IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TONY AMES — APPELLANT

VS. — NO. 20007-KA-1834-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: W. GLENN WATTS
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

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PROCEDURAL HISTORY:

On August 27-29, 2007, Tony Ames, "Ames" was tried for armed robbery and aggravated assault before a Lowndes County Circuit Court jury, the Honorable James T. Kitchens, Jr. presiding. R. 1. Ames was found guilty on both counts. R. 444-445. He was given a sixteen and a concurrent ten year sentence. R. 446. From that conviction and sentence he appealed to the Mississippi Supreme Court. C.P. 80.

ISSUES ON APPEAL

I.

WAS AMES ENTITLED TO A DIRECTED VERDICT?

II.

WAS A SIMPLE ASSAULT INSTRUCTION PROPER?

III.

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IV.

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V.

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V.

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STATEMENT OF THE FACTS

On April 2, 2006, Ames was indicted for armed robbery and aggravated assault of Mr. Preston Halbert on or about January 10, 2006 by a Lowndes County Grand jury. C.P. 3.

On August 27-29, 2007, Ames was tried for armed robbery and aggravated assault before a Lowndes County Circuit Court jury, the Honorable James T. Kitchens, Jr. presiding. R. 1. Ames was represented by Ms. Nicole Clickscales. R. 1.

The trial court pointed out for the record that Mr. Ames was "in jail attire." Ames was not in handcuffs or shackles. This was outside the presence of the jury prior to voir dire. R. 7. Defense counsel explained that according to Ames his mother was supposed to bring him some clothes. She had been called and reminded but had not yet arrived. R. 7-8.

The trial court delayed the trial while he waited for the mother to bring clothes. He also provided time for clothes to be found in the court house for Ames. Defense counsel and the prosecution attempted to find other clothing for Ames but to no avail. The court also allowed time for Ames to change clothes "at a break."

There was no objection from the defense and no claim by Ames or his counsel that he had been "forced" to wear the jail issued jump suit he was wearing prior to voir dire. R. 7-13.

Mr. Preston Halbert identified Ames as the person who threatened and beat him. R. 106; 181. The threat came after Halbert denied owing any money to Ames or his companion, Briggs. R. 108. Halbert testified that he "got scared" after Ames threatened him. This fear occurred after Ames threatened "to knock his teeth out." R. 110-111. Halbert also saw Ames reached for something "under the seat." R. 108.

This threat of force came after Halbert emphatically denied, more than once, owing him any money. Although Halbert tried to run from Ames when he parked the car, Halbert was caught by

Ames and Briggs.

Halbert testified to being beaten and kicked by Ames and Briggs. He believed he was beaten with "brass knuckles." R. 113. "They knocked me out with them things." R. 114. Halbert had his nose and the arch near his eye broken. He suffered damage to his vision as well as needed an operation to repair the damage to his body. Halbert testified that he had no weapon or knife when attacked by Ames. R. 158.

Ms. Carole Mann, an eye and ear witness to these events, testified that she heard Ames threaten "to knock out" Halbert's teeth. R. 192-193. This was after Ames had demanded money from him. She also testified to seeing Ames and Bring's beat, poke and kick Mr. Halbert after they succeeded in knocking him down to the ground. R. 196;199.

Halbert was rendered unconscious for some five minutes as a result of the beating. Mann testified that Ames and Briggs both had something sharp, and silvery in their hands. She believed it to be "brass knuckles." R. 195; 213..

Ms. Mann testified that she did not see Halbert with any weapon either in the car or when he was being chased and then beaten. R. 228.

Ms. Nell Shaw, a licensed nurse practitioner at Baptist Memorial Hospital, testified that she examined Halbert in the emergency room. She testified that her examination determined that he had numerous injuries, was cut and was bleeding. He had a broken nose and a broken facial bone near his eye. She believed that these injuries were "serious bodily injuries." R. 236. She also believed that the injuries to Halbert "were consistent" with him having been beaten with a blunt object, like brass knuckles. R. 236-237.

The trial court denied a motion for a directed verdict. This was on grounds that there was no evidence that anything was taken from Halbert after the threat and beating. R. 275-276.

Ames testified in his own behalf. He testified that he hit Halbert but he did so only to defend himself. He was supposedly defending himself from a knife which Halbert used against him. R. 325-326.

During jury instruction selection, Ames requested an instruction for simple assault. R.389. The trial court found a lack of evidence for it. R. 389-392. There was undisputed testimony that the victim suffered serious bodily injury. R. 236. Mr. Halbert identified Ames along with Briggs as his brass knuckle assailants. R. 106. The trial court found that Ames testimony was about defending himself from Halbert who allegedly had a knife R. R. 325-326. He admitted in his testimony that he acted intentionally and purposefully in hitting Mr Halbert more than once.

