

**COPY**

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

**NO. 2007-KA-00381-COA**

**JOHNNY BICKHAM**

**APPELLANT**

**vs.**

**FILED**

**STATE OF MISSISSIPPI**

**NOV 13 2007 APPELLEE**

**OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS**

**BRIEF OF APPELLANT**

**(ORAL ARGUMENT REQUESTED)**

Prepared By:

**Robert Stanley Little, Jr. MSB** 

Post Office Box 5

Tunica, Mississippi 38676

Telephone: 662.363.1161

Facsimile: 662.363.1184

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**CERTIFICATE OF INTERESTED PERSONS**

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 this Court may evaluate possible disqualification or recusal:

**Johnny Bickham, Appellant**

**Robert Stanley Little, Jr., Trial Attorney**

**Laurence Y. Mellen, Esq. District Attorney, Office of the District Attorney**

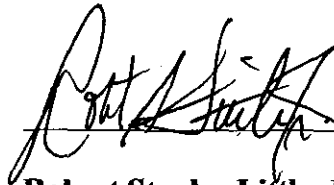
**Jim Hood, Esq. Attorney General, State of Mississippi**

**The Honorable Charles E. Webster, presiding Circuit Court Judge**

**Friars Point Police Department, investigating/arresting agency**

**Coahoma County Sheriff's Department, investigating/arresting agency**

Respectfully Submitted,



**Robert Stanley Little, Jr.,** 

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**WHETHER THE APPELLANT'S CONVICTION HAS CREATED AN EXCEPTIONAL CASE IN WHICH THE WEIGHT OF THE EVIDENCE PREPONDERATES SO HEAVILY AGAINST THE VERDICT THAT THE TRIAL COURT ABUSED ITS DISCRETION BY NOT INVADING THE PROVINCE OF THE JURY AND GRANTING THE APPELLANT'S MOTION FOR A NEW TRIAL.**

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**STATEMENT OF ISSUES**

**ISSUE ONE:**

**WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR DIRECTED VERDICT, PREMPATORY INSTRUCTION, AND JUDGMENT *NON-OBSTANTE VERDICTO*, WHERE THE EVIDENCE POINTS IN FAVOR OF THE DEFENDANT WITH RESPECT TO THE ELEMENT OF DELIBERATE DESIGN, WITH SUCH SUFFICIENT FORCE THAT REASONABLE MEN COULD NOT HAVE FOUND, BEYOND A REASONABLE DOUBT, THAT THE DEFENDANT WAS GUILTY .**

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### **STATEMENT OF INCARCERATION**

JOHNNY BICKHAM is presently incarcerated in the custody of the Mississippi Department of Corrections.

### **STATEMENT OF JURISDICTION**

This Honorable Court has jurisdiction of the case pursuant to *Article 6, Section 146 of the Mississippi Constitution* and *Miss. Code Ann. 99-35-101 (Supp. 2001)*.

### **STATEMENT IN SUPPORT OF ORAL ARGUMENT**

The Appellant requests oral argument in order to facilitate a complete understanding of the complex facts and legal questions facing this Honorable Court, based on the errors alleged herein. As this case involved five co-defendants, each represented with his own attorney, and each with a differing level of culpability based on the evidence, it is vital that counsel be given an opportunity to present oral argument to the Court.

## **STATEMENT OF THE CASE**

This case is the story of a young man currently under a life sentence without the possibility of parole, resulting from what was undisputedly, a single kick to the victim in the minutes preceding his savage beating by another. In the Summer of 2006, the Appellant, Johnny Bickham, was spending an evening with a group of friends at a residence located in Friars Point, Mississippi. One of the friends present, Anthony Smith, unexpectedly received word that his mother, Leanna Smith, had just been involved in an altercation with her boyfriend, Herman Fair. (T. 307). Upon hearing this news, Anthony Smith naturally became concerned and went to his mother's residence to check on her welfare. (T. 311). The Appellant, Johnny Bickham, and three other friends present at the time of the call accompanied Mr. Smith to this location. Upon their arrival, Anthony Smith encountered his mother. After a brief discussion with her, Mr. Smith stated that he "just wanted to speak with him" (Herman Fair). (T. 311). Suddenly, Herman Fair appeared and began making inflammatory comments directed at Anthony Smith's mother. (T. 311). In response to these derogatory comments about his mother, Anthony Smith punched Herman Fair, knocking him to the ground. (T. 311). Chaos ensued once Mr. Fair fell. Four of the co-defendants, including the Appellant, kicked the victim. (T. 312). From the undisputed testimony at trial, the Appellant kicked the victim just once, in the side. Furthermore, undisputed testimony was given to show that the Appellant's kick was not forceful, but was more of a "get up, come on, let's fight" move as if to provoke the victim to rise and fight. (T. 340-341). While four of the co-defendants were gathered around Herman Fair, the fifth co-defendant, Jamario Brady, picked up a golf

