IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2007-KA-01670-COA

VICTOR PERRYMAN — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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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 disqualifications or recusal.

1. State of Mississippi
2. Victor Perryman

THIS 27th day of March, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Victor Perryman

By: George T. Holmes

George T. Holmes, Staff Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Copiah County, Mississippi where Victor Perryman was convicted of carjacking and aggravated assault. A jury trial was conducted August 1, 2007, with Honorable Lamar Pickard, Circuit Judge, presiding. Perryman was sentenced as a nonviolent habitual offender to thirty (30) years for the carjacking and twenty (20) years for the aggravated assault and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

After spending the night out, Latoya Dente, a resident of Crystal Springs, in Copiah County, arrived at her Pacifica Circle home around 6:00 a. m. on March 22, 2007. [T.15-16]. When Latoya exited her black Honda Passport at her house, somebody called her name. [T. 20-21]. She testified she stopped and turned around and saw the appellant Victor Perryman, whom she recognized "from the neighborhood." *Id.* Latoya said Victor asked for an application to Latoya's place of employment, the Hinds County Sheriff's Department, which she advised she did not have. *Id.*

Latoya said she went inside her house, grabbed her "duty belt" and headed back to her vehicle to go to work. *Id.* As she was driving off, Latoya pulled to the side of the road to retrieve some compact disks which had fallen. When she did, Latoya said, "Victor got in my car and cut me." [T. 22]. The car was moving, they tussled, and the assailant dropped whatever it was that allegedly cut Latoya. [T. 23]. Latoya stumbled out of her vehicle and when she did, the assailant drove off in it. *Id.*

Realizing she had her duty belt on, Latoya unholstered her weapon and fired two rounds at the moving SUV hitting a tire. [T. 24-25]. Latoya's vehicle struck some mailboxes as it drove off and after this impact started making a distinctly loud noise. *Id.* Latoya's vehicle then turned down an adjacent street and drove off towards the nearby Cumberland apartments. *Id.* Latoya walked to her aunt, Linda Coleman's, home for help. *Id.*

The Crystal Springs police responded, and while explaining what happened, Latoya said she heard her vehicle, which was still making the distinct noise, she turned and saw the top of her Honda Passport at the Cumberland Apartments, visible from Aunt Linda's driveway. [T. 26-27]. The noise stopped, after which Latoya said she saw the appellant Victor Perryman coming through a pathway, he then disappeared. *Id.* Later, Latoya said she saw Victor Perryman again, along with others, at "Denequa Perryman's" residence at the Cumberland Apartments. [T. 27-29].

Latoya did not get a good look at the alleged weapon, but said it was "shiny" and "sharp". [T. 23-24]. Latoya obtained medical attention and returned later to the police department to "write up a statement." [T. 31]. The injury was to Latoya's throat and required thirteen (13) stitches. [T. 23-24, 70].

Linda Coleman testified she saw Victor Perryman also coming through the pathway, "straightening up and fiddling with his clothes and stuff" and then he "started shaking ... going like a cartoon or something " before going in the apartment with another person [T. 64-67]. Aunt Linda later pointed out Victor to the police who arrested him, and while Latoya was still on the scene being attended by the medical responders, she also identified Victor as the person who accosted her. [T. 30, 68-69].

Tracy Dixon, a resident of the Cumberland Apartments where Victor was allegedly seen, testified that she heard gunshots around 6:00 a.m on the morning of March 22, 2007, and, went outside and saw Latoya's black Honda Passport in the parking lot and

recognized it as belonging to Latoya, her former classmate. [T. 86]. According to Dixon, the Honda pulled into a parking space at the apartments with a flat tire and Victor Perry got out and took his shirt off, wiped the vehicle's steering wheel and walked down a path between the Cumberland Apartments and Pacific Circle, where Latoya lived. [T. 87-89].

