IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LEROY STEWART — APPELLANT

VS. NO. 2007-KA-1358-SCT

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
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LEROY STEWART **APPELLANT**

VS. **NO. 2007-KA-1358-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

It took a jury of the defendant's peers only twenty-one (21) minutes to find Leroy Stewart guilty of the felonious possession of nineteen (19) grams of marijuana, actually, if not constructively, inside a jail facility. (R. 169-71)

On June 29, 2007, several days following trial, the circuit judge sentenced Stewart to serve a total of fifteen (15) years in the custody of the MDOC to run consecutively to any sentence Stewart was presently serving. (R. 174)

Judge Pickard's sentencing order, on the other hand, reflects that Stewart was sentenced to only seven (7) years in the custody of the MDOC to run consecutively to any sentence Stewart was then serving. (C.P. at 63-64)

The latter is controlling.

LEROY STEWART prosecutes a criminal appeal from his conviction of possession of marijuana in a jail facility returned in the Circuit Court of Jefferson County, Lamar Pickard, Circuit Judge, presiding.

Following an indictment returned on May 3, 2007, for possession of marijuana inside the Jefferson/Franklin County Correctional Facility in Fayette, and after a trial by jury on June 25, 2007, Stewart was convicted of possession of pot in the jailhouse. (R. 169-71; C.P. at 63-64)

Sentencing took place on July 29, 2007, at which time the court, as stated previously, sentenced Stewart to serve fifteen (15) years in the custody of the MDOC to run consecutively to any sentence that Stewart was then serving. (R. 173-74)

As also noted previously, Judge Pickard's sentencing order signed on June 29, 2007, and entered on July 9, 2007, reflects that Stewart was sentenced to only seven (7) years in the custody of the MDOC to run consecutively to any sentence Stewart was then serving. (C.P. at 63-64)

We do not take issue with the conclusion the lesser sentence controls.

Stewart, who testified in his own behalf and denied having marijuana in his actual or constructive possession, apparently invites this Court to reverse and discharge. (Brief of Appellant at 4-6)

Mr. Stewart's indictment, omitting its formal parts, alleged that

> " . . . Leroy Stewart, . . . on or about the 4th day of March, 2007, in Jefferson County, Mississippi, and within the jurisdiction of this court, did wilfully, unlawfully, feloniously and knowingly have in his possession 19 grams of marihuana, a controlled substance, at the Jefferson Franklin Correctional Facility, contrary to and in violation of Section 47-5-198 of the Mississippi Code of 1972, he, the said Leroy Stewart having heretofore been convicted twice previously of felonies upon charges separately brought, *et cetera*." (C.P. at 2)

Following trial by jury conducted on June 25, 2007, the jury returned the following verdict: "We, the jury, find the defendant, Leroy Stewart, guilty." (R. 170; C.P. at 63)

Post-verdict but prior to sentencing, the district attorney elected not to proceed with charges against Stewart as a second and subsequent offender. (R. 172; C.P. at 2-3)

Only one (1) issue is raised on appeal to this Court:

Whether the trial court erred in failing to grant Stewart's motion for a directed verdict, request for peremptory instruction, and motion for judgment notwithstanding the verdict, i.e., the sufficiency of the evidence. (Brief of Appellant at 4)

STATEMENT OF FACTS

Following family visitation on March 4, 2007, Leroy Stewart was found to have 19 grams of marijuana contained in brown paper bag he tried to stuff down his trousers after leaving the visitation area. (R. 56)

Correctional officer Terry Robinson, whose task was to "shake down" the prisoner following visitation (R. 151-52). testified he observed Stewart emerge from the visitation area and attempt to shove a brown paper bag into the waistband of his pants. When Stewart saw Robinson approaching him, Stewart went over to inmate Knight and deposited the brown paper sack in the inmate's lap. (R. 56-58)

We quote:

> Q. [BY PROSECUTOR WALLACE:] And when you came to shake [Stewart] down, you said you saw him with something. And what was it that you saw him with?
>
> A. [BY ROBINSON:] A brown paper bag.
>
> Q. And after you saw that, what did you do?
>
> A. I was coming towards him, and he took off and give it to another inmate, laid it in his lap.
>
> Q. What did you do?
>
> A. Got the brown paper bag, opened it up, and he was trying to snatch it out of my hand.
>
> Q. What did you do after that?