In State's Exhibit 3, Ames' post **Miranda** statement after a signed waiver(exhibit 2) he stated that Halbert "pulled out a sword, and started coming toward me with it." See exhibit 2 in manila envelop marked Exhibits.

Ames was found guilty of both armed robbery and aggravated assault. R. 444. He was given a sixteen and a concurrent ten year sentence. R. 446. Ames' Motion For a NOV was denied. C.P. 79. From that conviction and sentence he appealed to the Mississippi Supreme Court. C.P. 80.

SUMMARY OF THE ARGUMENT

1. Arguments about analytic causal connections and failure to collect on a debt were waived for failure to raise them with the trial court. The issue raised at trial was that "nothing was taken from him." R. 276. **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994). 275-27; C.P. 79.

And the trial court did not err in denying a motion for a directed verdict on armed robbery and aggravated assault. R. 276. There was evidence of an intent to place the victim in fear for his safety. R. 108; 192-193. This threat was directed at taking money from Mr. Halbert. R. 108. There was evidence that the threat came prior to a severe beating with brass knuckles. R. 110; 193. And it was reasonable to infer that while no money was missing, this was only because it could not be found. Since Halbert's wallet was missing, it was reasonable to infer that it was taken when he was beaten unconscious by Ames. R.120. **McCain v. State**, 625 So. 2d 774, 778 (Miss. 1993).

It was reasonable to infer, under the facts, that Ames attempted to take Ames' money, but could not find it. **Houston v. State** 811 So.2d 371, 372 (Miss. App. 2001). It was in Halbert's watch pocket and not in his missing wallet.

Ames was identified by Halbert and Ms. Carol Mann, an eye and ear witness, as the person responsible for the threat, severe beating with a deadly weapon as well as the attempt to take and the actual taking of something of value. R. 181;188.

2. This issue was waived for failure to object. **Nicholson on behalf of Galled v. State**, 672 So. 2d 744, 752 (Miss. 1996). The record reflects that the trial court did not err in denying an instruction for simple assault. R. 390-392. The record reflects there was uncontested testimony and evidence that Halbert received "serious bodily injuries." R. 236. Halbert identified Ames as the person who "knocked him out with them things." R. 114. Ames testified that he and Briggs "intentionally" hit the victim more than once. They allegedly did so in self defense. Ames claimed

Halbert pulled a knife on him, and he was defending himself. R. 325-326. His testimony was contradicted by both Halbert and eye witness Mann. R. 159; 228.

Consequently, the trial court found that the record supported an instruction on self defense along with instructions for aggravated assault, and armed robbery. R. 391-392.

3. This issue was waived. It was waived for failure to object on the same grounds being raised on appeal. R. 252-264 ; C.P. 79. **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994). And the record reflects that the trial court did not err during testimony of Deputy James Faris.

The record reflects that Faris had already testified to finding no brass knuckles or any other weapon. He also testified to not seeking a search warrant. The record reflects that Faris was informed of these two felonies two weeks after the fact. This was because of Halbert's serious injuries and hospitalization. R. 253; 254.

The record reflects that the defense questions were general questions about investigative results. They called for information from not yet identified sources, which would have made the answers, if any, based on hearsay. R. 261-262

4. The record indicates that this issue was waived. It was waived for failure to object or proffer for the record on the same grounds being argued on appeal. R. 333-338; C.P. 79. **Duplantis v. State**, 708 So. 2d 1327, 1346 (Miss. 1998). In addition, the record reflects that Ames testified about how the charges went from a misdemeanor to two felonies. Ames was merely prevented from testifying about what others, who were not sworn witnesses, said to him. R. 335-338.

Ames fully presented his alleged self defense argument and general denials of culpability to the jury. He also had the benefit of co-defendant Briggs' testimony. R. 323-359.

5. This issue was waived for failure to make any objection much less one on the grounds being argued on appeal. R. 7-12. The record reflects there was no objection by Ames to his being allegedly

"forced" to wear a jail issued jump suit. The record reflects that Ames was not required to wear a jump suit. **Jackson v. State** 860 So. 2d 653, 668 (¶ 49) (Miss. 2003).

Rather Ames made inadequate arrangements for having his own clothes available. There is also a lack of record evidence for concluding that Ames' jump suit was so different from those worn by civilians as to single him out prejudicially. There is also a lack of evidence, to the best of the Appellee's knowledge, that Ames continued wearing this jump suit after voir dire. **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983).