Denequa Perryman, Victor's sister, also a resident of the Cumberland Apartments testified that Victor came to her house around 5:30 a.m. on the morning of March 22, 2007, and remained there until she left for work around 6:05 a.m. [T. 115-16]. Denequa testified that she had blocked the so called pathway and that Victor was wearing a different shirt than the one described by Latoya. [T. 119, 123]. Latania Catchings, Victor's girlfriend, who lives with Denequa, said she did not remember hearing any gunshots that morning and that she left around 6:15 a.m. with Victor leaving shortly before her. [T. 138-39]. The whole time she could hear Victor talking. [T. 132].

Michael Trimble, Denequa and Victor's cousin, testified that he came over and gave Victor a ride that morning around 6:25 a.m. Trimble stated he did not hear any gunshots and did not put anything in the trunk of his car as reported by Latoya. [T. 141-17].

SUMMARY OF THE ARGUMENT

Victor Perryman's indictment was fatally defective, his trial counsel asked for and was granted an incorrect jury instruction, and he was given an illegal sentence. The verdict was contrary to the weight of the evidence under both counts of the indictment.

ARGUMENT

ISSUE NO. 1: WHETHER COUNT 1 OF THE INDICTMENT WAS FATALLY DEFECTIVE FOR FAILING TO STATE A NECESSARY ELEMENT OF CARJACKING?

Appellate review of defective indictment claims are *de novo*. *Peterson v. State*, 671 So.2d 647, 652 (Miss.1996). Count One of the indictment charges Perryman with carjacking under MCA §97-3-117 (Rev. 1994), section (1) of which states:

> Whoever shall knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempting to do so, or by any other means shall take a motor vehicle from another person's immediate actual possession shall be guilty of carjacking.

The language of Section (1) of 97-3-117, as drafted, is somewhat circumlocutory. The phrase "or by any other means" reduces the elements of car jacking to "the violent or forceful taking of an automobile from the immediate actual possession of another person by any means." The gravamen of the offense, the conduct which the legislature criminalized, is the violent or forceful taking of a motor vehicle from a victim's

"immediate actual possession". Although the statute does not say so, by implication, the taking must be against the victim's will since the statute references force or violence.

By comparison, the statutory crime of robbery codified in Miss. Code Ann §97-3-79 (Rev.2006), armed or not, has always required as one of its elements the taking of another's personal property "from the person" or "from [their] presence". This armed robbery element is identical to the carjacking requirement of taking from the victim's "immediate actual possession." A taking which is does not rise to the level of robbery due to a missing element, e.g. not accomplished by force or violence or not from the immediate presence or from the person, is larceny. *Jones v. State,* 567 So.2d 1189, 1192 (Miss. 1990).

Count One of Perryman's indictment reads in pertinent parts:

> Victory [sic] Perryman ... on or about the 22nd day of February [sic], ... did wilfully, unlawfully, feloniously and knowingly by force or violence take actual possession of one Toyota [sic] Passport from Latoya Dent [sic], the actual owner thereof.[1]

The appellant's position is that his indictment was fatally defective under UCCCR 7.06 for not advising either by formal or factual pleading that the alleged taking of the

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1

Perryman's indictment was riddled with non-fatal errors. Neither Count contained the correct date of the offense, neither had the alleged victim's name correct. Count 1 was not enumerated and did not have the defendant's name correct, nor the correct manufacturer of the vehicle. [R. 7-9]. There was an amendment of the indictment; but, that only corrected the alleged victim's name. [R. 70].

motor vehicle in this case was from "the immediate actual possession of Latoya Dente" so as to bring the allegations into the definition or carjacking and give Perryman notice of the crime charged against him. There was no objection or demurer to the indictment in the record of this case. Nevertheless, failure to object or demur to an indictment is no bar to the issue being raised on appeal. *Durr v. State*, 446 So.2d 1016, 1017 (Miss.1984).

