

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-00236-COA

FILED

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BOBBY L. TRAVIS

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SUPREME COURT
COURT OF APPEALS**

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

**APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF THE
1ST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI**

BRIEF ON THE MERITS BY THE APPELLANT

**OFFICE OF THE PUBLIC DEFENDER,
HINDS COUNTY, MISSISSIPPI**

William R. LaBarre, [REDACTED]

PUBLIC DEFENDER

Alice T. Stamps, [REDACTED]

Virginia L. Watkins, [REDACTED]

Assistant Public Defenders

Post Office Box 23029

Jackson, Mississippi 39225

Telephone: 601-948-2683

Facsimile: 601-948-2687

Bobby L. Travis v. State of Mississippi

Cause No. 2007-KA-00236-COA

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and the judges of the Court of Appeals may evaluate possible disqualification or recusal.

William L. LaBarre,
HINDS COUNTY PUBLIC DEFENDER
Alice T. Stamps
Virginia L. Watkins
Assistant Public Defenders
Post Office Box 23029
Jackson, Mississippi 39225

Honorable Faye Peterson,
HINDS COUNTY DISTRICT ATTORNEY
Phillip Weinberg
Chad Doleac
Assistant District Attorneys
Post Office Box 22747
Jackson, Mississippi 39225

Honorable Bobby B. DeLaughter
Circuit Judge
Post Office Box 327
Jackson, Mississippi 39205

Mr. Bobby L. Travis
MDOC No. 124011
SMCI, SMCI No. 2
Post Office Box 1419
Leakesville, Mississippi 39451

So certified, this the 2nd day of November, 2007.


Virginia L. Watkins, MSB No. [REDACTED]
Certifying Attorney

Bobby L. Travis v. State of Mississippi

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STATEMENT OF THE ISSUES

I. The trial court erred in denial of the motion of Mr. Smith to dismiss for failure to grant a speedy trial, as two defense witnesses died between the time of the incident and the time of trial, depriving Mr. Travis of presenting a defense, all in violation of state and federal constitutional guarantees, and

II. The trial court erred in denial of the motion of Mr. Smith for a new trial, as the weight of the evidence was insufficient to sustain the verdict of the jury.

STATEMENT OF THE CASE

A. Disposition of the Proceedings Below

Bobby L. Travis was indicted with his cousin, Earltavious M. Jones, by a lawfully constituted grand jury of citizens from the 1st Judicial District of Hinds County, Mississippi during the March 2004 term. CP. 4. Mr. Travis and his cousin were charged with violation of MISS. CODE ANN. § 97-17-23 (1972), house burglary of an occupied dwelling and kidnapping in violation of MISS. CODE ANN. § 97-5-53 (1972) in connection with the home invasion of Boris Hines on May 16, 2003. CP. 4. Mr. Travis proceeded to trial before a jury of his peers on August 9, 2006; on August 10, 2005, the jury returned a verdict of “Guilty” on Count One of the indictment, house burglary, and “Not Guilty” on Count Two of the indictment, kidnapping. CP 56-57; 59; RE 13-15. Upon completion of a pre-sentencing report which demonstrated Mr. Travis, 36, had no prior criminal history, the trial court sentenced him to twenty-five (25) years, with ten (10) years suspended and fifteen (15) years to serve and five (5 years) probation, with credit for the time already served. CP 61-62; RE 15; T. 344.

After timely prosecution and denial of all post-trial motions, Mr. Travis initiated appeal of the instant cause which has been presented to this honorable Court for resolution. CP 65-72; RE 16.

B. STATEMENT OF THE FACTS

On August 13, 2003, Bobby L. Travis, who had never been in trouble with the law before, turned himself in to the Jackson Police Department, after hearing that he was wanted in connection with the May 16, 2003 burglary of the apartment of Boris Hines and subsequent kidnapping. T. 3; 271; CP 4.

Events began to unfold about 3 am, in the early morning hours of May 16 when the telephone rang in Apartment B10 of Boris Hines, manager of the Green Hill Place Apartments.

