

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**ROCHESTER EUGENE PRESLEY a/k/a RONALD STARKS                      APPELLANT**  
**a/k/a ZEE ZEE ZELAZURRA a/k/a ZEE ZEE ZELA ZURO**

**VS.**

**NO. 2007-CP-1193-SCT**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

**JIM HOOD, ATTORNEY GENERAL**

**BY: BILLY L. GORE**  
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**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**ROCHESTER EUGENE PRESLEY a/k/a RONALD STARKS                      APPELLANT**  
**a/k/a ZEE ZEE ZELAZURRA a/k/a ZEE ZEE ZELA ZURO**

**VERSUS**

**NO. 2007-CP-01193-SCT**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

This is an appeal from summary denial of post-conviction relief sought in the Circuit Court of Forrest County, Robert B. Helfrich, Circuit Judge, presiding. Appellant was unhappy with the revocation of his suspended sentence. (See appellee's exhibit A, attached)

ROCHESTER PRESLEY has violated the terms and conditions of his court-imposed ten (10) year suspended sentence and has been ordered to serve the remainder of that sentence imposed for Grand Larceny.

He complains on appeal he was denied minimum due process when he was not given a preliminary revocation hearing prior to his final revocation hearing at the close of which his ten (10) year suspended sentence was revoked.

Summary denial of Presley's motion was both prudent and proper because Presley's right

to a preliminary revocation hearing prior to his final revocation hearing was deemed waived once he had his final revocation hearing and his suspended sentence revoked.

In addition to this, Presley has already been tried and convicted in the Circuit Court of Forrest County of the two felonies - commercial burglary and felony grand larceny - which formed a predicate for the revocation of his suspended sentence.

Finally, Presley's two felony convictions have both been affirmed on direct appeal. *See Presley v. State*, 994 So.2d 191 (Ct.App.Miss. 2008), reh denied, cert denied, appellee's exhibit B, attached.

*This state of affairs constitutes at least a triple waiver of a matter that is now moot.*

#### **STATEMENT OF FACTS**

Several hours after pleading guilty on November 12, 2004, to grand larceny and thereafter receiving a ten (10) year suspended sentence, Presley committed a burglary and another grand larceny in Hattiesburg. His suspension was conditioned upon his good behavior and compliance with certain conditions, including committing no offenses against the laws of this state.

Not surprisingly, on May 24, 2005, the District Attorney filed a petition for revocation of suspended sentence stating that Presley had violated the terms and conditions of his suspended sentence.

According to the order denying post-conviction relief, notice of the revocation hearing was served on Presley who appeared in person for his hearing which was conducted on June 2, 2005. A complete transcript of the revocation hearing is a matter of record at C.P. 58-71.

Presley denied all allegations. (C.P. at 61)

At the close of the revocation hearing, Judge Helfrich found that Presley had violated the terms and conditions of his suspended sentence and sentenced him anew to serve a term of ten (10)

years in the custody of the MDOC. (C.P. at 70)

This did not sit well with Presley who, on April 10, 2007, filed a motion for post-conviction collateral relief. (C.P. at 7-48) Presley complained in his motion he was denied minimum due process when he was not afforded a preliminary revocation hearing prior to his final revocation hearing which ended with the revocation of his suspended sentence.

According to Presley, he had a constitutional right to a judicial hearing on probable cause prior to his final revocation hearing at which it was adjudicated fully, fairly, and finally that Presley had indeed violated the terms and conditions of his suspended sentence.

On June 21, 2007, Judge Helfrich signed a five (5) page order summarily denying as plainly without merit Presley's motion for post-conviction relief. *See* appellee's exhibit A, attached. Judge Helfrich found as a fact that on May 24, 2005, the Court served notice to Presley in the form of a notice of hearing on the petition to revoke suspended sentence. (C.P. at 54) After taking testimony at a full and complete revocation hearing, Judge Helfrich concluded as a matter of law that Presley had violated the conditions of his suspended sentence and summarily denied post-conviction relief. (C.P. at 57)

In denying relief Judge Helfrich specifically noted in his order " . . . that the matter which caused Presley's suspended sentence to be revoked was tried and he was found guilty by a jury of his peers to Grand Larceny in Forrest County Criminal File No. 05-550 CR and that matter is currently being appealed to the Supreme Court." (Appellee's exhibit A; C.P. at 56)

Presley complains on appeal he never waived his right to a preliminary revocation hearing. He claims he should have been provided one prior to a final hearing, and that the denial of a preliminary revocation hearing denied him the minimum due process required by **Berdin v. State**, 648 So.2d 73, 76 (Miss. 1994), and the decisions of the United States Supreme Court cited therein.

Put another way, Presley argues he was improperly revoked to serve a full ten (10) years.