As required by URCCC 7.06, "[a]n indictment must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It must fully notify the defendant of the nature of the charge and the cause of the accusation." *Garner v. State,* 944 So.2d 934, 940-41 (Miss. Ct. App.,2006). See also *Farris v. State*, 764 So.2d 411 (Miss.2000). [2]

Recent decisions of the Court of Appeals have demonstrated a shift from formalistic statutory pleading in indictments to allow fact driven pleading as well, so long as the factual pleading is "sufficient to notify" a defendant of the crime charged. *Williams v. State,* 772 So. 2d 406, 409 ¶13 (Miss. Ct. App. 2000). Although some might refer to this shift as a "less stringent" approach, that does not seem to be the case.

In *Garner v. State, supra*, the Court reiterated that the purpose of a criminal indictment under U.S. Const. Amend. VI and Miss. Const. Art. 3, § 26, is, *inter alia*, "to furnish the accused such a description of the charge against him as will enable him to

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Under former authority, the state's failure to plead the statutory element of taking from the person or presence of the victim in an armed robbery case was clearly fatal to the prosecution of the case. *Smith v. State*, 82 Miss. 793, 35 So. 178 (1903).

make his defense" and "to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction." 944 So. 2d 940-41.

In *Garner, supra*, Garner was charged with multiple armed robberies and alleged that one of his indictments failed to charge an essential element of armed robbery, namely, the exhibition of a deadly weapon. The claimed error in *Garner* was that one of the indictments charged the crime was committed by putting the victim "in fear of immediate injury to her person 'by representing that he has a pistol when in fact he was pointing a finger concealed by a coat at the cashier and demanded the cash from the store cash register ....'"

The *Garner* court ruled that, "because the indictment omitted the "exhibition of a deadly weapon" element, Garner was not placed on notice that the State would attempt to prove that he had exhibited a deadly weapon", thus the indictment, factually pled, only charged simple robbery. *Id.* The effect of the flawed indictment was that, "the circuit court lacked subject matter jurisdiction over the offense of armed robbery [but not] ...the crime of simple robbery. See also *Neal v. State*, 936 So.2d 463 (Miss. Ct. App.2006).

It is Perryman's position here that, as in *Garner, supra,* since his indictment did not formally state nor plead facts sufficient to conclude that the vehicle was taken from the person or immediate possession of the alleged victim, the indictment fails to conform to URCCC 7.06 to charge the crime of carjacking. The failure to plead the material

facts leaves the indictment vague and equally descriptive of the crime of larceny.[3]

The current standard of the Court of Appeals for indictment pleading "requires only that the indictment include the seven enumerated items of Rule 7.06 and provide the defendant with actual notice of the crime charged so that 'from a fair reading of the indictment taken as a whole the nature of the charges against the accused are clear.'" *Caston v. State,* 949 So.2d 852 (Miss. Ct. App.,2007). "Formal and technical words are not necessary ... *if the offense can be substantially described without them.*" [emphasis added]. *Id.* See also *Spears v. State*, 942 So.2d 772, 774(¶ 9) (Miss.2006).

The Court of Appeals opinion in *Williams v. State,* 772 So.2d 406 (Miss. Ct. App. 2000) is very applicable to the case at bar, yet is legally and factually distinguishable. Williams was charged with carjacking and his indictment read he "did recklessly and knowingly by force or violence, by the exhibition of a knife, take a motor vehicle from Farrah Goodman."

Like Perryman here, Williams complained that the indictment excluded a description of taking from the "immediate actual possession" of the victim. The *Williams* court found that the indictment most definitely did not charge Williams with armed carjacking, because, "it failed to allege the essential elements relative to the alleged use of

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MCA 97-17-42 (Supp. 2007) Any person who shall, willfully and without authority take possession of or take away a motor vehicle of any value belonging to another, with intent to either permanently or temporarily convert it or to permanently or temporarily deprive the owner of possession or ownership ...shall be guilty of a felony ... [subject to a sentence of nor more than 10 years imprisonment.]

the knife." Citing *Morgan v. State*, 741 So. 2d 246 (Miss. 1999). (An indictment must allege every essential element of the offense charged). On the other hand, the *Williams* court found that the indictment was sufficient to charge "unarmed" carjacking, because, the facts pled described the taking from Farrah Goodman which the court found to be the equivalent of taking from the "immediate actual possession" of Farrah Goodman. *Williams,* 772 So.2d at 409.[4]