T. 134-136. Hines testified that a female voice that he did not recognize told him someone was attempting to break into the truck belonging to Quala Watson, Hines' roommate; then hung up. T. 136; 171. Hines testified he went down to tell Watson of the call; Watson went to the front door and opened it. T. 136. As she did so, two men rushed through the door, Hines testified, both in masks, one carrying a shotgun, the other a handgun. T. 137; 151. Hines testified he had time only to see that one mask was dark blue as he rushed up the stairs to his bedroom and an assailant grabbed him by the leg and dragged him back down the stairs. T. 137; 161. Hines was then taken upstairs and a trash bag was put on his head and arms and feet tied with some elastic cord. T. 137; 139. The pair talked virtually the entire time they were in Hines' apartment, he testified, as they ransacked the refrigerator, closets, drawers and cabinets. T. 141; 172. Hines testified he was hit in the face and lip with fist and gun each time he asked about Quala Watson; Hines was told he owed the "boss" \$5,000. T. 139-141. Hines testified he bled profusely from the busted lip and other beatings. T. 140; 162. He had seen only two men, but heard a third male voice, which Hines testified he could not identify. T. 161.

After an unknown amount of time, he testified, the assailants took a terrified Hines to the living room, wrapped him in a sheet and a blanket, put a laundry basket on his head and took him over the shoulder of one of the men outside. T. 142-143. Hines testified he heard the sound of a key into the trunk of a car, then his legs were balled up and he was dumped into a car trunk. T. 143. Hines could still hear voices, but could not distinguish what was being said. After a few minutes, Hines testified his attackers removed him from the trunk and told he would be treated to a demonstration of what was done in New Orleans, then someone fired one of the weapons. T. 144-145. Hines testified he was put back in a vehicle, this time with Watson, whom he could hear. T. 145. The little band traveled a few more minutes, Hines testified, stopped and left Hines alone in the car. When he heard "complete silence" he was able to break free of his bonds and

escape through the broken window of an older model Buick at 335 Redwood Avenue. T. 146; 157-58; 266. Hines testified he ran to a nearby home and convinced the resident to allow him to use the telephone to summon police, who returned him to his apartment. T. 146. By the time Hines arrived home, it was daylight, he testified; the ordeal which began at 3 a.m. ended some four hours later. T. 146. Hines' apartment was in disarray. Missing were his collection of videotapes, his computer hard drive, monitor, DVD/VCR player, and a set of crystal, as well as keys belonging to Watson's car. In addition, all the keys to every apartment in the complex at Green Hill Place were missing from their usual spot on a bookshelf in the living room. T. 152; 159-160. All of the items but the crystal and apartment keys were returned to Hines a few months before trial. T. 154. At trial, it was established that several items extensively discussed in testimony before the jury were lost in the Jackson Police Department evidence room, such as the apartment keys depicted in a photocopy (Exhibit 9) and Hines' crystal. T. 152; 160; T. 232; 240; 243.

Officer Letisha Gibbs was dispatched to Hines' apartment and arrived at about 5:25 a.m. T. 206; 217. As she entered the complex, she saw an oncoming Nissan truck slow, shut off headlights, and the driver slump down into the seat, as though to avoid detection. T. 207. Suspicious, Gibbs stopped and ordered the driver to put his hands out the window. As she approached, she saw a gun on the seat beside the driver, identified as Earltavious M. Jones, 17-year-old cousin to Mr. Travis. T. 190; 208; 209; Exhibit 12. Gibbs ordered Jones, dressed in a completely black jumpsuit with a blue ski mask and cell phone in the pockets, out of the truck and discovered that he was sitting on top of a second handgun. T. 194; 219; Exhibit 13. She handcuffed Jones and put him in her patrol car. T. 191.

Indicted for the home invasion and kidnapping of Hines with his older cousin, Jones told an interesting tale that predictably enough exonerated him of any wrongdoing. In August of

2005, Jones pleaded guilty in August 2005 to a charge of house burglary as part of a plea agreement to testify against Mr. Travis. T. 193; 272. The agreement included dropping the kidnapping charge against Jones, which carried a possible life sentence. T. 200. Jones had not been sentenced at the time of the trial of Mr. Travis. T. 199.

Jones' testimony, however, differed significantly from that related by the victim, Boris Hines. Jones testified he remained outside the entire time, along for the ride to ostensibly spend the night with his cousin Bobby, arriving at Green Hill Place about 3 a.m. T. 177; 192. On arrival, however, Jones testified Mr. Travis reported his apartment lights were out, whereupon Mr. Travis drew a chrome pistol from beneath the seat of a red Nissan truck, which belonged to Jones' friend, Angie Nixon. T. 179; Exhibit 12. A third man whom Jones testified he knew only as "Dave" produced a .38 caliber handgun, which Jones identified as Exhibit 13. T. 181.

