecuted at the insistence of Nelson. For the purpose of a malicious prosecution claim, the instigation element is unfulfilled as to a defendant who has only given information to the police about the commission of a crime, or has accused another of committing it, so long as defendant leaves to the police the decision as to what shall be done about any arrest. *Funderburk v. Johnson*, 935 So. 2d 1084 (Miss. Ct. App. 2006). No liability for malicious prosecution attaches merely by reason of being a witness, or even by one's name being endorsed on an indictment. *Funderburk*, 935 So. 2d 1084. There is no evidence that the proceeding at issue was instituted by Appellees, and certainly not at the insistence of Appellees. This obvious and undisputed fact somehow escapes the attention of Robinson on appeal.

The victim of the crime is the individual who contacted the police, reported the theft, and was the Complainant. (R. 260, 320, 323). There is no evidence that any person associated with Jubilee, including Ms. Nelson, filed charges against Robinson, testified against Robinson in any way, nor insisted upon or participated in Robinson's arrest, prosecution, or ultimate incarceration. In fact, Defendants were never apprised of, or were contacted by, the Madison Police Department, regarding the ultimate determination

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<sup>1</sup> The Appellees commend to the Court the Memorandum Opinion and Order of Judge DeLaughter below. The scholarly opinion clearly addresses all of the issues raised by Robinson on appeal. The Opinion and Order is not a simple Order granting summary judgment, but shows ample consideration and insight concerning the facts and the law in both analysis and application.



regarding this matter. (R. 343, 365-366). Robinson conceded in his deposition that to his knowledge Defendants did not insist or encourage his arrest, prosecution or incarceration. (R. 378-340). Due to the lack of facts to support the "instigation" element, the grant of summary judgment in favor of the Appellees should be affirmed.

### **III. No Proof Exists to Support a Claim of False Imprisonment Against the Appellees.**

As an initial matter, it is important to remember the distinction between the claim of malicious prosecution and one for false imprisonment. The distinction between a malicious prosecution and false imprisonment "is that a malicious prosecution is prosecution with malice and without probable cause [and] the false imprisonment is the arrest and imprisonment without legal process. *State v. USF&G Co.*, 217 Miss. 576, 593, 654, So. 2d 697, 704 (1953). Consequently, a suit for false imprisonment cannot be sustained where Robinson's imprisonment is by virtue of legal process duly issued by a court or other official with jurisdiction. *King v. Weaver Pants Corp*, 127 So. 2d 718, 719 (Miss. 1930).

With this distinction in mind, the first obvious defect in Robinson's proof is that Robinson was never detained or arrested by Mahalie Nelson or Jubilee Chevron. Mr. Robinson freely came and went from the premises and was never held by the Appellees for any purpose, or even questioned. Simply put, the Appellees played no role in the nature, purpose, extent or duration of Plaintiff's imprisonment. These decisions were decided solely by government officials. Police officers were simply provided with a video tape of the theft and information from Ms. Nelson that the individual on the video tape looked like Robinson. (R. 254, 276). The decision of what should be done was left to law enforcement.

It is not false imprisonment when an actor simply gives information to the police about the commission of a crime or has accused someone of committing a crime, so long as the actor leaves to the police the decision as what shall be done about any arrest. *Sunshine Jr. Food Stores, Inc. v. Aultman*, 546 So. 2d 659 (Miss. 1989). Where an individual merely directs the attention of police to what may be a crime and the police arrest the alleged offender, the person who did nothing other than communicate the facts to the police is not liable for causing the arrest. *Id.* Where an arrest is made without knowledge and consent of a witness providing information, there can be no liability. *Id.* The grant of summary judgment should be affirmed as the Appellees never imprisoned Robinson, but law enforcement did.

Secondly, there are two periods during which Robinson was imprisoned. The first period occurred on June 18, 2001, and lasted for the period of one day. (R. 295). Any claim for false imprisonment arising out of this one day where he was arrested by police officials is time barred. "[A]ll actions for . . . false imprisonment . . . shall be commenced within one year next after the cause of such action occurred, and not after." Miss. Code Ann. §15-1-35. Where Robinson was arrested for a one day period on June 18, 2001 and was informed of the reason for his imprisonment, this period of imprisonment is time barred where the complaint in this action was not filed until November 7, 2003.