We have concluded, however, that Judge Helfrich, who considered the motion for post-conviction relief together with “ . . . the complete file, all materials proffered by Presley and all relevant law,” was eminently correct in denying post-conviction based upon a complete history of the case.

Accordingly, Judge Helfrich did not err in affirming the revocation of Presley’s suspended sentence and remanding him to the custody of the MDOC to serve the ten (10) years on his original sentence.

### SUMMARY OF ARGUMENT

While it is true that a probationer is constitutionally entitled to a preliminary [revocation] hearing in order to determine if there is probable cause to hold the probationer for a final decision concerning revocation, that matter has been rendered moot by the final decision concerning revocation, by Presley’s subsequent indictment and conviction, and by affirmation of his convictions on direct appeal.

Judge Helfrich correctly ruled, in effect, that Presley received all the procedural due process Presley was due. *See* Miss.Code Ann. §47-7-37 (Rev.2009); **Payton v. State**, 845 So.2d 713 (¶22) (Ct.App.Miss. 2003); **Agent v. State**, Cause No. 2009-CP-00111-COA (¶11) decided February 23, 2010 [Not Yet Reported].

The issue is moot.

Presley has already had his suspended sentence revoked after a full and complete final revocation hearing. He has since been indicted, tried, and found guilty of two crimes - commercial burglary and felony grand larceny - the commission of which served as the basis for the revocation of his suspended sentence.

These same two convictions, as well as imposition of the 7 and 10 year consecutive sentences to be served without the benefit of parole, have been affirmed on direct appeal. **Presley v. State**, *supra*, 994 So.2d 191 (Ct.App.Miss. 2008), reh denied, cert denied.

Accordingly, Presley's right to a preliminary revocation hearing has been waived and rendered moot in light of subsequent events, *viz.*, (1) adjudication during a final revocation hearing that Presley, more likely than not, violated the terms and conditions of his suspended sentence and (2) a finding by a jury of his peers that Presley was guilty beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence of the two felony offenses for which revocation was ordered.

### **ARGUMENT**

#### **JUDGE HELFRICH'S DECISION DENYING POST-CONVICTION RELIEF WAS NOT CLEARLY ERRONEOUS. RATHER, PRESLEY'S MOTION WAS CORRECTLY DENIED SUMMARILY BECAUSE PRESLEY'S CLAIMS WERE PLAINLY WITHOUT MERIT.**

"In reviewing a trial court's decision to deny a petition for post conviction relief this Court will not reverse such a denial absent a finding that the trial court's decision was clearly erroneous." **Kirksey v. State**, 728 So.2d 565, 567 (Miss. 1999) citing **State v. Tokman**, 564 So.2d 1339, 1341 (Miss. 1990).

However, if questions of law are raised, then the applicable standard of review is *de novo*. **Jackson v. State**, 965 So.2d 686 (Miss. 2007). *See also Agent v. State*, *supra*, Cause No. 2009-CP-00111-COA (¶5) decided February 23, 2010 [Not Yet Reported].

In the case at bar, application of neither standard is sufficient to derail the decision of the circuit judge to deny post-conviction relief.

In the real world of pre-indictment preliminary hearings, once a defendant has been indicted



by a grand jury finding probable cause to believe an offense has been committed and the defendant committed it, there is no further need for a preliminary hearing. The right to a preliminary hearing is moot and deemed waived. **Mayfield v. State**, 612 So.2d 1120 (Miss. 1992). *See also* **Rogers v. State**, 881 So.2d 936 (Ct.App.Miss. 2004); **Sanders v. State**, 847 So.2d 903 (Ct.App.Miss. 2003).

The identical logic should apply here where the preliminary hearing is a post-conviction preliminary revocation hearing as opposed to a pre-indictment preliminary hearing.

The purpose of the preliminary revocation hearing is to determine that reasonable ground exists for revocation by someone not directly involved in the case and to determine if probable cause exists to believe a violation has been committed. **Berdin v. State**, *supra*, 648 So.2d 73 (Miss. 1994).

That question has been thrice rendered moot by subsequent adjudications, to wit:

*First*, by a final revocation hearing wherein it was demonstrated that Presley, more likely than not, violated the conditions of his suspended sentence; *second*, by his conviction of the two crimes upon which revocation was predicated, and *third*, by affirmation on appeal of those two convictions.

It was not necessary for the sentence “revocator” to prove beyond a reasonable doubt that Presley violated the terms and conditions of his suspended sentence but only that it was “more likely than not” that he did so. **Younger v. State**, 749 So.2d 219 (¶12) (Ct.App.Miss. 1999), citing **Berdin v. State**, 648 So.2d 73, 79 (Miss. 1994), quoting from **Murphy v. Lawhon**, 213 Miss. 513, 517, 57 So.2d 154 (1952), and **Wallace v. State**, 607 So.2d 1184, 1189-90 (Miss. 1992).

