IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TONYA DEANN BELL — APPELLANT

VS. — NO. 2007-CP-1857-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TONYA DEANN BELL **APPELLANT**

VS. **NO. 2007-CP-1857-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

In this *pro se* appeal from a denial of a motion for reconsideration of sentence imposed in the wake of her two guilty pleas, Tonya Deann Bell claims " . . . she [has] discovered new evidence that shows that she was wrongfully accused" of possessing crack cocaine." (Brief of Appellant at 3)

The motion for reconsideration of sentence was treated by the circuit judge as a request for post-conviction relief made pursuant to Miss.Code Ann. §99-39-1 *et. seq.* *See* appellee's exhibit A, attached.

Regrettably, the newly discovered evidence claim is made for the first time in Bell's appellate brief. This issue was not presented to the trial judge in Bell's motion for reconsideration of sentence. (C.P. at 7-11) Bell, therefore, is procedurally barred from raising the issue in the present appeal. **Foster v. State,** 716 So.2d 538, 540 (Miss. 1998), citing **Berdin v. State,** 648 So.2d 73, 80 (Miss. 1994) ["Because Foster did not raise this issue in his petition for post-conviction relief, its consideration is precluded on appeal."]

STATEMENT OF FACTS

TONYA DEANN BELL is a thirty-two (32) year old African-American female and mother of two daughters. (C.P. at 4, 31) At the time of her pleas of guilty to reduced charges of possession of crack cocaine, Bell was a self-confessed cocaine addict. (Brief of Appellant at 4; C.P. at 8, 10, 33)

She appeals from the summary denial of her motion for reconsideration of sentence filed in the Circuit Court of Prentiss County, Thomas J. Gardner, III, Circuit Judge, presiding, after her suspended sentence was revoked for violating the terms and conditions of house arrest. Bell says she was violated with dirty urine. (Brief of Appellant at 4) Stated differently, she flunked a drug test.

The plea transcript reflects quite clearly that Bell entered her guilty pleas with an awareness the trial judge was probably going to accept the State's recommendation that Bell be given a suspended sentence coupled with house arrest. (C.P. at 27-29)

On June 29, 2005, Bell, during her plea-qualification hearing and under the trustworthiness of the official oath (C.P. at 23-35), admitted her guilt to each one of the reduced charges of cocaine possession taking place on April 4, 2003, and September 30, 2003, and charged in lower court cause numbers CR03-198 and CR04-060, respectively. (C.P. 15-18, 19-22, 30-31)

Judge Gardner thereafter found as a fact and concluded as a matter of law that Bell's pleas were voluntary, intelligent, and had a factual basis. (C.P. at 31)

In cause number CR03-198 Judge Gardner sentenced Bell to serve eight (8) years in the custody of the MDOC with the proviso she would be " . . . placed on ISP [Intensive Supervision Program] or house arrest followed by five (5) years post-release supervision." (C.P. at 21, 31; appellee's exhibit B, attached)

In cause number CR04-060 Judge Gardner sentenced Bell to serve eight (8) years in the custody of the MDOC which he " . . . suspended on condition that [she] violate no law . . . [and] no term or condition of the post-release supervision imposed in Cause CR03-198 . . . and that sentence runs consecutive to the sentence imposed here." (C.P. at 32-33)

Bell was subsequently violated for flunking a drug test and ordered to serve the full sixteen (16) years imposed collectively in CR03-198 and CR04-060.

On August 30, 2007, twenty-six (26) months after entering her pleas of guilty, Bell filed a pleading styled "Motion for Reconsideration of Sentence" which the trial judge treated as a motion for post-conviction collateral relief. (C.P. at 6-11, 49) After stating certain facts in mitigation of her sentence, Bell beseeched the trial judge to, *inter alia*, " . . . run her current charges together concurrent and or terminate her sentence." (C.P. at 10)

On September 4, 2007, Judge Gardner signed an order denying post-conviction relief on the ground "[p]etitioner has raised no meritorious issues in her motion for post-conviction relief." (C.P. at 49; appellee's exhibit A, attached.)