club and proceeded to strike Mr. Fair multiple times. (T. 312). In the midst of Jamario Brady's beating the victim with the golf club, Anthony Smith tried to stop him. Smith, expressing his intent, and the apparent intent of the others in the group, told Brady that they were not trying to kill Mr. Fair. (T. 312). Out of control, Brady ignored the pleas from Mr. Smith and continued to beat Herman Fair with his golf club. At this point, realizing that the situation was getting out of hand and growing beyond anything that he wanted to be a part of, the Appellant Johnny Bickham withdrew his involvement and left the chaotic scene as quickly as possible. (T. 351). After the Appellant and the others left the scene, Jamario Brady opted to stay, and he and he alone continued to savagely beat Mr. Fair for an unspecified amount of time before finally leaving the scene himself. All of this was corroborated by the lone eye witness, Rotandria Foster, and is undisputed in the record. Later, after locating the other four co-defendants, Brady would proceed to brag about the vicious assault he had perpetrated on Herman Fair. Brady boasted, "Yeah I killed the bitch, I tried to kill him." (T. 315).

A little later in the evening, Ms. Sheila Croom, neighbor of Ms. Smith, was startled by a loud bump outside of her apartment. Ms. Croom immediately went to the window to investigate the commotion. When she looked out of her window, she saw where Herman Fair was lying on the ground. She observed a man, whom she recognized as Dennis "Ray Ray" Thompson, crouching over Mr. Fair's body. (T. 521). Mr. Thompson was standing over Mr. Fair going through his pants pockets. (T. 521).



From her window Ms. Croom easily recognized both Mr. Thompson and Mr. Fair as the two men who had been in a recent confrontation. Earlier that same day, while attending a barbecue, the two men had had words. According to Ms. Croom, Mr. Thompson had not been invited to the barbecue and was only there "trying to start stuff." (T. 526). Mr. Thompson approached Mr. Fair, and the two men engaged in a verbal altercation. (T. 526). Upon witnessing this scene, Ms. Croom approached the two men and told Mr. Thompson to leave, which he did.

Later that evening, within five to ten minutes of seeing Dennis Thompson picking through Herman Fair's pockets, Ms. Croom went downstairs and opened her door. She found Mr. Fair lying motionless on the ground in the exact same spot she had seen him in earlier. At this time, Mr. Thompson had fled the scene. (T. 521). However, Mr. Thompson did reappear once the police arrived. Ms. Croom testified that once Officer Kenneth Davis of the Friars Point Police Department arrived on the scene, Mr. Thompson came from around the side of the building and stood in the exact spot in which Ms. Croom witnessed him earlier, right beside Mr. Fair's motionless body. There Mr. Thompson made a blanket statement, to no one in particular, that he had nothing to do with Mr. Fair's death. (T. 522). Mr. Thompson has not been seen in Coahoma County since the date that he and Ms. Croom were asked to come to the courthouse. (T. 525).

All of the individuals present at the scene at the time of the initial altercation were subsequently arrested on the charge of capital murder. Following a preliminary hearing before the Honorable Charles E. Webster in the Circuit Court of Coahoma County, the charge was reduced to murder, and the matter was bound over to the grand jury.