The proverbial “bottom line” is that Presley’s suspended sentence was conditioned upon, *inter alia*, his “commit[ting] no offense against the laws of this or any other state of the United States . . .”. Strange as it seems, Presley went out and committed a burglary and larceny only hours after receiving his suspended sentence. This was a clear violation of the conditions of his suspended

sentence

The trial court was entitled to remand Presley to the custody of the MDOC to serve the balance of his sentence, i.e., ten (10) years. See **Johnson v. State**, 925 So.2d 86 (Miss. 2006), which held that suspending a sentence and imposing probation are distinct events. “If a prisoner is under court imposed probation, that prisoner may be incarcerated if the conditions of probation are not followed.” **Johnson v. State**, *supra*, 925 So.2d 86, 92 (Miss. 2006). The same holds true when a prisoner fails to abide by the conditions of his suspended sentence.

By definition, a “suspended sentence” is a unique mechanism by which the court may postpone the imposition of a sentence altogether or delay the execution of a sentence once it has been pronounced. 21A Am.Jur.2d, Criminal Law §895 p. 163. Suspension is a term which generally applies to the actions of the state in relation to a prisoner under its supervision and control. *Wilson v. State*, 735 So.2d 290, 292, (Miss. 1999) (citing *Goss v. State*, 721 So.2d 290, 144, 145 (Miss. 1998)). Simply stated, “suspension” is the restriction placed upon the power of the State to act during that (the suspended portion of a sentence) period. *Id.*

\* \* \* \* \*

... A suspension of a sentence does not automatically mean that the defendant will be on probation and under a duty to report to a probation officer. **It simply means that *part of his entire sentence has been postponed pending the defendant’s good behavior or such other conditions as the court may see fit to establish.***

**Johnson v. State**, *supra*, 925 So.2d at 93 quoting with approval the Justice Mills dissenting opinion in *Carter v. State*, 754 So.2d 1210-11 [emphasis ours.]

Here there was suspension with conditions which Presley failed to meet. The judge, i.e., the trial court, was entitled to reinstate and execute Presley’s entire sentence.

Miss.Code Ann. §47-7-37 (Supp 2009), states, in part, that

[T]he court in term time or vacation, shall cause the probationer to be brought before it and *may* continue or revoke all or any part of the probation or the suspension of sentence, and *may* cause the sentence imposed to be executed or *may* impose any part of the sentence which

might have been imposed at the time of conviction. [emphasis in original]

While it is true that a probationer is constitutionally entitled to a preliminary [revocation] hearing in order to determine if there is probable cause to hold the probationer for a final decision concerning revocation, that matter has been rendered moot by the final decision concerning revocation, by Presley's subsequent indictment and conviction, and by affirmation of his convictions on direct appeal.

Miss.Code Ann. § 99-39-11 (Supp. 1999) reads, in its entirety, as follows:

(1) The original motion together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

**(2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.**

(3) If the motion is not dismissed under subsection 2 of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

(4) This section shall not be applicable where an application for leave to proceed is granted by the supreme court under section 99-39-27. [emphasis added]

Presley's post-conviction claims were properly denied because they were manifestly without merit.

## CONCLUSION

Not every motion for post-conviction relief filed in the trial court must be afforded a full adversarial hearing. **Hebert v. State**, 864 So.2d 1041, 1045 (Ct.App.Miss. 2004). *See also* **Rowland v. Britt**, 867 So.2d 260, 262 (Ct.App.Miss. 2003) [“(T)he trial court is not required to grant an evidentiary hearing on every petition it entertains.”]

Presley’s motion seeking post-conviction relief was correctly denied as plainly or manifestly without merit on the merits.

Appellee respectfully submits this case is devoid of any error. Accordingly, summary dismissal, as manifestly without merit, of Presley’s motion for post-conviction collateral relief should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

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**IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI  
TWELFTH JUDICIAL DISTRICT**

**ROCHESTER EUGENE PRESLEY, M.D.O.C. #113082**

**PETITIONER**

**VERSUS**

**CAUSE NO. CI07-0077**

**STATE OF MISSISSIPPI**

**RESPONDENT**

**FILED**

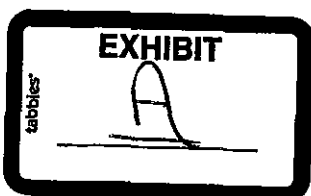
**JUN 22 2007**

*For Elin Adams*  
**FORREST COUNTY CIRCUIT CLERK**  
**OPINION AND ORDER**

BEFORE THE COURT is Petitioner's, Rochester Eugene Presley (hereinafter "Presley"), *Pro Se* Motion for Post-Conviction Collateral Relief, pursuant to the Mississippi Uniform Post-Conviction Relief Act, Miss. Code Ann. § 99-39-1 *et. seq.*, as amended, together with all relevant documents relating to the judgment under attack (See also Forrest County Criminal File No. 04-586 CR). After careful review of the complete file, all materials proffered by Presley and all relevant law, this Court is of the opinion that it is plainly evident that Presley is not entitled to any relief. Said Motion is, therefore, **SUMMARILY DISMISSED**, pursuant to Miss. Code Ann. §99-39-11(2) for the following reasons, to-wit:

**Background**

Presley pled guilty in the Forrest County Circuit Court to Grand Larceny and was sentenced on November 12, 2004 to serve a term of ten (10) years in the custody of the Mississippi Department of Corrections with all of the ten (10) year sentence, except time



served, suspended upon his good behavior and compliance with a list of conditions which included the following: (a) Commit no offense against the laws of this or any other state of the United States, or the laws of the United States.

On May 24, 2005, the District Attorney filed a Petition for Revocation of Suspended Sentence stating that Presley had violated the terms of his suspended sentence in that he committed felony Grand Larceny in the City of Hattiesburg on November 12, 2004 and committed Commercial Burglary in the City of Hattiesburg on or about November 12, 2004. On May 24, 2005, this Court served notice to Presley in the form of a Notice of Hearing on the Petition to Revoke Suspended Sentence by the Forrest County Sheriff's Department.

Thereafter on June 2, 2005 a hearing was held and this Court found that Presley had violated the terms and conditions of his suspended sentence and sentenced him to serve a term of ten (10) years in the custody of the Mississippi Department of Corrections.

### **Law and Analysis**

Presley now files his motion on the grounds that no preliminary hearing was held and that he should have been provided one, that he did not sign the documents waiving any rights to a preliminary hearing, that he was denied due process of law by having his probation revoked by this Court, that his Constitutional rights to a judicial hearing on probable cause was violated and the revocation was in violation of his 8<sup>th</sup> and 14<sup>th</sup> Amendment rights. It is clearly seen from the face of his Motion that Presley's revoking of his suspended sentence was in no way in violation of any laws.

Miss. Code Ann. § 99-39-11(2) (Rev. 2000) states: "If it plainly appears from the

face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified." Presley uses Miss. Code Ann. § 47-4-37 as his legal precedence. Presley also complains that he did not receive due process because the trial court revoked his sentences without following the proper revocation procedure.

The minimum due process requirements have been imposed on parole revocation proceedings in *Morrissey v. Brewer*, 408 U.S. 471, 485-87, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972), and that the same due process requirements apply to the probation revocation procedure as held by *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (1973). In *Riely v. State*, 562 So. 2d 1206, 1210 (Miss. 1990), the Mississippi Supreme Court acknowledged the minimum due process requirements set forth in *Morrissey* and *Gagnon* and held that the revocation procedure outlined in Miss. Code Ann. § 47-7-37 inherited these minimum due process requirements. Therefore, before a trial court may revoke a defendant's probation or suspended sentence, it must afford the defendant these minimum due process requirements.

Presley claims that he was denied due process because there was no preliminary hearing (as required in *Morrissey*). Further, Presley claims that "he did not sign the documents waiving any rights to a preliminary hearing". However, there are no documents in the file whatsoever which shows Presley signed anything. Presley has not offered any evidence to support his claims. Indeed, the record reflects that the trial court held a full revocation hearing on June 2, 2005 and Presley was present and had the opportunity to call

witnesses in his own behalf. Presley's claim that his suspended sentence was revoked without due process is without merit.

According to the transcript of the hearing held on June 2, 2005, the following was stated:

Court: Do you have any questions for Detective Keys, Mr. Presley?

Presley: Yes, sir.

Court: Okay.

Presley: What physical evidence do you have against me that's showing beside the truck was being found in South Carolina?

Keys: You had the key in your pocket. (Tr. 10)

As the transcript clearly shows, Presley has been deceiving in his account of the issues in this matter and in his motion as a complete hearing was held and he was given every opportunity to question or call any witnesses.

Also at the hearing, the State listed the evidence it relied upon in its Petition for Revocation of Suspended Sentence. Specifically, that Presley committed Grand Larceny in the City of Hattiesburg on November 12, 2004 and committed Commercial Burglary in the City of Hattiesburg on or about November 12, 2004 (Tr. 3 - 4). [It should be noted that the matter which caused Presley's suspended sentence to be revoked was tried and he was found guilty by a jury of his peers to Grand Larceny in Forrest County Criminal File No. 05-550 CR and that matter is currently being appealed to the Supreme Court.]

In *Moore v. State*, 585 So. 2d 738, 739 (Miss. 1991), the Supreme Court held that:



"The courts are empowered to revoke any or all of the defendant's probation or any part or all of the suspended sentence if, during the period of probation, it is found that the defendant violated the conditions of his probation/suspended sentence."