Jones testified Mr. Travis and "Dave" take handguns and "rush" into Hines' apartment. T. 181. Hines testified graphically about being bound hand and foot and taken out of his apartment over the shoulder of one of his assailants and dumped into the trunk of a car, (T. 142-144). Jones testified differently; after his cousin and Dave spent ten to fifteen minutes inside, Mr. Travis and "Dave" brought out a man and woman with something over their eyes and their hands tied. T. 182-183. Jones made no mention of a trash bag or laundry basket over the head of one of the individuals nor did he make any mention of one being bound hand *and* foot. The pair initially sought to put the two in a tan car, Jones testified, but Dave said the car had no gas, so they put Hines into the back seat of the Nissan pick-up and laid the woman (presumably Watson) over a pull-out seat before driving off. T. 184-185. This despite the testimony of Hines that he was first stowed into a car trunk – a fair cry from the back seat of a pick-up truck.

When Mr. Travis and "Dave" returned about an hour later, they had the woman with them, but not the male (Hines). T. 186. Jones testified that Mr. Travis and Dave took the woman

back to Hines' apartment, telling her to make what amounted to a ransom telephone call for \$5,000 Hines allegedly owed. T. 187.

Shortly after the pair re-entered Hines' apartment, Jones testified, they came out, then began loading into the truck laundry bags full of items from the apartment of Mr. Travis. T. 189. Jones testified he saw nothing coming from the apartment of Hines. T. 189. As the three had driven over in the truck, which belonged to Ms. Nixon, Jones testified he agreed to drive the Nissan pick-up back to the home of Mr. Travis' sister, even though he had no license. T. 178; 189. Mr. Travis and "Dave" pulled away in a maroon Corsica, leaving Jones to follow to the home of Mr. Travis' sister. T. 189. Jones loitered behind to smoke a cigarette before heading out, as Nixon did not permit smoking in her truck, then got behind the wheel. T. 190. It was at this point Officer Gibbs pulled into the complex; Jones testified he had tickets for driving with no valid driver's license and so sought to avoid attention from Gibbs. T. 191.

After he was handcuffed in Gibbs' patrol car, Jones testified Hines returned to the apartment, shirtless. T. 192. Police led him to the truck, where Hines identified the laundry bags as filled with his belongings: computer, monitor, videotapes and DVD/VCR player, taken while he had been held captive in the apartment. T. 192.

As Det. Denson began investigation, Jones was among his first interviews. T. 227. Although Jones testified he knew nothing of the mysterious "Dave," Denson conceded during cross-examination that Jones told him "Dave" lived on Boling Street. Denson, now an investigator for the Hinds County District Attorney's Office, did not follow up because, he testified, because Jones failed to give the correct spelling of the street name. T. 267.

And while Jones testified at trial that he had no idea where the four went when they left the apartment in the Nissan, Denson testified that he went to Redwood Avenue to the abandoned

house – and car – because Jones had told him Hines was taken there. T. 263. Gibbs also testified that Jones told her his aunt lived on Redwood Avenue. T. 220.

Despite Jones' professed ignorance of anything about "Dave" during his trial testimony, he gave Denson information about "Dave" during that initial interview. T. 267. Denson also acknowledged during cross-examination in January of 2004, an assistant district attorney relayed information of Dave's full name and address from Jones through Jones' lawyer. T. 268. Denson testified he did nothing with the information because Jones' attorney would not return his telephone calls. T. 268.

After the interview with Jones, Denson said he had two suspects, including Mr. Travis. T. 228. Jones testified that Mr. Travis allegedly told him of trouble with his landlord, Hines also testified that his relations with Mr. Travis and his girlfriend Tonya had grown cool, as Hines had been forced to issue a "final notice" to leave due to non-payment of rent. T. 150; 185. Tonya had threatened to "get" Hines when she received the final past due rent notice, Hines testified, but he did not say Mr. Travis was present when the threat was made. T. 150. After the burglary and kidnapping, Hines related the threat from Tonya to police. T. 148. And even though Hines acknowledged during cross-examination friendly and regular conversations with Mr. Travis from the time Mr. Travis moved in during October 2002, Hines also testified he could not tell if one of the voices he heard throughout his four-hour ordeal was that of Mr. Travis, although he admitted that the pair in his apartment talked virtually the entire time. T. 172-173. Hines also testified that he notified police of the car he said Mr. Travis drove, a Ford Festiva. T. 149. While Det. Denson testified that a mask, crystal and apartment keys (the subject of the photocopy in Exhibit 9) were found, no other ownership information was found to link the vehicle with Mr. Travis – and the supposedly recovered evidence, only the testimony of Hines and Jones. The mask, crystal and a

whole set of apartment keys logged into the Jackson Police Department evidence were never found. T. 230; 232.