6. This issue was waived. The record reflects there was no specific objection by Ames or his counsel to the cross examination of Briggs on the grounds being argued on appeal. R. 301-307 **Burns v. State** , 729 So. 2d 203, 219 (¶ 67)(Miss. 1998). The record reflects that Mr. Briggs' testimony was clearly contradicted by his previous sworn testimony in some instances. In fact, the record reflects that Briggs defiantly denied contradicting himself even when shown his previous testimony on point. R. 301; 304.

In other instances, Mr. Briggs' evasive answers were sufficiently at variance with his previous testimony to be construed as being "inconsistent," or in conflict with it.

ARGUMENT

PROPOSITION I

ARGUMENTS ABOUT CAUSAL CONNECTIONS AND DEBT THEORY WERE WAIVED. AND THERE WAS CREDIBLE, SUBSTANTIAL CORROBORATED EVIDENCE IN SUPPORT OF AMES' CONVICTIONS, INCLUDING ARMED ROBBERY.

Ames believes that the trial court erred in denying him a directed verdict. Ames believes that a directed verdict should have been granted on the armed robbery charge. Ames believes there inadequate evidence for establishing any casual connection between the threat, use of a deadly weapon and the taking of personal property. And he believes there was no evidence that anything of value was taken from Ames as a result of the threats, and use of a deadly weapon that caused Halbert to be fearful for his safety. Appellant's brief page 5-12.

The Appellee would submit that the issue about causal relationships between threats and taking or trying to take property was waived for failure to raise them with the trial court.

The argument about Ames' failure to collect on an alleged debt was also waived for failure to raise it with the trial court. **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994). 275-27; C.P. 79.

Without conceding that these issues were waived, they are also lacking in merit. The record also reflects that there was evidence both of a causal connection between the threats, the attempt to take and the taking of something of value and the use of deadly force. There was also evidence from which it was reasonable to infer that something of value was taken. Halbert's wallet was missing. R. 120. Halbert's twenty dollars was not removed only because it could not be found. It was not in the wallet which Ames took but concealed in Halbert's watch pocket.

Mr. Preston Halbert testified that he and Carol Malone, a neighbor, were given a ride by Mr.

Ames. Ames had a passenger in the car, Mr. Briggs. Halbert was going to a local store to get cigarettes for his sister. R. 102.

Inside the car, Halbert was addressed by Ames. Ames said , "don't you owe homey some money?" R. 108. Halbert was also told that if he did not get him (Briggs) some money, "he'll knock my teeth out." R. 110.

> A. And then when we got in the car and had–before we got to the store, he–got–he asked his partner, called him, "homey," that's what he called the other dude, "homey." **"Don't you owe homey some money?" I told him, "I don't owe nobody no money, man." ...And I got–and, you know, when he went up under the seat–pulled the car in park and went up under the see (sic) and had his hand up under the seat, and I thought, I got scared. And–and Carol said, you better get out of here.** R. 108. (Emphasis by Appellee).

The record cited reflects a demand for money, and an implied imminent threat of force. Mr. Halbert denied owing Ames or Briggs or any one else any money. R. 108. When Ames stopped the car, Halbert testified that Ames became more adamant, "**You got to give homey his money**." (Emphasis by Appellee). And he told him, "he would knock your(his) teeth out– if you(he) didn't give him any money." R. 110-111. The threat was clear, and it was imminent when Ames reached "under the seat" for something. R. 108. This was also when Ames stopped the car. Halbert tried to flee by getting out of the car. Ms. Mann, his companion in the car, encouraged Halbert to flee. She understood Ames to be threatening Halbert with force in order to get his money. R. 193.

Although he tried to flee, Halbert was not successful. He was chased by Ames who swung at him. The other man in the car, Briggs, also came after him. . Halbert testified that he was beaten "with them knuck things." R. 113. He believed it was "brass knuckles." R. 113.

Halbert was knocked down. He testified that they "beat him down" and also "stomped me." R. 114. Halbert was temporarily rendered unconscious. Later he discovered that he did not have his wallet. R. 120. Halbert did not place his twenty dollars in his wallet. Rather, "It was in my watch

pocket." R. 120.

Q. **Where was the money when you came to?**

A. **When I did got to the-when I got to the house, I had it, but I did–my billfold, I didn't have that though...** R. 120. (Emphasis by Appellee).

Halbert identified Ames as the person who threatened and beat and kicked him along with his friend Briggs. R. 106.

Ms. Carol Mann testified that she was Halbert's neighbor and friend. Mann testified to hearing Halbert being threatened. Ames claimed he owned some money to his friend, "my boy." R. 192. This was the other person in the car, Mr. Donnell Briggs. Halbert denied owing Briggs any money.

A. **So when we pulled to the gas pump, they started talking, he said if you don't get out the–he said if you don't give the man the money, he was going to knock his teeth out.**" R. 192-193. (Emphasis by Appellee).