IT IS THEREFORE ORDERED AND ADJUDGED that Plaintiff's, Rochester Eugene Presley, Motion for Post Conviction Collateral Relief is hereby **SUMMARILY DISMISSED** pursuant to Miss. Code Ann. §99-39-11(2).

IT IS FURTHER ORDERED AND ADJUDGED that the Forrest County Circuit Clerk's Office shall mail a copy of the Court's Order to Presley by certified, first class U. S. Mail, return receipt requested.

SO ORDERED AND ADJUDGED this the 21<sup>st</sup> day of June, A. D., 2007.



CIRCUIT COURT JUDGE

II. WHETHER THE FAULKNERS  
ARE DUE A REFUND OF THE  
PURCHASE PRICE OF THE  
PROPERTY AFTER THE TRANS-  
FER DEED WAS SET ASIDE

[8] ¶ 13. Upon finding that the Faulkners were not innocent purchasers of the property, the chancellor granted summary judgment in favor of Thomas Karl Wilcher and the Estate, thereby setting aside the land transfer. However, within the order of the chancellor, no mention is given to the return of the purchase price. On appeal, the Faulkners seek a refund of their purchase price, arguing that the failure to return the purchase price results in unjust enrichment. Thomas Karl Wilcher and the Estate argue that the chancellor did not err in canceling the deeds without ordering a refund of the purchase price as a condition of the relief. In support of their position, Thomas Karl Wilcher and the Estate cite to certain discovery revealing that the purchase price was paid into a bank account in the name of Connie Wilcher and the mother of the Faulkners, Hilda Denne. Further, the Wilchers point us to a settlement agreement reached between the Faulkners and the Wilchers for which the Faulkners were to receive certain items in lieu of refunding the entire purchase price of the property.

¶ 14. Having reviewed the record, we can find no evidence in support of either the Faulkners' or the Wilchers' or Estate's position. In fact, because the issue before the chancery court centered upon whether the Faulkners were the record title holders of the property, the issue of the return of the purchase price was never brought before or adjudicated in the lower court. Therefore, because the issue of the return of the purchase price of the property was not raised in the lower court, review is barred. *Coleman v. State*, 772 So.2d 1101, 1103(¶ 8) (Miss.Ct.App.2000). According-

ly, we dismiss this argument and decline review.

¶ 15. THE JUDGMENT OF THE CHANCERY COURT OF LEAKE COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

KING, C.J., LEE, P.J., CHANDLER, GRIFFIS, BARNES, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR.  
IRVING, J., CONCURS IN RESULT ONLY.



Rochester Eugene PRESLEY a/k/a  
Ronald Starks a/k/a Zee Zee Zelazur-  
ra a/k/a Zee Zee Zela Zuro, Appellant,

v.

STATE of Mississippi, Appellee.

No. 2006-KA-01195-COA.

Court of Appeals of Mississippi.

March 18, 2008.

Rehearing Denied Sept. 2, 2008.

Certiorari Denied Nov. 6, 2008.

**Background:** Defendant was convicted, following jury trial in the Circuit Court, Forrest County, Robert B. Helfrich, J., of burglary and grand larceny. Defendant's motion for judgment notwithstanding the verdict was denied. Defendant appealed.

**Holdings:** The Court of Appeals, King, C.J., held that:

- (1) evidence was sufficient to support burglary conviction, and
- (2) evidence was sufficient to support grand larceny conviction.

Affirmed.

EXHIBIT

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**1. Criminal Law** ⚖️1159.6

When a criminal verdict is based only on circumstantial evidence, the test to be applied on appeal from the verdict is whether a rational fact finder might reasonably conclude that the evidence excludes every reasonable hypothesis inconsistent with guilt of the crime charged.

**2. Criminal Law** ⚖️1144.13(2.1)

Even when a criminal verdict is based only on circumstantial evidence, appeal from the verdict requires that the appellate court view the evidence in a light most favorable to the verdict.

**3. Burglary** ⚖️42(3)

Evidence, although circumstantial, was sufficient to support burglary conviction; defendant was seen within a few hundred yards of subject building several hours before the burglary, keys to building owner's truck were kept inside the building, the back window to building was broken and several things were missing, including the keys, such keys were later found in the truck, which defendant had operated, and when confronted, defendant gave arresting officers four different aliases and two different addresses and falsely stated that the truck belonged to his uncle.

**4. Burglary** ⚖️3, 9(5)

The crime of burglary has two essential elements, the unlawful breaking and entering and the intent to commit some crime once entry has been gained.

**5. Burglary** ⚖️42(1)

When determining what inferences can be drawn from possession of recently stolen property, as circumstantial evidence in a burglary case, circumstances of possession and the presence or absence of evidence of participation in the crime other than mere possession must be viewed.