A. I found marijuana. (R. 56-57)

Inmate Knight described his observations of the entire incident as follows:

> Q. [BY PROSECUTOR WALLACE:] Now, while you were waiting, what happened?
>
> A. While I was waiting, at the time - - I forget the time, but Mr. Stewart came out of the visitation or wherever he came to the door. When he came to the table, I didn't know what was going on. He had a brown bag - - tried to put a brown bag in my arm. I opened my arm and the brown bag fell to the floor. And at the process, the guard picked the bag off the floor, and they questioned me, and that's basically my story. That's what happened. What was in the bag, I didn't have no idea until they told me what was in the bag. They come back and told me, "Do you know what you're getting yourself in?" I say, "What you mean?" They say, "This bag have marijuana in it." I say, "It's not mine because Mr. Stewart tried to put it in my arm and I let it hit the floor and the guard picked it up." (R. 39)

The defendant testified in his own behalf and denied having, either actually or constructively, possession of marijuana inside the jailhouse. (R. 143, 146-47)

Stewart also denied he passed anything to inmate Knight or to anyone else. (R. 147-48)

Also testifying on Stewart's behalf was his brother, Sammy, who denied he passed anything to Leroy during his visit, and Jerome Banks, another inmate, who testified he remembered having a conversation with Knight in which Knight told him he had some marijuana he was trying to get off him. (R. 134)

The State produced five (5) witnesses during its case-in-chief. (R. 102-143)

Jethrell Knight, an inmate at the Jefferson/Franklin County Correctional Facility, testified that following family visitation Stewart came to the table with a brown bag and attempted to place it in Knight's arms. Knight let the bag drop to the floor where it was retrieved by a guard. (R. 39-40)

Terry Robinson, a correctional officer with the correctional facility testified that as Stewart was leaving the visitation area, he was trying to stuff a brown paper bag down his trousers. (R. 56)

> Q. [BY PROSECUTOR WALLACE:] Now you've had a chance to look at [S-1 for identification.] And do you recognize it?
>
> A. [BY ROBINSON:] Yes, sir.
>
> Q. And what is it?
>
> A. Marijuana.
>
> Q. And where did you get that from?
>
> A. Out of that paper bag that Leroy Stewart had.
>
> Q. Now, what did you do with it when you got it?
>
> A. Went to control one and called the captain.
>
> Q. And after that what happened?
>
> A. I told the captain he needs to come to the back, I found some marijuana on Leroy Stewart.
>
> Q. And who was your captain.
>
> A. Captain Kaho. (R. 57-58)

Clifton Kaho, Chief of Security at the correctional facility, testified he assisted in the visitation. The Stewart family visitors went through a metal detector but were not subjected to a "pat down." (R. 67) Following visitation, Kaho was informed by Officer Robinson he had recovered marijuana from inmate Leroy Stewart. (R. 67-68)

Art Thomas, an agent with the Mississippi Bureau of Narcotics, testified he transported the substance to the Mississippi State Crime Laboratory for analysis. (R. 84)

Chris Wise, a forensic scientist specializing in the identification of controlled substances, testified the substance in question was 19.0 grams of marijuana. (R. 89-90)

At the close of the State's case-in-chief, Stewart made a motion for a directed verdict of acquittal on the general ground " . . . the State has not established a *prima facie* case against the defendant." (R. 94)

The motion was overruled by Judge Pickard with the following observations:

> THE COURT: All right. Well, I believe that the court in examining the evidence in the light most favorable to the nonmoving party, giving that nonmoving party the benefit of all favorable evidence and all reasonable inferences that may be drawn from the evidence, I feel like the state has made a *prima facie* case, and I'll overrule our motion. * * * (R. 95)

The defendant thereafter produced four witnesses who testified in Stewart's defense.