Mann testified that when she heard Ames say, "If you don't give the man some money, I'm going to knock your teeth out," she knew Halbert was in danger. She testified, "I told him to get out of the car..." R. 193.

Mann identified Ames as the person who threatened and then beat and kicked Mr. Halbert. R. 188.

Although Halbert tried to ran away, Mann saw Ames catch, hit, beat and poke Halbert with "brass knuckles" and then "kick him" when he was on the ground. R.196.

Mann testified that she could see that Ames had something in his hand. R. 195. She described it as silver, sharp and held inside his hand. She thought it "looked like some brass knuckles." R. 195. She showed the jury how he held it "with his hand folded up, like that." R. 195.

Mann also testified to seeing Ames "poking him with it on the side, hitting and kicking him." R. 199. Mann testified that she did not ever see Halbert with any weapon at any time. R. She did hear Halbert threaten anyone or swing his arms at anyone. Nor did she see any injury to Ames. She only saw injuries to Halbert. He received them after Ames' demanded money from him in her presence. R. 228-229.

Ms. Neil Shaw was a nurse practitioner at the Baptist Memorial emergency room . She had twelve years experience in emergency room evaluations, referrals and treatments. She was accepted as an expert witness. R. 233. Shaw testified that Halbert had fractures on his face and a broken nose. She described his fractures more clearly as being "fracture of the zygomatic arch" and "fractures of the walls of the maxillary sinuses." R. 235-236.

She believed that Halbert's injuries were "serious bodily injuries." R. 236. She also testified that his injuries were "consistent with" what one would experience if struck with some type or blunt object or weapon. R. 236-237.

> Q. **And was that-that injury, in fact, consistent with the use of some type of weapon? Some type of a blunt object?**
>
> A. **In my opinion, yes.** (Emphasis by the Appellee).

Mr. Halbert testified to having had his face and nose broken, as well as to having some brain damage. He had loss some sight in one of his eyes. He had surgery as a result of his injuries. R. 114; 117.

The trial court denied a motion for a directed verdict on both counts. The grounds for the directed verdict on the armed robbery was that "nothing was taken from him." R. 276. The record cited above indicates this is not the case. R. 120. It is more accurate to say the record reflects that while no money was taken, this was only because Ames could not find it. Halbert concealed the

money in his pant's watch pocket. R. 120. Since Halbert's wallet was missing, it is reasonable to infer that it was taken by Ames.

> Clinkscales: Yes, your honor. I must make a motion at this time for a directed verdict, based upon the fact that there has not been sufficient evidence presented by the state on its case in chief to establish that there was any assault, that there was any robbery. **By the –by the victim's own admission, nothing was taken from him. So at this time, we would move for a directed verdict on both counts, and especially on the armed robbery charge.** (Emphasis by Appellee).
>
> Allgood: If your honor please, the statute says take or attempt to take. The mere attempt in itself is armed robbery. I think the medical evidence suffices to support the use of a deadly weapon.
>
> ...
>
> Court: All right. When reviewing motions for a directed verdict, the court is drawn to a case called **Wetz v State**, 503 So 2d at –or I think it's 505 So 2d 803. The standard is the Court must give the non-moving party the benefit of all favorable inferences that may be drawn from the evidence. When the court reviews the evidence that's before the jury at this point in time, the court believes the state was at least set forth a prima facie showing, and it becomes a jury issue at this point in time what they believe the events were that occurred on the 10th of January, 2006. R. 276.

In addition, in **Williams v. State**, 317 So. 2d 425, 427 (Miss 1975), the Supreme Court found that there was evidence that Williams was guilty of armed robbery. In that case, Williams used "self help" in threatening a store clerk with a pistol. He did so in order to take the amount of money he wanted returned on some shoes that he had already worn. In other words, Williams could not use a deadly weapon to collect money for what he erroneously thought was a debt owed to him for shoes he had purchased .

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not an appeals court.

> The three challenges by McCain (motion for directed verdict, request for peremptory instruction, and motion for NOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for NOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for NOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808 , **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);..We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

When the evidence cited and summarized above was taken as true with all reasonable inferences, there was more than sufficient, credible substantial evidence in support of the trial court's denying a motion for a directed verdict. There was corroborated testimony that Halbert was threatened with a severe beating if he did not provide Briggs and Ames with some money. Halbert was afraid of receiving injury to his person. R.108. This was why he got out of the car and tried to flee.