SUMMARY OF THE ARGUMENT

Bell's newly discovered evidence claim is made for the first time in Bell's appellate brief. This issue was not presented to the trial judge in Bell's motion for reconsideration of sentence. (C.P. at 7-11) Bell, therefore, is procedurally barred from raising the issue in the present appeal. **Foster v. State,** *supra*, 716 So.2d 538, 540 (Miss. 1998), citing **Berdin v. State,** 648 So.2d 73, 80 (Miss. 1994) ["Because Foster did not raise this issue in his petition for post-conviction relief, its consideration is precluded on appeal."]

The circuit judge did not err in denying post-conviction relief because Bell's claim targeting the duration of her sentence, however sincere and well-meaning, was manifestly without merit.

Miss. Code Ann. §99-39-11; **Garlotte v. State,** 530 So.2d 693 (Miss. 1988).

Bell has failed to establish by a preponderance of the evidence she was entitled to any relief as a result of a disproportionate, unfair and/or improper sentence. **Todd v. State,** 873 So.2d 1040 (Ct.App. Miss. 2004).

The sentence imposed for cocaine possession is within the limits prescribed by statute, Miss.Code Ann. §97-3-7(2). Accordingly, it is neither disproportionate to the severity of the offense nor a product of an abuse of judicial discretion. **Williams v. State,** 757 So.2d 953 (Miss. 1999); **Smith v. State,** 569 So.2d 1203 (Miss. 1990).

ARGUMENT

BELL IS, *INTER ALIA,* PROCEDURALLY BARRED FROM RAISING ON APPEAL A CLAIM OF AN INVOLUNTARY PLEA BASED UPON "NEW EVIDENCE" BECAUSE THAT CLAIM WAS NEVER RAISED IN THE COURT BELOW.

On June 29, 2005, Tonya Bell, in open court and under the trustworthiness of the official oath, entered pleas of guilty to two separate charges of cocaine possession. (C.P. at 23-35)

Bell's two indictments charged her with the sale of cocaine on September 30, 2003, and April 4, 2003. (C.P. at 15-16, 19-20) The two charges for sale were later reduced to possession. (C.P. at 18, 22)

We quote the following colloquy from the plea-qualification hearing taking place on June 29, 2005:

> THE COURT: The Court finds that this defendant has knowingly, understandingly, freely and voluntarily entered these pleas of guilty; that there is factual basis for each such plea. Those pleas are hereby accepted, and the defendant is adjudged guilty on each such plea.

Before I impose sentence, Ms. Bell, do you have anything you would like to say?

THE DEFENDANT: No, sir. Just that I thank the Court and my lawyer to give me this second chance to be on house arrest, where I may be with my two girls.

* * * * * *

THE COURT: In accord with the recommendation made by the State, the sentence of this Court in Cause CR03-198 is that you serve a term of eight (8) years in the custody of the Mississippi Department of Corrections. You will be placed on ISP or house arrest followed by five (5) years' post-release supervision by the Department of Corrections. * * * As an additional provision to the post-release supervision, you will, at your own expenses and willingly, engage in any drug, alcohol, or other rehabilitative services deemed appropriate by the Department of Corrections. This sentence will run consecutive to that imposed in CR04-060.

In that cause, the sentence of the Court is that you serve eight (8) years in the custody of the Mississippi Department of Corrections. That eight (8) years is suspended on condition that you violate no law of the United States, the State of Mississippi, or any other state, that you violate no term or condition of the post-release supervision imposed in Cause [number] CR03-198. This sentence will run consecutive to the sentence imposed in Cause CR03-198, and that sentence runs consecutive to the sentence imposed here.

Ms. Bell, you're going to be out on ISP and that's not going to be easy.

THE DEFENDANT: No, sir.

THE COURT: This is a chance for you not to go to the penitentiary, but it's a whole lot better chance you will go. Now, it's going to be terribly restrictive. It's not going to be easy. If you'll just get

> in your mind that you are in the custody of the Department of Corrections who allow you to remain at home, I think it might be a lot easier.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Because if you violate, you don't come back here. You go straight to Rankin County for sorting and from there you go to a facility they designate. Now, if you have a drug program - - problem, you better get some help.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Because you've got an interesting history of drug business now. **The State has reduced these charges.** That's three sales I know of. And when you leave here, ask your attorney if I'll send you to the penitentiary. I don't have to. **As a matter of fact, the Department of Corrections will do that if you step off the base. They're going to tag you out and send you.** (C.P. at 31-33) [emphasis ours]

It did, and she was.