**6. Burglary** ⚖️42(1)

To determine the strength of the inference to be drawn from possession of stolen property in a burglary case, the Court of Appeals must consider: (1) the temporal proximity of the possession to the crime to be inferred; (2) the number or percentage of the fruits of the crime possessed; (3) the nature of the possession in terms of whether there is an attempt at concealment or any other evidence of guilty knowledge; and (4) whether an explanation is given and whether that explanation is plausible or demonstrably false.

**7. Larceny** ⚖️64(7)

Evidence, although circumstantial, was sufficient to support grand larceny conviction; defendant was found in possession of stolen truck only six days after it was stolen and did not have a credible explanation for his possession, and the night before the truck was taken, defendant was seen several hundred yards away from the business where the truck was kept. West's A.M.C. § 97-17-41(1).

Brenda Jackson Patterson, attorney for appellant.

Office of the Attorney General by Laura Hogan Tedder, attorney for appellee.

Before KING, C.J., ROBERTS and CARLTON, JJ.

KING, C.J., for the Court:

¶1. On April 4, 2006, in the Forrest County Circuit Court, Rochester Eugene Presley was found guilty of burglary and grand larceny. Aggrieved, he appeals and alleges that there was insufficient evidence to sustain the conviction on either count. We find no error and affirm.

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### FACTS

¶2. John Gray, the owner of Grayco Systems in Hattiesburg, testified that on Friday, November 12, 2004, all of his employees had left work by 5:00 p.m. When Daphne Moss, the office manager, came to the building around 5:00 p.m. the next day, she discovered that a large glass window in the rear of the building had been broken, and the office had been ransacked. She called Gray and the police to report the incident. Once the police arrived, Gray and the office manager identified several items as missing, including: two servers, three computers, a couple of printers, approximately six monitors, some keyboards, a vacuum cleaner, a CD player, a radio, and some tapes.

¶3. In addition, Gray noticed that his blue plastic key ring, with the keys to his 1995 Ford F-150, was not in the wooden desk where he left it. His truck, which Gray normally left parked behind the building, was also missing.

¶4. Upon receiving the news of the incident, Hattiesburg Police Department crime scene technician Jeff Byrd arrived at Grayco Systems to gather any possible forensic evidence. The police were able to determine that the burglary had occurred at approximately 2:15 a.m. At trial, officers admitted that they found *no* evidence at the crime scene that established Presley had burglarized Grayco Systems.

¶5. Derrick Minor testified that he dropped Presley off at the bus station at approximately 8:30 p.m. on November 12. He knew that Presley had a bus ticket, but Minor did not wait around to see him get on a bus.

¶6. Officer Richard Murphy, with the Orangeburg County Sheriff's Department in South, Carolina testified that he came into contact with Presley two different times while on duty in Orangeburg County on November 19, 2004. He provided little

information as to the first encounter, but the second encounter began as a response to a suspicious vehicle on the side of the road. When Officer Murphy found the unattended vehicle on the side of the road, he ran the license plate number. It was a South Carolina license plate that registered as stolen and not belonging to the truck. He then ran the truck's vehicle identification number.

¶7. While awaiting the results from the vehicle identification number, Officer Murphy, with the help of another officer, found Presley approximately 300 yards away from the truck. When asked about the truck, Presley responded that it was his uncle's truck. When the information came back that the Ford F-150 was the same truck stolen from Grayco Systems, the officers placed Presley under arrest. While patting him down, they found the keys to the truck on a blue plastic key ring.

¶8. In addition to telling officers the truck belonged to his uncle, Presley gave the officers a total of four aliases and two different addresses. It was not until his fingerprints were taken that they were able to identify him.

¶9. At the conclusion of the State's case, Presley moved for a directed verdict, which was denied. The defense then rested. After the jury retired to deliberate, they returned verdicts of guilty as to the burglary of Grayco Systems and to the grand larceny of the truck. After receiving the verdicts, Presley filed a motion for judgment notwithstanding the verdict which challenged the sufficiency of the evidence among other things. The trial court denied the motion, and Presley now appeals that denial.

### ANALYSIS

[1, 2] ¶10. On appeal, Presley makes only one challenge to each count. He alleg-

es that the evidence was insufficient to sustain a conviction on either count. Since this case is based only on circumstantial evidence, the test to be applied is whether "a rational fact finder might reasonably conclude that the evidence excludes every reasonable hypothesis inconsistent with guilt of the crime charged." *Shields v. State*, 702 So.2d 380, 382 (Miss.1997) (citing *DeLoach v. State*, 658 So.2d 875, 876 (Miss.1995)). However, we must view the evidence in a light most favorable to the verdict. *Jones v. State*, 819 So.2d 558, 561(¶ 11) (Miss.Ct.App.2002). We now address each count separately.