An eye witness corroborated his testimony. Mann saw Ames beating, poking and kicking Halbert when he was on the ground. R. 199. She corroborated him as having been threatened with having "his teeth knocked out" if he did not surrender some money. R. 192-193. She also corroborated Halbert in testifying she "saw" Ames with something in his hand when he was beating Halbert. R. 194. She believed , as did Halbert, that this was "brass knuckles." R.194-195. While Halbert found the money hidden in his watch pocket of his pants, he testified that his wallet was missing when he later restored to consciousness. R. 120. Mann also testified that Halbert lost

consciousness from the beating for some five minutes.

In **Houston v. State** 811 So.2d 371, 372 (¶ 4) (Miss. App. 2001), the Appeals Court found that nothing of value need be taken as one of the elements of an armed robbery charge. In that case, as in the instant cause, there were threats, use of a deadly weapon, and the unsuccessful attempt to take money. However, as shown with cites to the record, it was reasonable to infer that under the facts of this case, money was not taken only because it could not be found. It was concealed in the victim's watch pocket. However, his wallet was missing, which was something of value.

> ¶ 3. Houston bases his argument on the proposition that he was charged with armed robbery, but that the investigating officer's report indicates that nothing of value was actually taken in the incident. He argues that an actual taking is an essential element of the crime of armed robbery and seems to be contending that, at best, he could only have been guilty of attempted armed robbery. The police report, filed as an exhibit to Houston's motion, recites that Houston and accomplice entered a package liquor store for the purpose of robbing it, and that, in furtherance of that purpose, one of the assailants fired a handgun wounding the store owner as he ducked behind the counter. However, rather than surrendering to the robbery, the wounded owner rose from behind the counter armed with his own weapon and began firing at the robbers, causing them to flee before actually obtaining anything of value from the store.
>
> ¶ 4. **The fallacy in Houston's argument is best seen by considering the holding of the Mississippi Supreme Court in the case of Harris v. State that in Mississippi both an attempt to take and an actual taking of another's personal property against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon constitutes robbery. Harris v. State**, 445 So.2d 1369, 1370 (Miss.1984) (emphasis by appellee)..
>
> ¶ 5. We note that Houston does not contend that the facts were otherwise than contained in the police report. Rather, he stakes his entire claim on the proposition that those facts do not, as a matter of law, constitute the crime of armed robbery. The facts of the incident as reported by the investigating officer are sufficient to establish the crime as charged in the indictment under **Harris v. State**. Houston's argument is, therefore, without merit.

On a motion for a directed verdict, Ames was not entitled to have evidence favorable to his innocence taken as true with reasonable inferences. Conflicts in the evidence about factual specifics

created by his testimony were for the jury to resolve during their deliberations.

In **Noe v. State**, 616 So. 2d 298, 302 (Miss. 1993), this Court stated that when the sufficiency of the evidence is challenged that the evidence favorable to the State must be accepted as true with all reasonable inferences. Evidence favorable to the defense must be disregarded.

> In judging the sufficiency of the evidence on a motion for a directed verdict, or request for peremptory instruction, 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. **Clemons v. State**, 460 So. 2d 835 (Miss. 1984)

Testimony from Ames about his allegedly acting in self defense to defend himself from an alleged knife or "sword" was for the jury to resolve. R. 325-326; see exhibit 3 for Ames statement to investigators about Ames having "a sword.". His testimony was contradicted by eye witnesses Halbert, Mann, and Officer Faris.

There was overwhelming evidence in support of Ames conviction for armed robbery as well as for aggravated assault. This issue is lacking in merit.

PROPOSITION II

THIS ISSUE WAS WAIVED. AND THE RECORD REFLECTS NO BASIS FOR A SIMPLE ASSAULT INSTRUCTION.

Ames believes that the trial court erred in denying him a simple assault jury instruction. He thinks that he was entitled to such an instruction, because he denied having any weapon. Rather he claimed to have been attacked and injured by Mr. Halbert. Ames also does not think that Halbert's injuries were life threatening. Appellant's brief page 12-17.

The record reflects that there was no objection to the trial court's failure to grant a simple assault instruction. R. 390-392; C.P. 79.

In **Nicholson on behalf of Galled v. State**, 672 So. 2d 744, 752 (Miss. 1996), the Court stated that where there was no "contemporaneous objection" to the failure to grant an instruction, the court need not consider that issue on appeal.

> This Court does not review jury instructions in isolation. **Malone v. State**, 486 So. 2d 360, 365 (Miss. 1986). If the instructions given provide correct statements of the law and are supported by the evidence, there is no prejudice to the defendant. **Sanders v. State**, 313 So. 2d 398, 401 (Miss 1975). This Court has fully examined the instructions granted by the trial court in the case sub judice and finds that, taken together, the jury was correctly and completely charged.
>
> Regarding the instructions Galled claims the trial Court erroneously refused, Galled failed to object to the refusal of D-4. As a result, this Court is not bound to address the alleged error on appeal. **Lockett v. State**, 517 So. 2d 1317, 1332-33 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed 895 (1988).