Unfortunately, Ms. Bell did not take advantage of the prosecutor's benevolence and the imposition by the trial judge of a suspended sentence with house arrest. By her own admission she violated the terms and conditions of her house arrest and was sent to prison for sixteen (16) years - eight (8) years on each sentence to be served consecutively as opposed to concurrently. (C.P. at 8)

Bell claims in her appellate brief she has "new evidence" demonstrating she was not guilty of cocaine possession on April 4, 2003, charged in cause number CR03-198; rather, she was " . . . just a 'walk-up bystander', who was in the wrong place at the wrong time." (Brief of Appellant at 4) She laments there was insufficient evidence to demonstrate she was guilty of possession in CR03-198 and that " . . . she took a guilty plea for what she thought was (8) years for both charges." (Brief of Appellant at 3-4)

Such, in effect, is a first time challenge to the voluntariness of her guilty plea in cause number CR03-198.

First, this claim is materially contradicted by Bell's testimony and acknowledgments given under the trustworthiness of the official oath during her plea-qualification hearing. (C.P. at 31)

When a defendant's claims are in contradiction with the guilty plea record, the trial judge, as Judge Gardner may have done here, is entitled to rely heavily on the record of the proceedings. **Bilbo v. State,** 881 So.2d 966 (Ct.App.Miss. 2004); **Richardson v. State,** 769 So.2d 230 (Ct.App.Miss. 2000). *Cf.* **Taylor v. State,** 682 So.2d 359, 364 (Miss. 1996); **Sherrod v. State,** 784 So.2d 256 (Ct.App.Miss. 2001).

In **Richardson v. State,** 769 So.2d at 230 (Ct.App.Miss. 2000), the Court of Appeals, citing **Roland v. State,** 666 So.2d 747, 751 (Miss. 1995),

> " . . . concluded that an evidentiary hearing is not necessary if the record of the plea hearing reflects that the defendant was advised of the rights which he now claims he was not aware. *Id.* When the record of the plea hearing belies the defendant's claims, an evidentiary hearing is not required. If the defendant's claims are totally contradicted by the record, the trial judge may rely heavily on the statements made under oath. *Simpson v. State*, 678 So.2d 712, 716 (Miss. 1996). In *Mowdy v. State*, 638 So.2d 738, 743 (Miss. 1994), the court stated: "Where the petitioner's version is belied by previous sworn testimony, for example, as to render his affidavit a sham we will allow summary judgment to stand.*** "

See also **Taylor v. State,** 682 So.2d 359, 364 (Miss. 1996) ["There is a great deal of emphasis placed on testimony by a defendant in front of the judge when entering a plea of guilty."]; **Hull v. State,** 933 So.2d 315 (Ct.App.Miss. 2006) ["A trial judge may disregard the assertions made by a post-conviction movant where, as here, they are substantially contradicted by the court record of proceedings that led up to the entry of a judgment of guilty."]; **Dawkins v. State,** 919 So.2d 92

(Ct.App.Miss. 2005).

"Solemn declarations in open court carry a strong presumption of verity." **Richardson v. State,** *supra,* 769 So.2d at 234. *See also* **Brown v. State,** 926 So.2d 229 (Ct.App.Miss. 2005). reh denied, cert denied.

Same here.

Second, and perhaps more importantly, these claims and observations concerning an involuntary plea based upon "new evidence" do not appear as grounds for relief in Bell's motion for reconsideration of sentence; rather, they have been raised for the first time in her brief on appeal. The trial judge had no opportunity to rule on the "new evidence" claim articulated by Bell and presented here for the first time.

This is fatal to Bell's post-conviction complaint.