As to the second period of imprisonment, following his indictment, Robinson must prove that he was: 1) detained by a private company or individual, and 2) that the detention was unlawful. *Alpha Gulf Coast, Inc. v. Jackson*, 801 So. 2d 709 (Miss. 2001). On October 17, 2001, Robinson was indicted by the grand jury of Madison County and a capias was issued that same day by the Circuit Clerk of Madison County, Mississippi. (R. 368-

371). As detailed in the affidavit of the Asst. District Attorney, the basis for the indictment included the complaint of Denise Bell, the statement of Mahalie Nelson, officer identification based upon their review of the video tape, as well as the Assistant District Attorney's comparison of Mr. Robinson and the man depicted on the video tape. (R. 365-366). In Mississippi, the grand jury is considered to be an arm of the circuit court. Thus, Alvin Robinson's imprisonment from July 26, 2002 through November 12, 2002 was by virtue of legal process issued by the grand jury of Madison County. Certainly, it is beyond pale that the grand jury of Madison County is an official body with jurisdiction to issue an arrest warrant. Therefore, there can be no false imprisonment cause of action for the second period of imprisonment of Robinson. A suit for false imprisonment cannot be sustained where Robinson's imprisonment is by virtue of legal process duly issued by a court or other official with jurisdiction. *King v. Weaver Pants Corp*, 127 So. 2d 718, 719 (Miss. 1930). For the foregoing reasons, the claim of false imprisonment has no merit. This court should affirm the judgment below in favor of the Appellees.

**IV. Plaintiff Presented No Evidence to Support a Claim of Intentional Infliction of Emotional Distress, Negligence and/or Gross Negligence.**

Robinson spends very little time addressing any issues regarding intentional infliction of emotional distress, negligence, or gross negligence in his brief and little is necessary to dispose of this claim. Like all of plaintiff's causes of action, these claims arose out of one act: Nelson's identification of Robinson as the man she believed took the wallet of Mrs. Bell based upon her review of Jubilee Chevron's surveillance video tape. For all the same reasons set forth above, the plaintiff has failed to pierce the qualified privilege that Mahalie Nelson has to cooperate with police for an admittedly legitimate purpose -

bringing a lawbreaker to justice. In addition, there is a complete dearth of evidence that Mahalie Nelson or Jubilee Chevron instigated criminal proceedings against Robinson, but that the victim, who had her wallet stolen, did.

In *Downtown Grill, Inc. v. Connell*, 721 So. 2d 1113 (Miss. 1998), the complainant stated claims for defamation, malicious prosecution, intentional infliction of emotional distress and gross negligence arising out of a similar "identification" of an individual to the police in connection with a crime. In that case, the Mississippi Supreme Court, after a jury verdict in favor of the plaintiff, reversed and rendered on all counts where there was "no evidence contained in the record that the [defendant] acted out of malice in any way. The evidence establishes that the [defendant] was motivated by his interest to assist [a police officer] with his investigation. The same holds true in the case *sub judice*. Robinson's claims of intentional infliction of emotional distress, negligence, and gross negligence are without evidentiary support. Mahalie Nelson communicated with law enforcement regarding the legitimate purpose of apprehending criminal, for which she has no liability. *Ipsa facto*, no claim exists against Jubilee Chevron for vicarious liability. *J & J Timber Company v. Broome*, 932 So. 2d 1 (Miss. 2006). As a further note, the fact that Robinson continues to appeal on the basis of a count of mere negligence, appears to be a tacit admission by the plaintiff that the record is wholly devoid of any evidence that the acts of Mahalie Nelson were malicious. Apparently, the plaintiff invites this court to make wholesale revisions to what remedies are available to an individual who may have been accused of a crime. This court should decline to broaden these remedies and hold instead follow the numerous cases which hold that an individual is entitled to a qualified privilege for communications made to a police office regarding the identification of a suspect to a

crime.

### **CONCLUSION**

In this case, the central question is the same as in *Downtown Grill*, "are citizens protected by a qualified privilege for statements made to a law enforcement officer investigating a criminal complaint, filed by someone else?" *Downtown Grill, Inc.*, 721 So. 2d 1113. The answer is that the qualified privilege exists. The evidence in this case reveals that there is no genuine issue of material fact but that the qualified privilege attaches to Mahalie Nelson and that Robinson has not made out a *prima facie* case of liability against Mahalie Nelson or Jubilee Chevron.

Respectfully submitted,

HILL CITY OIL COMPANY, INC. d/b/a JUBILEE  
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CERTIFICATE OF SERVICE

I, William W. McKinley, Jr., do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing instrument to:

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555 Tombigbee Street, Suite 107  
Jackson, MS 39201

Honorable Bobby DeLaughter  
Hinds County Circuit Court Judge  
P. O. Box 27  
Raymond, MS 39154

This the 6<sup>th</sup> day of November, 2007.



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WILLIAM W. McKINLEY, JR.