Quala Watson never appeared to testify; Hines testified he saw her upon his return to his apartment that morning and has not seen her since. T. 151.

SUMMARY OF THE ARGUMENT

Mr. Travis was denied his fundamental right to a fair and speedy trial, guaranteed by both the state and federal constitution and Mississippi law, because during the intervening roughly thirty-nine months between the incident and trial, two defense witnesses died who could corroborate that Mr. Travis was living in Louisiana. Mr. Odell Harris died in the Kenner, La., area in February or March 2006 and a second witness, whom Mr. Travis knew as Mr. Booker, or Pawpaw, died in January of 2006. Mr. Harris could verify that Mr. Travis was living and working in Louisiana when the events of May 13, 2003 took place; their deaths deprived him of his ability to mount a meaningful defense against the charges against him.

The jury's verdict supports Mr. Travis' argument that the evidence was insufficient, for the jury found him innocent of kidnapping. Yet if the testimony of Mr. Hines is to be believed, the kidnapping was part and parcel of the burglary, as police so testified. The verdict of the jury is factually inconsistent with evidence, particularly when considered with the substantive distinctions between the testimony of the victim, Boris Hines and Earltavious Jones, who freely admitted he lied, and who freely admitted he pleaded to a burglary he did not commit to escape a possible life sentence for kidnapping.

ARGUMENT

I. The trial court erred in denial of the motion of Mr. Smith to dismiss for failure to grant a speedy trial, as two defense witnesses died between the time of the incident and the time of trial, depriving Mr. Travis of presenting a defense, all in violation of state and federal constitutional guarantees, and

The trial court erred in denial of the Motion to Dismiss filed *pro se* in January 2005 by Mr. Travis because of the fatal prejudice accruing to him upon the death of two defense witnesses who could have corroborated his presence elsewhere during the early morning hours of May 16, 2003. Both of the witnesses died in the intervening three years Mr. Travis waited for trial. CP 16-20; T. 27-28; RE 17-18. The trial court's decision violated both his statutory and constitutional rights to due process and a fair and speedy trial. MISS. CODE ANN. § 99-17-1 (1972); U.S. CONST., AMEND. V, VI, XIV; MISS. CONST., ART. III, § § 14; 26.

Mr. Travis, a truck driver, testified that two witnesses who could testify that he was living in Louisiana at the time of the May 16, 2003 incident both died since his arrest. T. 5. Odell Harris of Kenner, La., whom Mr. Travis testified owned some trucks and permitted Mr. Travis to drive for him, died in February or March 2006. A Mr. Booker, also of the New Orleans, La., area died in January 2006, and Mr. Travis testified he, too, would have testified as to Mr. Travis's whereabouts on May 16, 2003. T. 6. The inability to mount a defense due to the death of alibi witnesses is of incalculable prejudice to Mr. Travis, who was the mercy of the state's docket to bring the case on for trial.

Mississippi law requires that an accused be brought to trial within 270 days of arraignment unless there is a showing of "good cause." MISS. CODE ANN. § 99-17-1 (1972) Even more stringent than the statutory speedy trial right, however, is the constitutional right to a speedy trial, which begins when the individual is accused; in this case, with the arrest of Bobby L. Travis on August 13, 2003. T.3; 271.