Orlando Luckett, an inmate at the Jefferson/Franklin County Correctional facility, testified he ran into Officer Robinson as he (Luckett) was leaving the visitation area. (R. 106-07) Robinson told Luckett he saw Knight putting something inside his pants. (R. 107) Robinson, who pointed to Knight sitting at a table, said to Luckett: "I just caught him with some marijuana, and I'm assuming that Stewart gave it to him. I didn't see Stewart give it to him, but I assumed it." (R. 109)

Sammy Stewart, the defendant's brother, testified he visited Leroy that day but denied bringing any marijuana into the facility. (R. 115, 117-18)

Stewart testified he went through a metal detector and that he was "patted down" from head to toe by the "head chief" there. (R. 114)

Jerome Banks, another inmate at the correctional facility, testified he had a discussion with Knight who told him he had some marijuana he (Knight) was trying to get up off of him.

> Q. [BY DEFENSE COUNSEL:] Now, did he do or say anything after this that bothered you or caused you some concern?
>
> A. [BY BANKS:] When we was sitting there talking and he was saying Warren County is fixing to come pick me up, he said he had marijuana that he was trying to get up off him.

Q. Did you see it?

A. I did not see the marijuana.

Q. What did you see?

A. I seen him go in his pants and come out with a brown paper bag, but there was a camera right there facing me and him. (R. 134)

Leroy Stewart, the defendant, testified in his own behalf and denied he possessed marijuana in the jailhouse. Stewart also denied he passed anything to Knight or attempted to place anything inside his pants or pull anything out. (R. 146-48)

The State produced correctional officer **Terry Robinson** in rebuttal. Robinson testified he saw with his own eyes Leroy Stewart with a brown paper bag, and it was later determined this brown paper bag contained marijuana. (R. 156)

We quote:

Q. [BY PROSECUTOR WALLACE:] Now, this day did you see Leroy Stewart with a brown paper bag?

A. [BY ROBINSON:] Yes, sir.

Q. Did you look in that brown paper bag?

A. After I got it.

Q. And what was in the brown paper bag?

A. Marijuana.

Q. And this is the marijuana here?

A. Yes, sir.

Q. Did you see Jethrell Knight try to pass anything to Leroy Stewart?

A. No.

Q. What did you - - did you see Leroy Stewart try to pass anything?

A. Yes, sir.

Q. And how - -

A. Brown paper bag.

Q. And how long were you able to see this brown paper bag in Mr. Stewart's possession?

A. It wasn't long. I went and got it.

Q. Huh?

A. I went and got it.

Q. You headed to him when you saw the bag. And where was the bag when you first saw it?

A. He was trying to get it out of his pants.

Q. Try to get it out or put it in?

A. Get it out. (R. 156-57)

* * * * * *

Q. Did you tell Orlando Luckett that I never saw Leroy Stewart put any dope on him?

A. No, sir.

Q. Did you tell Orlando Luckett I just assumed that it was Leroy Stewart's dope.

A. **I didn't have no talk with Orlando Luckett.** (R. 157-58) [emphasis ours]

At the close of all the evidence, Stewart, insofar as we can tell, failed to renew his motion for a directed verdict made at the close of the State's case-in-chief. (R. 159)

Peremptory instruction was requested and denied. (R. 169; C.P. at 44)

The jury retired to deliberate at 4:47 p.m. (R. 169) and returned twenty-one (21) minutes later at 5:08 p.m. with the following verdict: "We, the jury, find the defendant, Leroy Stewart, guilty." (R. 170)

A poll of the jury reflected the verdict was unanimous. (R. 171)

Sentencing was deferred until June 29, 2007, at which time Judge Pickard, following his review of a pre-sentence investigation report, sentenced Stewart to serve a total of fifteen (15) years in the custody of the MDOC. (R. 174)

Judge Pickard's subsequent order, however, reflects the imposition of a seven (7) year sentence to run consecutive to the sentence currently being served. (C.P. at 63)

On July 2, 2007, Stewart signed a motion for new trial or, in the alternative, motion for judgment notwithstanding the verdict. He alleged, *inter alia,* the verdict of the jury was against the overwhelming weight of the evidence, and the State failed to prove every element of the offense charged. (C.P. at 55-58)

The motion for JNOV and for a new trial was overruled on July 2, 2007. (C.P. at 60)

Pam Ferrington, a practicing attorney in Natchez, rendered effective assistance during Stewart's trial for possession of marijuana inside a jailhouse.