To distinguish Perryman's case from *Williams* on this point, the major differences is that there is no reference here to a weapon in Count One. A knife is referenced in Count Two, charging aggravated assault, but there is no association of the weapon with the allegation of the taking of the automobile as in *Williams*. Statutory elements cannot be imported between counts. *Berry v. State,* --- So.2d ----, 2007 WL 1747486 (Miss. Ct. App.,2007. *pending motion for rehearing.*)

In *Williams,* the indictment alleges that the victim's vehicle was taken "by force or violence, by the exhibition of a knife" which factually requires that the exhibition of the weapon was to the person from whom the motor vehicle was taken. In the present case, without reference to a weapon in Count One, there is no factual pleading or other language which informs either directly or by implication that the taking was from the

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The *Williams* court distinguished application of *Peterson v. State*, 671 So. 2d 647 (Miss. 1996). In deference, Perryman will not cite to the *Peterson* decision here, but does not abandon the argument that *Peterson* may apply to this issue.

immediate actual possession of Latoya Dente. Reading Perryman's indictment, it is just as likely that Dente's car was taken from her driveway while she was inside her house. Granted the indictment says "by force or violence", but it does not state whether the force or violence was visited on the Honda Passport or on Dente.

Looking at the indictment language from *Williams* and the case at bar through the prism of Rule 7.06, "take a motor vehicle from Farrah Goodman" can only be equivalent to the words "take a motor vehicle from Farrah Goodman's immediate actual possession", because, the offense charged was "substantially described" without the use of "formal or technical words" in *Williams* due to the described display of a deadly weapon. 772 So.2d at 409. Here in Perryman's case, the crime charged was not "substantially described". The lack of descriptive language, either formal or otherwise, left the description of the taking vague as to whether or not it was from Dente's immediate actual possession. Therefore Count One Perryman's indictment failed to adequately inform him of the carjacking charge.

Another distinguishing factor for the Court to consider here, when comparing *Williams*, and which is addressed more appropriately in the next issue, is that in *Williams*, the jury instruction included all of the statutory elements of carjacking, included those omitted from the indictment, here the jury instruction did not include from "the actual immediate possession." 772 So. 2d at 410, [R. 53].

Victor Perryman respectfully requests the Court reverse the conviction in Count

One, or at a minimum reduce the conviction to larceny of a motor vehicle under MCA 97-17-42 (Supp. 2007) and remand for resentencing.

ISSUE NO. 2: WHETHER THE JURY WAS INSTRUCTED ON THE STATUTORY ELEMENTS OF CARJACKING?

Due process requires the state to prove each statutory element of an offense beyond a reasonable doubt. *Blue v. State,* 716 So.2d 56, 572-73 (Miss.,1998), *Neal v. State*, 451 So.2d 743, 757 (Miss.1984). In the present case, the elemental jury instruction D-13 which was given to the jury as Jury Instruction # 4, like the indictment in this case, lacked the element of taking from the "immediate actual possession" of the victim from the charge in Count One. [R. 53-54]. [5]

The court in *Williams v. State, supra,* reiterated that jury instructions which lack the essential statutory elements of an offense result in fundamental error. *Williams,* 772 So. 2d at 410. In *Williams*, the jury instructions lacked an essential element of armed car jacking, so the court found that Williams could only have been convicted on the elements

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Jury Instruction No. 4 (D-13): Victor Perryman has been charged in Count with the offense of carjacking under Section 97-39-117(1) of the Mississippi Code.
If you, the jury, find from the evidence in this case beyond a reasonable doubt that:
1. Victor Perryman, on or about March 22, 2007, in Copiah County, Mississippi;
2. Did knowingly or recklessly, by force or violence
3. Take actual possession of a Toyota [sic] Passport from Latoya Dente, the actual owner thereof,
then you should find the said Victor Perryman guilty of carjacking as to Count 1 ...
[R. 53-54]

which were presented to the jury, namely "unarmed" carjacking. Applying *Williams* to the facts and present issue, the only crime under Count One upon which the jury ruled was larceny of a motor vehicle under MCA §97-17-42 (Supp. 2007) . See also, *Clayton v. State*, 759 So. 2d 1169, (Miss. 1999).