While an eight-month delay under Mississippi law is presumptively prejudicial, the sole remedy for violation of the *constitutional* right to a speedy trial is reversal and discharge of the accused. *Jenkins v. State*, 607 So.2d 1137, 1138 (1992), citing *Spencer v. State*, 592 So.2d 1382, 1387 (Miss. 1991); *Strunk v. United States*, 412 U.S. 434, 439-440 (1973); *Smith v. State*, 550 So.2d 406, 409 (Miss. 1989). Once attached, the denial of the right to speedy and public trial is analyzed under the familiar, four-prong standard of *Barker v. Wingo* 407 U.S. 514, 515 (1972) length of delay; reason for delay; assertion of the right to a speedy trial and prejudice to the accused. *Id.*, 515. It is the burden of the prosecution to demonstrate good cause for delays in prosecution; improper motives weigh heavily in the balancing conducted for violation of speedy trial rights. Furthermore, when the record is silent as the reason, such time is counted against the state. *Jenkins*, at 1139. Finally, the time between arrest and indictment is chargeable to the state when defendant present and several grand juries had met since then. *Id.*

In the present case, Mr. Travis was arrested August 13, 2003; no indictment was sought until the March 2004 term of the Hinds County Grand Jury and the indictment was not filed until June 8, 2004, more than a year after the incident and nearly 10 months after the arrest of Mr. Travis. CP4. Time between his arrest and indictment is counted against the state. *Jenkins*, 1139.

At the time of his arraignment, August 2, 2004, when trial was set for November 16, 2004, the trial court correctly notes Mr. Travis was represented by private counsel, who subsequently sought to withdraw via motion filed August 16, 2004. CP 8; 9. The trial court found that upon withdrawal of privately retained counsel, the Hinds County Public Defender's Office was appointed Sept. 7, 2004 and within two days of appointment, on Sept. 9, had filed a Motion for Discovery. CP 13. The case was continued from Nov. 16, 2004 to May 19, 2005 at the request of the defendant, so that time, under the *Barker* standards is not counted against the defendant.

The chronology runs roughly:

August 13-2003 to June 8, 2004, date of filing of indictment – 300 days, counted against the State; (*Jenkins*, at 1139);

November 16, 2004 to May 19, 2005, - 186 days, counted against Mr. Travis for seeking a continuance; (T. 23)

May 19, 2005 to Feb. 22, 2006 – 279 days. The trial court does not appear to hold this delay against the State, although no reason is shown for the continuance from May 19, 2005 to February 22, 2006. Under *Barker*, and its progeny, Mr. Travis submits that such an explained delay be counted against the state.

Feb. 22 to August 9, 2006 – 166 days. This delay the court attributes to a crowded docket and the fact that a trial was already in progress on Feb. 22, 2006. T. 26. Regardless, more than 300 days passed between arrest and indictment and at least 279 between the May 19, 2005 date set after counsel for Mr. Travis sought the first continuance and Feb. 22, 2006, a “presumptively prejudicial” period under Mississippi law.

As for assertion of the right, the January 25, 2005 Motion to Dismiss filed *pro se* by Mr. Travis would have been denied if brought on for hearing because at that point *all* delay would be counted against the defendant, the trial court found, an error as noted from *Jenkins*, at 1139, cited above. T. 23. The trial court also found the *pro se* Motion to Dismiss would have been deemed abandoned under Uniform Rule of Circuit and County Court Practice 2.04. T. 24. But as counsel for Mr. Travis noted at trial, *Brentgetty v. State*, 794 So.2d 987, 994 (Miss. 2001) specifically notes in response to a similar argument by the State that “[w]hile failure or delay in raising a speedy trial claim may cost a defendant points in the *Barker* analysis, there is no procedural bar solely for failing to properly pursue the claim in open court.”

Finally, the trial court found that Mr. Travis suffered no prejudice, for although he testified he was unable to pursue his career as a truck driver due to conditions placed on his bond, the trial court rather acidly noted no such conditions were the fault of the trial court. T. 25. This begs common knowledge that private bonds almost always carry conditions regarding out-of-state or out-of-area travel. The trial court also found that since no record of discovery or of issuance of subpoenae for Mr. Harris or Mr. Booker appeared in the court file, no prejudice would have ensued because the trial court would have refused to permit them to testify due to violation of rules of discovery. T. 27.

Nevertheless, Mr. Travis would submit that he did indeed suffer severe prejudice, particularly given the case against him, which rested solely on the shoulders of a twenty-year-old relative who sought to escape a life sentence for burglary and kidnapping, discussed in greater detail in Issue No. II. As the United States Supreme Court noted in *U.S. v. Marion*, 404 U.S. 307, 320 (1971), “inordinate delay, wholly aside from possible prejudice to a defendant on the merits may seriously interfere with a defendant’s liberty, whether free on bail or not and ... disrupt employment, drain financial resources, curtail his associations, subject the defendant to public obloquy and create anxiety in him, his family and friends.”