Brenda Jackson Patterson, an Attorney with the Mississippi Office of Indigent Appeals, has been substituted on appeal and has provided equally effective representation to Stewart.

SUMMARY OF THE ARGUMENT

The trial judge did not err in denying Stewart's motion for a directed verdict, request for peremptory instruction or motion for JNOV. This is not a case where reasonable and fair-minded jurors could only have found the defendant not guilty. **Daniels v. State,** 742 So.2d 1140 (Miss. 1999).

Rather, the testimony of correctional officer Terry Robinson and the testimony of inmate Jethrell Knight, if true, is sufficient proof that Stewart was in actual possession of a brown paper bag containing marijuana.

Proof that Stewart's possession was inside a jailhouse is not in dispute.

A reasonable and fair-minded juror could have found from the testimony and evidence that Stewart actually possessed the marijuana inside the jailhouse. Indeed, there can be no question about it.

We agree with Judge Pickard, who denied Stewart's motion for a directed verdict at the close of the State's case-in-chief, that Stewart's guilt or innocence was not a question for the trial judge but for the jury as finder of fact. (R. 94) Incriminating testimony from Robinson and Knight was sufficient to warrant a jury in finding that Stewart actually possessed marijuana.

If the testimony of Robinson and Knight is true, Stewart exercised dominion and control over the marijuana, was well aware of the presence and character of the substance inside the brown bag, and was intentionally and consciously in possession of it.

In short, there was enough evidence which, if true, was sufficient to prove that Stewart both "knowingly" and "intentionally" possessed the marijuana at the time and place testified about.

Stewart concedes the evidence was conflicting. In this posture, his guilt or innocence was a jury issue. **Townsend v. State,** 939 So.2d 796 (Miss. 2006) [The jury is the final arbiter of a witness's credibility.]

ARGUMENT

THE TRIAL JUDGE DID NOT ERR IN OVERRULING STEWART'S MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT.

Stewart, comparing the testimony of various witnesses for the State and the defendant,

> "Their testimony made it impossible for a reasonable juror not to have reasonable doubt as to Mr. Stewart's innocence and no reasonable doubt of Jethrell Knight's guilt as the person who had the marijuana." (Brief of the Appellant at 9)

The problem with this argument is that when considering the sufficiency of the evidence on motion for judgment notwithstanding the verdict, evidence favorable to the State must be accepted as true and evidence favorable to the defendant, i.e., the testimony of Banks and Luckett, must be disregarded.

In judging the legal sufficiency, as opposed to the weight, of the evidence on a motion for a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to *disregard* evidence favorable to the defendant. **Anderson v. State,** 904 So.2d 973 (Miss. 2004), reh denied; **Lynch v. State,** 877 So.2d 1254 (Miss. 2004), reh denied, cert denied 125 S.Ct. 1299, 543 U.S. 1155, 161 L.Ed.2d 122 (2004); **Hubbard v. State,** 819 So.2d 1192 (Miss. 2001), reh denied; **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996); **Ellis v. State,** 667 So.2d 599, 612 (Miss. 1995); **Clemons v. State,** 460 So.2d 835 (Miss. 1984); **Forbes v. State,** 437 So.2d 59 (Miss. 1983); **Bullock v. State,** 391 So.2d 601 (Miss. 1980). *See also* **Jones v. State,** 904 So.2d 149, 153-54 (Miss. 2005) ["The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."]

This includes the testimony of both Banks and Luckett, witnesses for the defendant which must be disregarded.