In **Berdin v. State,** 648 So.2d 73, 80 (Miss. 1994), we find the following language controlling the posture of Bell's complaint:

> Both Berdin and the State raised issues under assignment number II that are procedurally barred. Berdin never raised this issue at the hearing as error for post-conviction relief. **It is assigned as error for the first time in her brief.** An assignment of error may not be raised for the first time on appeal. *Collins v. State,* 594 So.2d 29, 35 (Miss. 1992). Therefore, this issue is not properly before the court. [emphasis ours]

Again, same here. *See also* **Cross v. State,** 964 So.2d 535, 538 (Ct.App.Miss. 2007) [Issue of depression as a factor for involuntary guilty plea "procedurally barred" because presented for the first time on appeal]; **Foster v. State,** 716 So.2d 538, 540 (Miss. 1998) citing **Berdin v. State,** *supra.* [Because voluntariness of guilty plea was not raised in petition for post-conviction relief, " . . . its consideration is precluded on appeal."]

The motion to reconsider sentence was treated by the circuit judge as a motion for post-conviction relief and denied summarily on the ground that Bell " . . . has raised no meritorious issues in her motion for post-conviction relief." (C.P. at 49; appellee's exhibit A, attached.)

We concur.

Third, and finally, the sentence imposed was within statutory limits.

Bell's motion for reconsideration of sentence suggested she has received more than her just desserts because she has already served a good deal of time, she had completed certain courses/programs and she had started her class to receive her GED. In effect, Ms Bell beseeched the court for a sentence reduction because she had cleaned up her act. (C.P. at 10)

While all of this is perhaps commendable, the truth of the matter is the sentence imposed was within statutory limits and neither excessive nor disproportionate to the offense of cocaine possession. This is especially true where, as here, Bell was given a suspended sentence with house arrest.

Unfortunately, she had no funds to enroll in a drug and/or alcohol treatment program while on house arrest , and by the time she did, it was too late.

It is elementary "[t]he burden is upon [Ms Bell] to prove by a preponderance of the evidence that [s]he is entitled to the requested post-conviction relief." **Bilbo v. State,** *supra,* 881 So.2d 966, 968 (¶3) (Ct. App.Miss. 2004) citing Miss.Code Ann. §99-39-23(7) (Rev.2000).

We respectfully submit the trial judge did not abuse his judicial discretion in finding that Tonya Deann Bell failed to do so here.

Bell's "Petition to Enter Guilty Plea" is not a matter of record.

Bell's guilty plea transcript is, however, a matter of record at C.P. 23-35 and again at C.P. 36-48.

Bell argues that given her clean record since her incarceration her two eight (8) year sentences should be revised to run concurrently as opposed to consecutively.

We argue, on the other hand, her sentence, which was within the limits prescribed by statute, is not subject to appellate review. *See* Miss.Code Ann. §41-29-139(c)(1)(B).

The type and duration of a sentence has always been a matter within the discretion of the trial judge. A sentence will not be reviewed if it is within the limits prescribed by statute. **Reynolds v. State,** 585 So.2d 753 (Miss. 1991); **Moore v. State,** 873 So.2d 129 (Ct.App.Miss. 2004).

We reiterate.

The sentence imposed, although the maximum authorized by law, was within statutory limits and did not constitute an abuse of judicial discretion. **Hart v. State,** 639 So.2d 1313 (Miss. 1994); **Stromas v. State,** 618 So.2d 116 (Miss. 1993); **Moore v. State,** 873 So.2d 129 (Ct.App.Miss. 2004), reh denied; **Brown v. State,** 872 So.2d 96 (Ct.App.Miss. 2004); **Miller v. State,** 870 So.2d 667 (Ct.App.Miss. 2004) [Appellate court reviews a denial of post-conviction relief under an abuse of discretion standard]; **Miles v. State,** 864 So.2d 963, 968 (Ct.App.Miss. 2003), reh denied ["Sentencing is within the complete discretion of the trial court and [is] not subject to appellate review if it is within the limits prescribed by statute."]

In short, Bell has failed to demonstrate by a preponderance of the evidence her sentence was, or has become, excessive or disproportionate to the circumstances of the offense charged or the character of the offender. *See* **Falconer v. State,** 832 So.2d 622, 623 (Ct.App.Miss. 2002) [Petitioner, a first offender, failed to demonstrate any unconstitutional dimension to his sentence, as it was within the limits of the statutory sentencing scheme.]