In *Jones v. State* 567 So. 2d 1189, 1191-92 (Miss. 1990), Jones was charged with armed robbery, among other things arising from incidents occurring in a convenience store. The *Jones* court reversed, in part, because an element of armed robbery was left out of the jury instructions. The *Jones* court said, consistent with *Williams, supra*, that if an element, such as putting a victim in fear under our armed robbery statute, is "relied upon" by the prosecution it must be set out in the jury instructions. In *Jones*, some cigarettes were snatched by one defendant while the victim attendant was dealing with another defendant. The court found that the jury instructions were deficient because they left out the "cause and effect relationship between the taking and putting in fear". *Id.*

In *Smith v. State*, 82 Miss. 793, 35 So. 178 (1903), the Supreme Court reversed an armed robbery conviction noting that "these essential averments are omitted from the indictment and [jury] instruction[s]" and said further, "[t]his is a statutory offense, and the language of the statute should be strictly pursued.

Application of the legal precedents cited under this issue, lead to one conclusion. Perryman is entitled to a new trial, or a rendered larceny conviction and resentencing for Count One.

ISSUE NO. 3: WHETHER PERRYMAN'S TRIAL COUNSEL WAS INEFFECTIVE FOR REQUESTING AN ERRONEOUS ELEMENTAL JURY INSTRUCTION?

Perryman was entitled to a jury instruction which contained all of the statutory elements of car jacking as a fundamental due process right. *Blue v. State,* 716 So.2d 56, 572-73 (Miss. 1998), *Jones v. State* 567 So. 2d 1189, 1191-92 (Miss. 1990), *Neal v. State*, 451 So.2d 743, 757 (Miss.1984). However, Perryman's trial counsel submitted an instruction D-13 which was given to the jury as Jury Instruction # 4 which excluded the element of taking from the immediate possession as discussed in the previous issue. [R. 53].

Failure to seek proper jury instructions thwarts the constitutional fundamental right of a criminal defendant to a fair trial, particularly a defendant's right to have the jury fully and properly instructed on the law and theories of defense. *Green v. State*, 884 So. 2d 733, 735-38 (Miss. 2004).

In *Madison v. State* , 932 So. 2d 252, 255 (Miss. Ct. App. 2006), the court reiterated the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984), on claims of ineffective assistance of counsel as recognized in *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). Under the *Strickland* test, a defendant must show "(1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense". There is a rebuttable presumption that counsel's performance falls "within

the wide range of reasonable professional assistance." 932 So. 2d 255. The presumption of sufficiency "may be rebutted with a showing that, but for counsel's deficient performance, a different result would have occurred" under "the totality of the circumstances in determining whether counsel was effective." *Id.*

If the issue of ineffective assistance of counsel is raised, as is here, on direct appeal the court will look to whether:

> (a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed. *Id.*

The appellant hereby stipulates through present counsel that the record is adequate for this court to determine this issue and that a finding of fact by the trial judge is not needed.

The prejudice to Perryman under the *Strickland* test was that the state's burden of proof was reduced in that the state did not have to prove one of the statutory elements, and Perryman was denied due process of law under the Sixth and Fourteenth Amendments and Article 3 §26 of Mississippi Constitution of 1890, be being found guilty without a jury finding of one of the material statutory elements of the crime with which he was charged. The fair result would be a new trial. *Havard v. State*, 928 So. 2d 771, 789-90 (Miss. 2006).

ISSUE NO. 4: WHETHER PERRYMAN'S SENTENCE UNDER COUNT ONE WAS ILLEGAL?