The grand jury of Coahoma County indicted the group *en masse* for murder on November 28, 2006. (C.P.8, R.E.3). During the interim period between the arrests and the preliminary hearing, multiple co-defendants made statements to law enforcement detailing their version of the events of the evening in question. There was no significant discrepancy among the co-defendants' statements and the evidence presented at trial, except that co-defendant German did not see Appellant Bickham kick the victim at all whereas Bickham admitted to one kick, and that version was ultimately corroborated by the independent eye witness, Rotandria Foster.

Trial commenced on February 23, 2007, in the Circuit Court of Coahoma County before the Honorable Charles E. Webster.

On cross-examination, Officer Magsby, an eight year veteran to the Coahoma County police force, testified that all the evidence he obtained consistently matched the admission of the appellant as to kicking the victim, Mr. Fair, one single time. Officer Magsby also admitted that in his entire employment with the Coahoma County police force, there had never been an instance of a person charged with first degree murder for a single kick to a victim's side. (T. 438). Officer Magsby also testified that the Nike tennis shoes he personally confiscated from the Appellant after the incident lacked shoestrings. Mr. Magsby further admitted that the only way to inflict serious injury to someone using a laceless soft-soled tennis shoe would be "if it fit tight." (T. 439). The Appellant's Nike tennis shoes, which were published and displayed to the jury, consisted of soft leather and large tongues, two components not likely to make for a "tight fit."

During trial, Officer Magsby also testified to the lack of evidence found on the Appellant's tennis shoes, State's Exhibit 12. (T. 441). The Appellant's white tennis shoes, along with other evidence from the scene, were sent to the Mississippi Crime Lab for testing. When asked on the stand about the evidence found on the Appellant's shoes, Officer Magsby testified that absolutely no evidence from the crime scene was found on Mr. Bickham's pair. The white tennis shoes were not stained with Mr. Fair's blood, nor did they have any fibers from the beige cotton t-shirt Mr. Fair was wearing at the time of the attack. (T. 441). Although Officer Magsby said he did not request the shoes to be tested for fibers of the victim's shirt, he admits that no physical evidence whatsoever was found on the Appellant's footwear. The Appellant's white, soft-soled, laceless tennis shoes contained no hairs, DNA, blood, or fibers from any part of the victim's clothes or body. (T. 442). There was no trace of Mr. Fair found anywhere on the footwear that the Appellant admittedly wore during his single kick to the victim's side. The only evidence of Mr. Bickham's single kick to Mr. Fair's side was the Appellant's own admission and the testimony of the lone eye witness, Rotandria Foster, that Appellant Bickham did kick Fair only one time and "he didn't hit him nary a time." (T.352). Further complicating the evidence for the State, co-defendant Thomas German claimed in his statement that he didn't even see Appellant Bickham kick the victim at all. (Exhibit TG-1).

Despite all of the undisputed testimony to the contrary, a Coahoma County jury convicted all five co-defendants of murder on February 23, 2007, and each was sentenced to a term life imprisonment by the Court. (CP.96, 29-33, 38, R.E.4, 5-9, 10). The Court subsequently denied all of Mr. Bickham's post-trial motions for relief. (CP.49-53, R.E.11-15). Feeling aggrieved by the seeming miscarriage of justice, your Appellant

Johnny Bickham perfected his appeal in this matter to the Mississippi Supreme Court on March 28, 2007. (CP.86-87, R.E.16-17).

### **SUMMARY OF THE ARGUMENT**

The case before the Court is exceptional in nature, in that the complicated explanation of the law in question, i.e. "deliberate design," when coupled with the unusual number of co-defendants and their respective counsel, has resulted in a conviction for murder which is clearly not supported by the undisputed facts of the case or the weight of the evidence.

The State's own witnesses at trial agreed that the Appellant, Johnny Bickham, kicked the decedent only one single time. The State's witnesses further testified that there was no collusion or common plan among the co-defendants, and additional testimony by an eye-witness confirmed that one co-defendant severely beat the victim alone, which led to the others' immediate abandonment of the scene.

Your Appellant will argue here below that the co-defendants' apparent common design to commit only the misdemeanor of simple assault caused confusion among the jury with the instructions of the Court, and this confusion led to the conviction of all five on the charge of murder, a verdict completely against the evidence presented at trial.