**I. Whether the evidence was insufficient to support the conviction of burglary.**

[3, 4] ¶ 11. We first address Presley's conviction of burglary. "The crime of burglary has two essential elements, the unlawful breaking and entering and the intent to commit some crime once entry has been gained." *Murphy v. State*, 566 So.2d 1201, 1204 (Miss.1990). In accordance with our standard of review, we look at the facts that could support the conviction of burglary.

¶ 12. First, Presley was seen within a few hundred yards of Grayco Systems several hours before the burglary, as testified to by Minor. The keys to the stolen truck were kept inside the building in a wooden desk near the back of the building. The back window to Grayco Systems had been broken, and several things were missing, including the keys to Gray's truck. The keys found on Presley operated the stolen truck and were on the same blue plastic key ring as the keys that were taken. When confronted, Presley gave the arresting officers a total of four different aliases and two different addresses. In addition, when questioned about the vehicle, Presley stated that it belonged to his uncle. Clearly, there is sufficient evidence to sup-

port that a burglary had occurred, and Presley was in possession of one of the items stolen from Grayco Systems. The only question is whether the evidence was sufficient to show that Presley was the one that committed the burglary.

¶ 13. Presley suggests that this case is very similar to *Murphy* where the supreme court reversed a conviction of burglary due to insufficient evidence. *Id.* at 1206. In *Murphy*, a business was burglarized, and two power saws were taken. *Id.* at 1203. Murphy was seen within several hundred yards of the burglarized business and then spotted with the saws while leaving the area. *Id.* Two witnesses testified that they each bought a saw from Murphy, and he told them they were given to him by his cousin. *Id.* After the State rested its case, Murphy testified in his own defense. *Id.* He stated that he found the saws behind a garbage dumpster near the burglarized business. *Id.* He thought it was his "lucky day" and took the saws home and fixed them up. *Id.* The supreme court held that it was a reasonable hypothesis that someone other than Murphy stole the saws and placed them behind the dumpster to get them at a later time. *Id.* at 1206.

¶ 14. While these cases may appear similar, there is one stark difference. Murphy gave an explanation which was not demonstrably false as to why he had the saws. The same cannot be said for Presley, as his only given reason for possession of the stolen truck was that it was his uncle's truck. This was demonstrably false as the vehicle identification number clearly showed the truck belonged to Gray. In light of case law developments since *Murphy*, that distinction is very important.

[5] ¶ 15. The supreme court in *Shields*, decided almost seven years after *Murphy*, adopted the Court of Appeals for the Eleventh Circuit standard for what

inference can be "drawn from possession of recently stolen property." *Shields*, 702 So.2d at 382. "The circumstances of possession and the presence or absence of evidence of participation in the crime other than mere possession must be viewed." *Id.* (citing *Cosby v. Jones*, 682 F.2d 1373, 1380, 1382-83 (11th Cir.1982)).

[6] ¶ 16. To determine the strength of the inference to be drawn from possession of stolen property, we must consider:

1. The temporal proximity of the possession to the crime to be inferred;
2. The number or percentage of the fruits of the crime possessed;
3. The nature of the possession in terms of whether there is an attempt at concealment or any other evidence of guilty knowledge;
4. Whether an explanation is given and whether that explanation is plausible or demonstrably false.

*Id.* at 383 (footnote omitted).

¶ 17. The first factor, temporal proximity, lends some strength to the inference since Presley was found in sole possession of the truck, only six days after the burglary. As to the second factor, Presley was the only person found in possession of the keys and the truck. The rest of the stolen items were still unaccounted for. However, the last two factors lend the greatest strength to the inference. Presley clearly showed guilty knowledge when found by officers in South Carolina. The license plate on the rear of the truck had been replaced with a stolen South Carolina license plate. Also, when the officers asked Presley for his name and address, he gave a total of four different aliases and two separate addresses. Finally, as to whether Presley provided an explanation as to his possession of the stolen vehicle, Presley stated that it was his uncle's truck. However, this explanation was demonstra-

bly false since the vehicle identification number showed that the vehicle in fact belonged to Gray. This final factor is what clearly distinguishes this case from *Murphy*.

¶ 18. These factors, in combination with Presley being seen near the burglarized business within several hours of the burglary, provide enough evidence for us to conclude that there was sufficient evidence to support a conviction of burglary. Therefore, this allegation of error is without merit.

## II. Whether the evidence was insufficient to support the conviction of grand larceny.

[7] ¶ 19. Similar to Presley's argument against burglary, he alleges that the evidence was insufficient to support his conviction for grand larceny. Grand larceny is defined as the "taking and carrying away, feloniously, the personal property of another, of the value of Five Hundred Dollars (\$500.00) or more..." Miss.Code Ann. § 97-17-41(1) (Rev.2006). The evidence clearly establishes a crime of grand larceny. The only question left for us is whether the evidence is sufficient to show that Presley committed the crime.