The maximum sentence for carjacking under MCA §97-3-117(1)(a) is fifteen (15) years. The maximum sentence for armed carjacking under MCA §97-3-117(2)(a) is thirty (30) years. Perryman was sentenced to thirty (30) years but he was not charged nor convicted of armed car jacking. [R. 75-77]. The sentence is patently illegal and he respectfully asks the Court to require correction it if there is no reversal on other grounds.

Count One of the indictment purports to charge Victor Perryman with simple unarmed carjacking, not armed carjacking. The prosecutor never indicated that there was ever any intention to try Perryman for armed car jacking. In opening remarks and closing, he only used the term "carjacking", not "armed carjacking", he never associated the alleged carjacking with the use of a deadly weapon. [T. 5-6, 8, 149, 151, 156, 159].

From the indictment, to the words of the prosecutor, and through the jury instructions all show that this was a carjacking charge, not armed carjacking. The state on appeal cannot, in good faith, take a different position.

Since the jury was not instructed, did not deliberate, and did not render a verdict as to armed car jacking under Count One, the only crime Perryman could be sentenced for is for carjacking as in *Williams*, *supra*, or larceny of an automobile as argued elsewhere under the authority of *Jones, supra.*

The United States Supreme Court of *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120

S.Ct. 2348, 147 L.Ed.2d 435 (2000) prohibits a trial court from sentencing a criminal defendant based on facts not found to exists by a jury. The sentence in this case is illegal because there was no jury finding of armed carjacking. A sentence that exceeds statutory authority is illegal. *Stewart v. State* 372 So.2d 257 (Miss. 1979). Perryman would also suggest that, since there was no jury finding of a taking from the "actual immediate possession" of Latoya Dente, that the proper sentence under Count One would be for larceny of a motor vehicle under MCA §97-17-42 (Supp. 2007) with a maximum of up to ten (10) years.

ISSUE NO. 5 WHETHER THE VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE

Where an indictment charges that an assault is committed with one weapon, but the trial evidence either conflicts as to the weapon or fails to prove the weapon altogether, the conviction cannot stand. *Harrell v. State,* 148 Miss. 718, 114 So. 815, 816 (1927). But see, *contra*, *Bowers v. State*, 145 Miss. 832, 835, 111 So. 301 (1927).

The principal of *Harrell, supra*, was applied in *Cooley v. State*, 803 So.2d 485 (Miss. Ct. App., 2001), where the indictment charged aggravated assault with a hatchet; but, the evidence did not establish a hatchet being used. The supreme court reversed and rendered a conviction for simple assault, even though there was evidence that the victim's "ear was partially detached, and he received several stitches on top of his head" according to the dissent.

In *Edwards v. State* 736 So.2d 475, 483-84 (Miss. Ct. App.,1999) the state failed, in part, to produce a weapon in an aggravated assault trial. The court found that even though the evidenced did not show that Edwards was innocent and other elements of the offense had been proven, there remained a "overwhelming gap ... in the proof the shooter's identity.

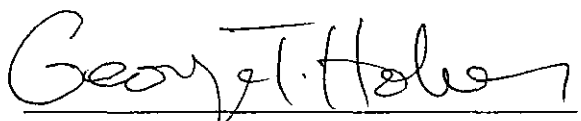
A fair application of the principles suggested require reversal under both counts of the indictment.

CONCLUSION

Victor Perryman respectfully requests to have his convictions under both Counts reversed with remand for a new trial, or under Count 1 remanded for resentencing for larceny.

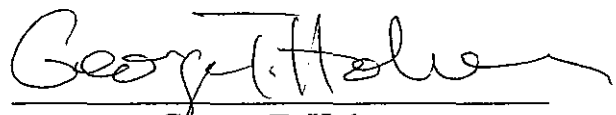
Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Victor Perryman, Appellant

By: 
George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 27th day of March, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Lamar Pickard, Circuit Judge, P. O. Box 310, Hazlehurst MS 39083, and to Hon. Terry Wallace, Asst. D. A. , P. O. Box 767, Hazlehurst MS 39083, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



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