In light of the above facts and contentions the trial court erred in failing to grant the Appellant's Motion for Directed Verdict, JNOV, and/or Motion for New Trial.

## **ARGUMENT**

### **ISSUE ONE:**

**WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR DIRECTED VERDICT, PREMPATORY INSTRUCTION AND JUDGMENT *NON-OBSTANTE VERDICTO* WHERE THE EVIDENCE POINTS IN FAVOR OF THE DEFENDANT, WITH RESPECT TO THE ELEMENT OF DELIBERATE DESIGN, WITH SUCH SUFFICIENT FORCE THAT REASONABLE MEN COULD NOT HAVE FOUND, BEYOND A REASONABLE DOUBT, THAT THE DEFENDANT WAS GUILTY .**

In August of 2006, a Coahoma County jury convicted Johnny Bickham, the Appellant herein, of murder. More specifically, according to the second and third elements of the offense, Mr. Bickham was convicted of “unlawfully, willfully, and feloniously and without authority of law and with deliberate design (emphasis added) to effect death, kill and murder said Herman Fair, by beating and kicking him to death.” (CP.108, R.E.18)

Clearly, the key element in this language—the element to which the evidence was so woefully insufficient--was that of deliberate design.

The Appellant, Johnny Bickham, feels that the definition of “deliberate design” in jury instruction C-13 is a complete and accurate statement of the law. That instruction states the following:

The Court instructs the Jury that “deliberate design” as it is used in these instructions, means an intent to kill without authority of law, and not being legally justified, or legally excusable. “Deliberate” always indicates full awareness of what one is doing, and generally implies careful and unhurried consideration of the consequences. “Design” means to calculate, plan, or contemplate. “Deliberate design” to kill a person may be formed very quickly, and perhaps only moments before the act of killing the person. However, a “deliberate design” can not be formed at the very moment of the fatal act. (CP.110, R.E.19)

However, when this jury instruction is coupled with jury instruction C-10 which stated “the Court instructs the jury that if two or more persons are engaged in the commission of a felony, then the acts of each in the commission of such felony are binding upon all and all are equally responsible for the acts of each in the commission of such felony.” (CP.106, R.E.20), it opens the door for what appears to have been a tragic misinterpretation of the law. The record remains undisputed that Appellant Johnny Bickham kicked the victim, Herman Fair, one single time in the side, prior to abandoning the group once Mr. Brady undertook his vicious attack with the golf club. Because the jury was never advised that a single kick, absent any deliberate design to kill would be a misdemeanor simple assault, there apparent assumption that this was a felony may have left them feeling no choice but to convict for murder based on jury instruction C-10. With no testimony whatsoever of a deliberate design prior to the confrontation and with an abandonment of the altercation as soon as it escalated due to Mr. Brady’s actions, there does not exist even a basis upon which the jury could draw even a supposition of deliberate design.

The standard of review for the trial court's denial of a motion for judgment notwithstanding the verdict is sufficiency of the evidence. *Bush v. State*, 895 So.2d 836, 842-45 (Miss.2005). With regard to the sufficiency of the evidence, this Court must ask whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* The critical inquiry is whether the evidence shows “beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence

fails to meet this test it is insufficient to support a conviction.”

*Id.* at 836, 843 (quoting *Carr v. State*, 208 So.2d 886, 889 (Miss.1968).

The proper remedy for a verdict based on insufficient evidence is for this Court to reverse and render. *Id.*

In viewing the evidence in the light most favorable to the prosecution, we are left with nothing that shows where the Appellant’s actions could have possibly risen to the element of deliberate design. As previously indicated by undisputed testimony, Johnny Bickham accompanied his friends to a scene where one of the friend’s mothers had just been victimized. In the heat of the moment, he kicked the victim one time in an attempt to provoke him into a fist-fight. He kicked him this one time while wearing tennis shoes that were without laces, making it virtually impossible for him to inflict any serious injury upon the victim. This is the complete extent of his involvement in what would later develop into a terrible crime. His friend, Anthony Smith—the initial aggressor and the reason that Johnny Bickham was present at all—made it clear that he himself wasn’t there to kill Herman Fair. In fact, when the young Jamario Brady ignored Anthony Smith’s pleas and continued to viciously assault Mr. Fair by beating him with a golf club, Johnny Bickham did what any prudent person would have done in a similar situation where the events escalated beyond his intent and went spiraling out of control. Mr. Bickham abandoned his friends and the situation, wanting nothing to do with Jamario Brady’s senseless beating of Herman Fair.