CONCLUSION

Bell's claims are procedurally barred for the reasons stated. But even if not, her arguments were manifestly without merit.

Miss.Code Ann. § 99-39-11 reads, in its pertinent parts, as follows:

* * * * * *

> (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.*

* * * * * *

Apparently, it did, he did, and he was. **Garlotte v. State,** *supra*, 530 So.2d 693 (Miss. 1988)["This case presents an excellent example of the appropriate use of the summary disposition provision of §99-39-11(2)]; **Falconer v. State,** 832 So.2d 622 (Ct.App.Miss. 2002) ["(W)e affirm the dismissal of Falconer's motion for post-conviction relief as manifestly without merit."].

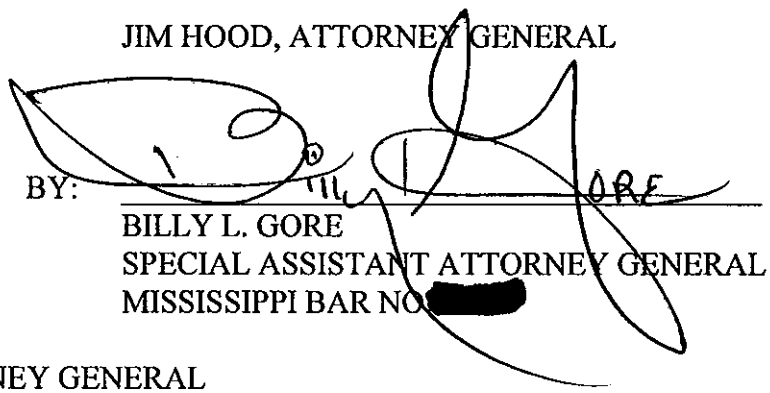
Summary denial was proper because Bell's post-conviction claim targeting the voluntariness of her pleas and the duration of her sentence was manifestly without merit. No further fact-finding was required, and relief was properly denied without the benefit of an evidentiary hearing focusing upon additional facts in extenuation and mitigation of sentence.

Appellee respectfully submits this case is devoid of any claims worthy of an evidentiary hearing or vacation of the sentence imposed following Bell's voluntary pleas of guilty. Accordingly, the judgment entered in the lower court summarily denying Tonya Bell's

motion for post-conviction relief should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



BY: _____

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

IN THE CIRCUIT COURT OF PRENTISS COUNTY, MISSISSIPPI

TONYA BELL **PETITIONER**

VERSUS **CAUSE NO. CR03-198G; CR04-060G**

STATE OF MISSISSIPPI **RESPONDENT**

ORDER

This cause comes before the Court on Petitioner's *pro se* Motion for Reconsideration of Sentence. This Court will treat the Motion for Reconsideration of Sentence as one for Post-Conviction Relief pursuant to Miss. Code Ann. § 99-39-1, et seq.

Petitioner has raised no meritorious issues in her motion for post-conviction relief.

IT IS ORDERED that Petitioner's Motion for Post-Conviction Relief be and same is **DISMISSED** pursuant to Miss. Code Ann. § 99-39-11 (2007). **IT IS FURTHER ORDERED** that the Clerk of this Court shall mail a certified copy of this Order to the *pro se* Petitioner.

SO ORDERED this, the 4 day of Sept., 2007.

THOMAS J. GARDNER III
CIRCUIT JUDGE

FILED
SEP 17 2007
CIRCUIT CLERK

Minute Book 99
Page 62

EXHIBIT
A

IN THE CIRCUIT COURT OF PRENTISS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. CAUSE NO. CR03-198 G PR

TONYA DEANN BELL

SENTENCING ORDER
INTENSIVE SUPERVISION PROGRAM / HOUSE ARREST

THIS CAUSE, HAVING BEEN BROUGHT BEFORE THE COURT FOR SENTENCING OF THE DEFENDANT, TONYA DEANN BELL, WHO HAS BEEN ADJUDICATED GUILTY OF THE CRIME OF POSSESSION OF MORE THAN 0.1 GRAMS BUT LESS THAN 2 GRAMS OF COCAINE