In addition, the record reflects that there was a lack of record support for a simple assault instruction.

Although Ames testified that Halbert allegedly had a knife, he admitted that he hit him "like once or twice." R. 325-326. And he admitted that his companion Briggs also hit him. This would be an admission of at least three blows being delivered to the victim. R. 326.

Briggs corroborated Ames by admitting in his testimony that he also "hit" Halbert. R. 285. Both Ames and Briggs claimed that they were defending themselves when they hit Halbert. They testified that Halbert allegedly had a knife which he was trying to use against them.

As stated by Mr. Ames:

> That's when Mr. Halbert turned around and took a swipe at him, so out of defense, he hit him...**So that's when I got up, and when I got up. I hit Mr. Halbert...And I hit him. I ain't hit him but like once or twice, and Halbert slipped and fell to the ground.** Didn't no one knock him to the ground. And when he fell to the ground, didn't no one hit him while he was on the ground. 325-326. (Emphasis by Appellee).

Mrs. Nell Shaw , an emergency room nurse practitioner, was accepted as an expert witness. She testified that Halbert, who she examined in the emergency room, had a broken nose, and broken bones in his face. She believed his injuries were "serious bodily injuries." R. 236. She also believed the injuries were consistent with the use of some type of blunt weapon like "brass knuckles." R. 236-237.

Ms. Mann , who testified to being an eye witness to the assault upon Halbert, corroborated him in testifying that Ames (and Briggs) both had something metallic and shiny in their hands. R. 213. She thought, like Halbert, that they were "brass knuckles." R. 194-195. She testified to seeing them hit, and poke him with something silvery they had in their hands. They also kicked him. R. 199. She also testified that Halbert never had any weapon. R. 228.

The trial court found the testimony indicated that the victim's injuries were "serious bodily injury." The testimony from the victim, as well as from Ames and Briggs indicated that the victim was struck "intentionally and purposefully."

> Court: But the injury, the undisputed testimony at this point in time is that the injury was serious bodily injury. Now whether it occurred through self defense or through an aggravated assault, it was serious bodily injury. This instruction will be refused, because it seems to this Court that either the defendants–or either-the defendant's either guilty of aggravated assault or he is not guilty, because of self defense. That

seems to be the–and that's what the testimony was, that he was intentionally struck. R. 391-392.

The Appellee would submit that there was a lack of evidence for granting a simple assault instruction. There was expert testimony that Halbert's injuries were serious bodily injuries. R. 236. He testified to having suffered broken bones, and to having lost clear vision in his eye. R. 114. Ames presented no testimony indicating otherwise. Ames claimed in his testimony that he fought with and hit Halbert only to defend himself from an alleged knife. R. 325-326. This provided grounds for a self defense instruction rather than for simple assault.

The Appellee would submit that this issue is lacking in merit.

PROPOSITION III

THIS ISSUE WAS WAIVED. AND TESTIMONY FROM DEPUTY FARIS WAS PROPERLY RECEIVED.

Ames believes that the trial court erred during the testimony of Deputy James Faris. He believed the trial court improperly interfered with his cross examination. Ames believes this prevented him from being able to reveal to the jury that after a thorough search, no brass knuckles or any other type weapon was ever found by investigators. He thinks that this failure to present this evidence interfered with his defense to the charges. Appellant's brief page 17-19.

The record does not indicate any objection was raised with the trial court about how not questioning Officer Faris about hearsay sources of information interfered with his right of full cross examination. R. 254-263. It was therefore waived. **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994).

In addition, the record indicates that Officer James Faris had already testified that he had not found any brass knuckles or other weapons. He also testified that he did not seek a search weapon because the information he received about the armed robbery and assault came two weeks after the alleged assault and armed robbery had occurred. This information was not revealed to him initially because the victim had been rendered unconscious, and hospitalized with serious injuries which required an operation.

> Q. What about a weapon? Were you ever able to recover some brass knuckles, or any knifes, or anything of that nature?
>
> A. No, sir, I did not. R. 253.
>
> ...
>
> Q. Explain for the ladies and gentlemen why you didn't obtain a search warrant to try and go search somebody's place to look for brass knuckles and knifes or anything of that nature?

A. Because when I got involved in it, it was two weeks later, and I didn't feel like I had probable cause to get a search warrant. R. 254

The record also indicates that on cross examination the defense lawyer asked open ended questions. They seemed to be based upon some unidentified "hearsay source." Defense counsel explained to the court that it was her understanding that Officer Faris had "spoke to four individuals" about the possible use of weapons. She never identified who these sources were.