Another problem with Stewart's complaint is that some of the testimony is conflicting, and

the issue is one of credibility. The Supreme Court, of course, does not pass upon the credibility of witnesses, and where the evidence justifies a verdict, it must be accepted as having been found worthy of belief. **Moore v. State,** 933 So.2d 910 (Miss. 2006), reh denied.

The Court of Appeals has correctly held that mere conflicting testimony is not enough for an appellate court to order a new trial. **Bullard v. State,** 923 So.2d 1043 (Ct.App.Miss. 2005), reh denied, cert denied 927 So.2d 750.

The evidence must be viewed in the light most favorable to the State, and the State must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. **Howard v. State,** 853 So.2d 781 (Miss. 2003), reh denied, cert denied 124 S.Ct. 1455, 540 U.S. 1197, 158 L.Ed.2d 113, post-conviction relief denied 945 So.2d 326, reh denied.

Even the federal courts agree that on motion for judgment of acquittal, the verdict will be affirmed if a reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. All the evidence, together with reasonable inferences, are viewed in the light most favorable to the prosecution. **United States v. Simmons,** 470 F.3d 1115 (5 Cir. 2006).

The rule in this State is no different.

If under this standard, sufficient evidence to support the jury's verdict of guilty exists, the motion for a directed verdict, request for peremptory instruction or motion for JNOV should be overruled. **Brown v. State,** 556 So.2d 338 (Miss. 1990); **Davis v. State,** 530 So.2d 694 (Miss. 1988).

Viewing the testimony of Robinson and Knight in its most favorable light, it is clear a rational trier of fact could have found beyond a reasonable doubt that shortly after family visitation Stewart possessed marijuana inside the jailhouse.

The evidence, together with all reasonable inferences to be drawn therefrom, was, in our

opinion, legally sufficient to support Stewart's conviction of possession.

There was ample testimony from which a reasonable, fair-minded, hypothetical juror could find that Leroy Stewart was in actual possession of the marijuana, but even if not, at least constructive possession of the marijuana found either on the floor of the jailhouse or in the lap of another inmate.

Whether or not the facts show actual possession by inmate Knight, Stewart or both was a question for the jury and not the trial court.

Possession of a controlled substance may be either actual, constructive, individual or joint. **Wolf v. State,** 260 So.2d 425, 432 (Miss. 1972).

"Constructive possession allows the prosecution to establish possession of contraband when evidence of actual possession is absent." **Fuente v. State,** 734 So.2d 284, 288 (Ct.App.Miss. 1999), quoting from **Roberson v. State,** 595 So.2d 1310, 1319 (Miss. 1992).

That does not appear to be the case here where the testimony of both Robinson and Knight place the marijuana directly in the pants and in the hands of Stewart.

Nevertheless, the jury was instructed, *inter alia*, that in order to find Stewart guilty of possession, " . . . there must be sufficient facts to warrant a finding that Leroy Stewart was aware of the presence and character of the particular substance and was consciously and intentionally in possession of it. Constructive possession may be shown by establishing that the controlled substance was subject to the defendant's dominion and control." *See* jury instruction D-6 at C.P. 47.

We submit the identity of Stewart as either actual or constructive possessor of marijuana was supplied by direct ear and eyewitness testimony of Knight and Robinson as well as by reasonable inferences drawn from all the evidence. Their version of the facts is not so contradictory as to be unbelievable.

A jury could have inferred that Stewart was well aware of the presence and character of the marijuana found inside the brown paper bag he attempted to stuff inside his trousers and subsequently abandoned in the arms, if not the lap, of inmate Knight.

Judge Pickard, the trial judge, applied the correct legal standard in denying Stewart's motion for a directed verdict made at the close of the State's case-in-chief. (R. 94-95)

What standards are applied by a reviewing court in reviewing the often raised questions involving the legal sufficiency of the evidence?

In **Bush v. State,** 895 So.2d 836 (Miss. 2005), the Supreme Court re-articulated the standards applied by a reviewing Court in reviewing the sufficiency of the evidence. "If a review of the evidence reveals that it is of such quality and weight that, 'having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense,' the evidence will be deemed to have been sufficient." **Bush v. State,** *supra,* 895 So.2d at 843.