Mr. Travis adequately demonstrated the prejudice which innured to him due to the delay in bringing his case to trial. He was deprived of due process because of the death of witnesses he claimed were vital to supporting his claim that he was elsewhere the night the events took place. See *Hentz v. State*, 542 So.2d 914, 917 (Miss. 1989). Mr. Travis was denied the right to earn his living as he had since 1991 and he had sought to assert his right to a speedy trial. His conviction should be reversed and his sentence vacated, due to the failure to provide Mr. Travis a speedy trial.

II. The trial court erred in denial of the motion of Mr. Smith for a new trial, as the weight of the evidence was insufficient to sustain the verdict of the jury.

Again, counsel for Mr. Travis brings before this Court still another case which hinges on tenuous evidence, and virtually no direct evidence.

Hines testified he could not say whether one of the voices he heard was that of Mr. Travis, a tenant since October 2002, about six months. T. 170. This was someone with whom Hines conversed regularly, at least until he was forced to demand past due rent from Mr. Travis. T.173-174.

As noted earlier, Hines' testimony was graphic and clear about what had happened to him; trash bag over his head, bound hand and foot, wrapped in blankets and sheets and carried out of his apartment over the shoulder of one of his assailants and dumped into the trunk of a car. T. 142-43. Hines saw the mask of only one invader – blue, the same color Earltravious Jones had in his pocket; he saw a handgun, chrome, the same as Earltravious Jones had with him when arrested wearing an all black jumpsuit. T. 161; 194; 258; 284; Exh. 15.

Jones' testimony goes all over the map. Hines wasn't dumped in a car trunk, he was placed on the back seat of a pick-up truck. T. 185. Jones testified he never knew the last name of "Dave" or anything else about him; yet even on May 16, 2003, he told Denson the street on which "Dave" lived and a year later, with plea bargaining in the works, he relayed "Dave's" full name and address through his lawyer to an assistant district attorney. T. 267; 268. Jones lied about review of his May 16, 2003 statement that he had not seen it in thirty-nine months; then admitted under cross-examination that his lawyer had been over "a couple of pages" with him the afternoon before trial. T. 198. Further, Jones lied when he testified that he had no idea where the blindfolded and tied male was taken when Mr. Travis and "Dave" brought him down from his apartment that night. Yet, Det. Denson testified that he went to Redwood Avenue, where

CONCLUSION

Because Mr. Travis was fatally prejudiced by the death of two witnesses who could corroborate his presence elsewhere on the night of the crime, witnesses who could have testified had he been granted his constitutionally guaranteed speedy trial and because the evidence lacks sufficient weight to sustain the verdict of the jury, Mr. Travis respectfully petitions this Court to reverse his conviction and vacate his sentence. Alternatively, he asks for reversal and remand for a new trial.

Respectfully submitted,



Virginia L. Watkins, MSB No. 9052
Assistant Public Defender

OFFICE OF THE PUBLIC DEFENDER,
HINDS COUNTY, MISSISSIPPI
William R. LaBarre, MSB No. [REDACTED]
PUBLIC DEFENDER
Alice T. Stamps, MSB No. [REDACTED]
Virginia L. Watkins, MSB No. [REDACTED]
Assistant Public Defenders
Post Office Box 23029
Jackson, Mississippi 39225
Telephone: 601-948-2683
Facsimile: 601-948-2687

Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be delivered via hand delivery a true and correct copy of the foregoing *Brief on the Merits by Appellant*, to the following:

Honorable James Hood III
Attorney General
Charles W. Maris Jr., Esq.
Assistant Attorney General
Criminal Litigation Division
Post Office Box 220
Jackson, Mississippi 39205-0220

Honorable Faye Peterson
District Attorney, Hinds County
Post Office Box 22747
Jackson, Mississippi 39225

Honorable Bobby DeLaughter
Circuit Judge
P.O. Box 327
Jackson, Mississippi 39205

And via United States Mail, postage prepaid, to:

Mr. Bobby L. Travis
MDOC No. 124011
SMCI, SMCI No. 2
Post Office Box 1419
Leakesville, Mississippi 39451

So certified, this the 2nd day of November, 2007.


Virginia L. Watkins, MSB No. [REDACTED]
Certifying Attorney