The evidence that was presented at trial shows that while Johnny Bickham certainly made some poor decisions and participated in an action that was far from

angelic, his behavior could not reasonably be viewed as the kind necessary for a conviction of deliberate design murder. Kicking a man, one time, in an attempt to provoke, does not even remotely demonstrate a full awareness or a careful and unhurried consideration of the consequences. The consequences were clearly nowhere near the Appellant's intent. In fact, when the consequences of the actions of others, namely Jamario Brady, became apparent, the Appellant quickly withdrew himself from the situation. Johnny Bickham did not wish to see Herman Fair killed. Even the enraged son, who led the group to the scene, made it clear that the intent was not to kill Herman Fair. Johnny Bickham was a young man who accompanied his friend to what he believed would be, at most a classic fist-fight with a man who had abused his friends mother.

It is further unreasonable to find that Johnny Bickham had made any calculation, plan, or contemplation to kill Herman Fair. Without a doubt, no reasonable trier of fact could have located a scintilla of evidence that even *links* Johnny Bickham with the elements of deliberate design murder, much less beyond a reasonable doubt. The critical inquiry is whether the evidence shows "beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." *Hubbard v. State*, 938 So.2d 287 (Miss. 2006).

In light of the evidence before this Honorable Court, it is clear that the evidence was insufficient for any rational trier of fact to find Johnny Bickham, the Appellant, guilty of the elements of the offense, namely the element of deliberate design. The only possible explanation would be that the jury misinterpreted instructions C-10 and C-13 to



believe that they were required to return a verdict convicting the Appellant of murder due to his likely guilt on the charge of simple assault as a result of his single kick. It would simply make no sense for the five boys to have all had a deliberate design to murder Herman Fair when all but Jamario Brady quickly abandoned the scene as soon as he began the beating with the golf club.

Accordingly, the trial court erred in failing to grant the Appellant's motion for a directed verdict at the end of the State's case, peremptory instructions to the jury to find the Appellant "not guilty" and the motion for Judgment *non-obstinate verdicto*. Johnny Bickham's limited involvement, and the facts stated before you are undisputed. In the absence of any further competent evidence in this case that would meet the elements of the charge, namely the element of deliberate design, this Honorable Court should reverse the conviction of the Appellant herein, render this case and discharge the Appellant from the Mississippi Department of Corrections. Or, in the alternative, this Court should remand this case for a new trial.

**ISSUE TWO:**

**WHETHER THE APPELLANT'S CONVICTION HAS CREATED AN  
EXCEPTIONAL CASE IN WHICH THE WEIGHT OF THE EVIDENCE  
PREPONDERATES SO HEAVILY AGAINST THE VERDICT THAT THE  
TRIAL COURT ABUSED ITS DISCRETION BY NOT INVADING THE  
PROVINCE OF THE JURY AND GRANTING THE APPELLANT'S MOTION  
FOR A NEW TRIAL.**

Given that the specific facts of the case have been presented to this Honorable Court, *ad nauseam*, the Appellant hereby incorporates all prior statements of fact and all other discussions herein into the analysis of this issue.

A motion for a new trial is left to the circuit court's discretion and raises issues regarding the weight of the evidence. *Jackson v. State*, 551 So.2d 132, 148 (Miss.1989).

The standard of review for a challenge to the weight of the evidence is found in *Thornhill v. State*, 561 So.2d 1025, 1030 (Miss.1989):

In determining whether or not a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when it is convinced that the circuit court has abused its discretion in failing to grant a new trial.