IT IS, THEREFORE ORDERED AND ADJUDGED THAT THE DEFENDANT BE SENTENCED TO SERVE A TERM OF 8 YEAR(S) IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, THE DEFENDANT IS TO BE PLACED IN THE INTENSIVE SUPERVISION / HOUSE ARREST PROGRAM PER SECTION 47 - 5 - 1001 THROUGH 47 - 5 - 1015 OF THE MISSISSIPPI CODE AND THE COURT RETAINS JURISDICTION FOR A PERIOD OF ONE (1) YEAR PER MISSISSIPPI CODE SECTION 47 - 7 - 47,1972 ANNOTATED. SAID SENTENCE IS CONDITIONED UPON THE DEFENDANT AGREEING AND COMPLYING WITH ALL OF THE CONDITIONS OUTLINED IN THE INTENSIVE SUPERVISION AGREEMENT AS PROVIDED BY THE MISSISSIPPI DEPARTMENT OF CORRECTIONS.

IF THE DEFENDANT SHOULD FAIL TO SUCCESSFULLY COMPLETE THE INTENSIVE SUPERVISION PROGRAM, THE MISSISSIPPI DEPARTMENT OF CORRECTIONS MAY, WITHOUT FURTHER ORDERS FROM THIS COURT, PLACE THE DEFENDANT IN WHATEVER MISSISSIPPI DEPARTMENT OF CORRECTIONS FACILITY DEEMED APPROPRIATE TO COMPLETE SAID SENTENCE.

IF THE DEFENDANT COMPLETES THE INTENSIVE SUPERVISION PROGRAM, THE MISSISSIPPI DEPARTMENT OF CORRECTIONS SHALL NOTIFY THE COURT AND THE COURT SHALL HAVE THE OPTION OF ORDERING THE DEFENDANT TO BE PLACED ON SUPERVISED PROBATION FOR THE REMAINDER OF HIS / HER SENTENCE OR UNTIL THE COURT SHALL ALTER, EXTEND, TERMINATE, OR DIRECT THE EXECUTION OF THE ABOVE SENTENCE.

IT IS FURTHER ORDERED THAT

Upon successful completion of ISP, defendant is to be placed on 5 years Post Release Supervision. Defendant is to pay court costs in this cause, a fine of $1,000.00, $160.00 to NMNU, $25.00 to Tupelo Crime Lab, and $100.00 to MS CVCF. This sentence is to run consecutive with that imposed in CR04-060 G PR. Defendant shall complete any alcohol & drug treatment as directed by Supervising Officer.

SO ORDERED THIS 29TH DAY OF JUNE 2005

CIRCUIT COURT JUDGE

FILED
JUN 29 2005
BUD GREEN
CIRCUIT CLERK

EXHIBIT

Minute Book 90

Page 770

CERTIFICATE OF SERVICE

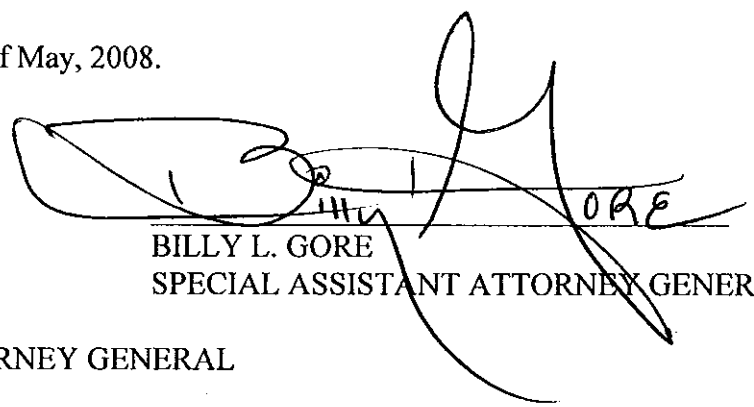
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Thomas J. Gardner, III
Circuit Court Judge, District 1
Post Office Drawer 1100
Tupelo, MS 38802-1100

Honorable John R. Young
District Attorney, District 1
Post Office Box 212
Corinth, MS 38834

Tonya, D. Bell, #N5843
CMCF 1A-Bldg., A-Hall #4
Post Office Box 88550
Pearl, MS 39288

This the 5th day of May, 2008.



BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680