Q. How many weapons were reported to have been used on that night?

Allgood: If your Honor please, what's reported has a hearsay source. I have to object to that.

Court: It was–are you asking how many weapons Mr. Halbert reported to–to this officer?

Clickscales: No, he spoke with four individuals, and it could have come from any four of them.

Court: If you'll specify if it's from Mr. Halbert, I think that's fine. If it's somebody else, Mr. Halbert's testified. R. 261.

The only persons who had testified about weapons at this stage of the trial were Mr. Halbert and Ms. Malone. They both testified that Halbert was beaten with what looked like brass knuckles. R. 111;195. Although Ames had not yet testified, when he did he spoke of Halbert, the victim, as allegedly having a knife. However, at the time of this cross examination Ames had not yet testified.

The defense attorney also questioned Officer Faris about why he did seek a search warrant if weapons were reportedly used in the incident. R. 262.

The trial court after a bench conference, cautioned the defense that questions about what Halbert said would not be based upon a hearsay source, but questions from other unidentified sources would be.

> Court: Well, you're asking him about searching the house. I don't know many judges that would sign a search warrant for a house two weeks after looking at something like that. I wouldn't. Now hearsay is not-I'm going to-I'm going to overrule if you're asking what Mr. Halbert told this man. It's certainly hearsay if it's somebody else. I even guess Ms. Malone can test–if–if Ms. Malone was the source, but anyone else, it is hearsay at this point in time. R. 163.

In **Montgomery v. State** 891 So.2d 179, 185(¶ 41) (Miss. 2004), the Supreme Court affirmed the trial court's exclusion of cumulative evidence.

> ¶ 41. Miss. R. Evid. 403 expressly allows a trial court to exclude evidence which it finds to be cumulative. **Knotts by Knotts v. Hassell**, 659 So.2d 886, 891 (Miss.1995); see also **Clark v. City of Pascagoula**, 507 So.2d 70, 76 (Miss.1987) (holding that trial judge did not abuse his discretion by excluding cumulative evidence). "The touchstone of Rule 403 is whether or not the evidence-of whatever type-is cumulative, and if evidence is in fact cumulative it is within the discretion of the court to exclude said evidence." **Knotts**, 659 So.2d at 891.

In **Dozier v. State** 257 So. 2d 857, 859 (Miss. 1972), the Supreme Court pointed out that the trial court has broad discretion to limit cross examination "to relevant factual issues."

> The scope of cross-examination, although ordinarily broad, is within the sound judicial discretion of the trial court and such court possesses an inherent power to limit such examination to relevant factual issues. **Winter v. Nash**, 245 Miss. 246, 147 So.2d 507 (1962).

The Appellee would submit that the record indicates that questions about information from unidentified sources who had not yet testified would be based upon hearsay. In addition, the record reflects that Officer Faris had already testified about the results of his investigation. Seeking a search warrant for whatever house in which a defendant might be residing two weeks after his alleged use of a deadly weapon would not be reasonable under the facts of this case.

Both Ames and co-defendant Briggs testified fully about how they were allegedly defending themselves from Mr. Halbert who allegedly had a knife. They denied having any brass knuckles or any other weapon. R. 291; 330. They denied having tried to rob him of any of his possessions, or money. The record reflects that they were not limited in their ability to defend themselves against

the charges. R. 282-360.

Therefore, this issue is also lacking in merit.

PROPOSITION IV

THIS ISSUE WAS WAIVED. AND THE TRIAL COURT PROPERLY LIMITED HEARSAY TESTIMONY FROM AMES WITHOUT PREVENTING HIM FROM PRESENTING HIS DEFENSE.

Ames believes that the trial court erred in sustaining an objection to hearsay during his testimony. Ames thinks this preventing him from explaining to the jury what happened to him when he went to justice court. Since the result of his going to justice court two weeks after the incidents in question resulted in the charges being changed from simple to aggravated assault, he believes this testimony would have been helpful to his defense. He further thinks that he had a right to use this as impeachment of Halbert, since he had already testified about going to justice court. Appellant's brief page 19-22.

The record reflects that the issue of impeaching Halbert's testimony was not raised with the trial court and was therefore waived. R. 333-338. C.P. 79. In **Duplantis v. State** , 708 So. 2d 1327, 1346 (Miss. 1998).

> In the case at bar, Duplantis failed to object at trial on the same grounds that he alleges on appeal. The rule is that when counsel objects to evidence, he must point out to the trial judge the specific reason for or the ground of the objection or else the objection is waived. **Norman v. State**, 302 So. 2d 254, 259 (Miss. 1974).