¶ 20. Our case law has held that "the presumption of guilt [of larceny], which arises from the possession of goods recently stolen, may be rebutted by an explanation or an account given by the accused as to how he acquired possession. The explanation, however, must be both reasonable and credible." *Pearson v. State*, 248 Miss. 353, 362, 158 So.2d 710, 714 (1963). If the explanation is not reasonable and credible, the evidence is sufficient for larceny. *Wilson v. State*, 237 Miss. 294, 301, 114 So.2d 677, 680 (1959). Presley offered only one explanation for possession of the stolen vehicle, claiming that it was his uncle's. As proven by the vehicle identification

number, the truck actually belonged to Gray.

¶ 21. Presley cites to *McLain v. State*, 198 Miss. 831, 24 So.2d 15 (1945) for the proposition that there was insufficient evidence to sustain the conviction. In *McLain*, the supreme court reversed a conviction for grand larceny due to insufficient evidence to prove McLain was the one who committed the charged crime. *Id.* at 837, 24 So.2d at 16. However, McLain was not found in possession of the stolen vehicle. *Id.* at 835, 24 So.2d at 15. The only evidence linking him to the stolen vehicle was a single thumbprint found inside the vehicle. *Id.* at 836, 24 So.2d at 16. In the case before us, there exists much more evidence against Presley than one thumbprint. Presley was found in possession of the stolen truck only six days after it was stolen without a credible explanation. Additionally, he was seen several hundred yards away from the business where the truck was kept the night before it was taken. From these facts, there was sufficient evidence for the jury to find Presley guilty of grand larceny.

¶ 22. Therefore, this allegation is also without error.

#### CONCLUSION

¶ 23. Since sufficient evidence existed to support the convictions on both counts, we affirm the judgment of the trial court.

¶ 24. **THE JUDGMENT OF THE CIRCUIT COURT OF FORREST COUNTY OF CONVICTION AS AN HABITUAL OFFENDER OF COUNT I, BURGLARY AND SENTENCE OF SEVEN YEARS WITHOUT THE POSSIBILITY OF PAROLE OR EARLY RELEASE, AND OF COUNT II, GRAND LARCENY AND SENTENCE OF TEN YEARS WITHOUT THE POSSIBILITY OF PAROLE OR EARLY RELEASE TO RUN CONSECUTIVELY**

**WITH THE SENTENCE IN COUNT I, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO FORREST COUNTY.**

LEE AND MYERS, P.JJ., IRVING, CHANDLER, GRIFFIS, BARNES, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR.



Nhan NEILL, appellant

v.

**WATERWAY INC./TEAM AMERICA and Legion Insurance Company Successor Tennessee Insurance Guaranty Fund, Appellees.**

No. 2007-WC-00346-COA.

Court of Appeals of Mississippi.

March 25, 2008.

Rehearing Denied July 22, 2008.

Certiorari Denied Nov. 6, 2008.

**Background:** Claimant appealed from decision of the Circuit Court, Tishomingo County, Thomas J. Gardner, III, J., which affirmed decision of the Workers' Compensation Commission awarding claimant permanent partial disability benefits.

**Holding:** The Court of Appeals, Lee, P.J., held that substantial evidence supported the Commission's decisions finding that claimant suffered a 60% loss of industrial use of both the right and left upper extremities and awarding him permanent partial disability benefits.

Affirmed.

**CERTIFICATE OF SERVICE**

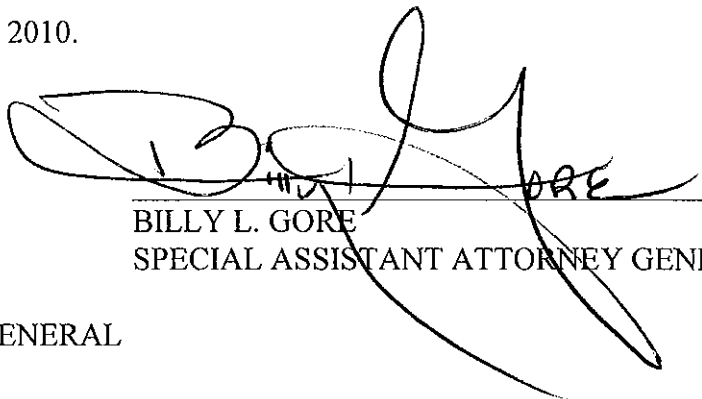
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

**Honorable Robert B. Helfrich**  
Circuit Judge, District 12  
P. O. Box 309  
Hattiesburg, MS 39403

**Honorable Jon Mark Weathers**  
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This the 25th day of June, 2010.



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