Our position on this issue can be summarized in only three (3) words: "classic jury issue." Judge Pickard concluded as much. (R. 94-95)

CONCLUSION

A reasonable and fair-minded juror could have found from the evidence that Leroy Stewart actually possessed the brown paper bag containing marijuana seized by Officer Robinson inside the jailhouse.

The jury was certainly not bound to accept all of the testimony of Jerome Banks who testified, *inter alia*, that Knight told him he (Knight) had some marijuana he was trying to get up off of him and, further, that he observed Knight removing a brown paper bag from his trousers.

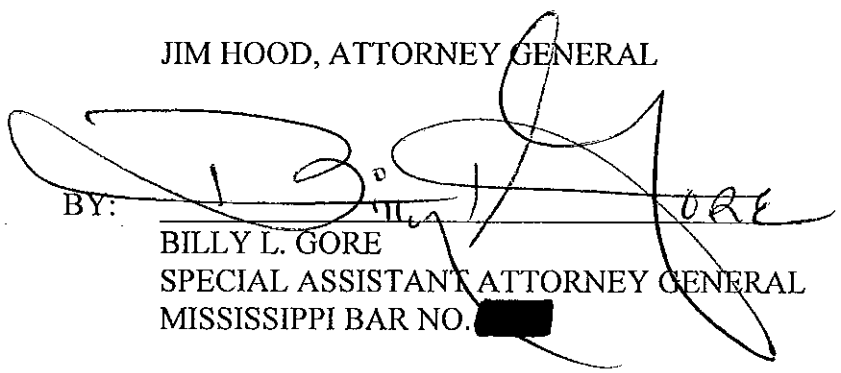
A reasonable and fairminded juror could have found that at the time Officer Robinson

discovered the marijuana, it was actually possessed by Stewart who was well aware of its presence and character and was intentionally and consciously in possession of it. If the facts had been otherwise, Stewart would not have attempted to conceal the bag inside his trousers or abandon it in the arms of another inmate.

Appellee respectfully submits no reversible error took place during the trial of this cause. Accordingly, the judgment of conviction of possession of marijuana in a jail facility, together with the seven (7) year sentence consecutive to the sentence currently being served imposed by the trial judge, should be affirmed. (C.P. at 63-64)

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

CERTIFICATE OF SERVICE

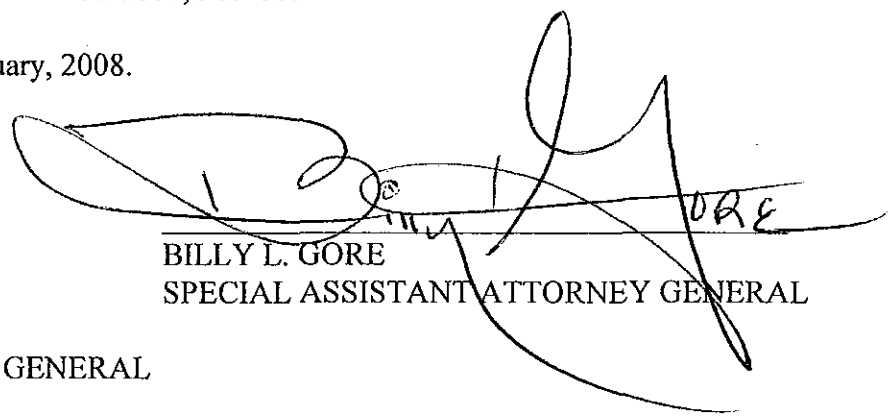
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Lamar Pickard
Circuit Court Judge, District 22
Post Office Box 310
Hazlehurst, MS 39083

Honorable Alexander C. Martin
District Attorney, District 22
Post Office Drawer 767
Hazlehurst, MS 39083

Brenda Jackson Patterson, Esquire
Attorney at Law
301 North Lamar St., Ste. 210
Jackson, MS 39201

This the 6th day of February, 2008.



BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-36