*Id.*

As shown in issue one hereinabove, the trial court clearly erred in not granting the Appellant's motion for directed verdict, peremptory instructions to the jury to find the Appellant "not guilty" and the motion for JNOV. Without question, the evidence given at trial was insufficient for a reasonable trier of fact to find Johnny Bickham guilty of the elements of the charge. Clearly, the element of deliberate design was not only not

proven, but it was disproven by the State's on eye witness, Rotandria Foster, multiple times on the stand. Not only did all of the other boys immediately abandon the scene but at least one even plead with Jamario Brady to stop his assault, stating that they did not come there to kill him. (T319-351).

This error by the trial court was further compounded by a subsequent failure to grant the Appellant Johnny Bickham's motion for a new trial, upon return of the jury verdict. The Appellant Johnny Bickham certainly does not dispute the fact that, in weight of evidence claims, "only in exceptional cases in which the evidence preponderates heavily against the verdict, should the trial court invade the province of the jury and grant a new trial." *Carter v. State*, 963 So.2d 33, 35 (Miss. 2007). It is the Appellant's contention that this case is, beyond any doubt, "exceptional" as to the nature of the proceedings, and most certainly exceptional as to the fact that the evidence preponderates heavily against the verdict.

While the Appellant believes that the lay persons of the jury may have deliberated to the best of their ability, there is no doubt that the nature of this case led to an outcome that failed to allow the interests of justice to be properly served. This trial was certainly unorthodox, to say the least. Five different co-defendants were represented by five different attorneys. Without a doubt, this certainly created an element of confusion in the courtroom. In addition, when it is considered that a cursory view of the facts leaves one with the initial impression of a "five against one" altercation, with varying degrees of involvement between the co-defendants, and further testimony that a sixth individual, Dennis "Ray Ray" Thompson, was in close proximity to the victim looting from his

pockets at or near the time of death, the previously mentioned element of confusion devolves into a situation that is nothing short of chaotic. The triers of fact were left to sort out a situation that was muddled, confusing, and clearly frustrating. This was the type of scenario that could easily lead to jurors being unable (or unwilling) to try to differentiate between certain sets of facts. This scenario created an environment that was ripe with the possibility of a verdict being returned that went heavily against the weight of the evidence. To see proof of this possibility, we have to only look at the fact that Johnny Bickham sits in prison today for a single kick--far less action than what countless others have done and received only a conviction for simple assault.

In view of all the undisputed facts of this case, taken in the light most favorable to the prosecution, and in light of the bizarre, chaotic circumstances surrounding the trial itself, it is clear that this Honorable Court is faced with an exceptional case in which the evidence heavily preponderates against the verdict. As a result, the trial court without a doubt abused its discretion, and with respect to Johnny Bickham, should have invaded the province of the jury by granting Appellant's motion for a new trial. As a result of this error, Johnny Bickham has been unfairly convicted of murder and is slated to spend the remainder of his life in the penitentiary, without the proper elements of this crime, namely the element of deliberate design, having ever been met or even alleged by the evidence. As a result of this abuse of discretion, this Honorable Court should reverse the conviction and sentence in this case, and remand to the lower court with proper instruction for a new trial.

### **CONCLUSION**

The Appellant herein submits that based on the facts and propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be vacated and rendered, and the Appellant discharged from custody. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be reversed and vacated, with this matter remanded to the trial court for a new trial. The Appellant further states to the Court that the individual and cumulative errors, as cited hereinabove, are fundamental in nature, and therefore, cannot be harmless.

**CERTIFICATE OF SERVICE**

I, Robert S. Little Jr., attorney for the Appellant herein, do hereby certify that I have, this day, mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

**Honorable Charles E. Webster**, Circuit Court Judge  
ELEVENTH JUDICIAL DISTRICT  
Post Office Drawer 998  
Clarksdale, Mississippi 38614


**Laurence Y. Mellen, Esq.** District Attorney, Office of the District Attorney  
ELEVENTH JUDICIAL DISTRICT  
Post Office Box 848  
Cleveland, Mississippi 38732

**Jim Hood, Esq.** Attorney General, State of Mississippi  
ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI  
Post Office Box 220  
Jackson, Mississippi 39205; and,

**Mr. Johnny Bickham**, Appellant

This, the 13th day of November, 2007.



ROBERT STANLEY LITTLE, JR.   
Certifying Attorney