In addition, the record reflects that the trial court properly sustained objections to hearsay. Ames was attempting to testify about what others (" Sonny Sanders called") said to him over the telephone. R. 333. Ames next attempted to testify about what "Judge Phillip Robertson" allegedly said to him in Justice Court. Another objection to hearsay was sustained. R. 334-335. However, the trial court informed Ames that he could testify about what happened or what he did as a result of the hearing in Justice Court. An additional objection was sustained to questions about whether Ames was "required to pay medical bills?" R. 335.

As to alleged previous hearsay testimony, the record reflects that Mr. Halbert who admitted to being illiterate, testified about going to "the small court." This was in answer to a question about where he was sent after he went to justice court. R. 118-119.

He testified to going from the doctor bandaged up to the justice court back to the doctor and then the sheriff's office. R. 118-119. The record reflects that Halbert did not testify to any thing of substance related to any evidence against Ames in his testimony. And there was no objection to Ames being prevented from testifying about alleged previously introduced hearsay testimony.

The Appellee would submit that this issue was therefore waived. **Duplantis, supra.**

> Q. Where did they tell you to go when you went to justice court.
>
> A. They told me to go to the –they sent me up to the judge and the judge–the judge believed me, you know what I'm talking about. The judge believed what they did, you know what I'm saying. But I told them–I told them to pay–pay for my-pay for my–you know, what-the damages that they had did to my face. R. 119.

The second reference to the justice court was during the testimony of Carole Malone. R. 225-226. However, she was not questioned about and did not testify about what others said or did in justice court. . She merely testified that she went to justice court two weeks later and that she spoke with law enforcement when she went to the court. R. 225-226.

The Appellee would submit that the record reflects that the trial court did not err during Ames' testimony. Ames was not prevented from presenting his side of the story concerning the charges against him. He testified about his displeasure at having the original misdemeanor charges changed to felony charges. R. 336-337. As stated by Ames in his own testimony:

> I was incarcerated before I ever talked to the investigator. He talked to us about six hours after we–after we had came for justice court. And after he got the statement from him, that's when he called us up there and talked to us. After we told our side of the story, that's when James Faris changed my charge to armed robbery and aggravated assault. And I'm like, "I don't rob nobody." I said, "You can't change my charge. How you going to change my charge?'

> Q. So it went from being a simple assault in justice court to being–
>
> A. To two felonies. And if I knew that simple assault was a misdemeanor then, I would have plead guilty to it then. But I felt like I ain't do nothing wrong, so I plead not guilty. R. 337

He also testified extensively about how he allegedly defended himself against Mr. Halbert, and how he did not allegedly rob him. He testified that he and Briggs had no brass knuckles or any other weapon. R 325-330.

In **Nalls v. State** 651 So.2d 1074, 1076 -1077 (Miss.1995), relied upon by Ames, the Supreme Court, affirmed Nalls' conviction. Any error in not allowing additional cross examination about crime lab personnel problems was harmless given overwhelming evidence of guilt.

Nalls is also distinguishable because he , unlike Ames, preserved the issue for appeal. As stated above, cross examination of hearsay was not raised with the trial court. R. 333-338. C.P. 79.

> Despite the error, we affirm the conviction because we find the error to be harmless. Although Maddox's conduct in the crime lab, at best, raises questions about the integrity of the cocaine attributed to Nalls once it reached the crime lab, the results of the field test on the rocks retrieved at the scene of the *1077 (Cite as: 651 So.2d 1074, *1077) crime are undisputed. Moreover, there is no evidence that some other rocks were substituted for those obtained from Nalls and Chapman's independent analysis of those rocks is similarly undisputed. The evidence supports a jury verdict that Nalls was guilty of possessing cocaine to the extent that we can say beyond a reasonable doubt that no juror would have decided differently had they been exposed to information concerning Maddox's transgression.
>
> The Appellee would submit that this issue is also lacking in merit.

PROPOSITION V

THIS ISSUE WAS WAIVED. AND AMES WAS NOT WEARING HAND CUFFS OR SHACKLES ONLY A JUMP SUIT ISSUED BY THE JAIL AT THE BEGINNING OF VOIR DIRE.

Ames believes that he was prejudiced before the jury because they saw him wearing prison attire rather than civilian attire. He believes he should not have been forced into being tried in jail attire. He thinks these jump suit made the jury think of him as a criminal rather than merely as a defendant in a criminal case. Appellant's brief page 23-26.

To the contrary, the record reflects no objection to Ames' jump suit by the defense. R. 8-13. The record further reflects that Ames made inadequate arrangements for obtaining his own clothes. The trial court and prosecution did not force Ames to wear anything. To the contrary, they tried to find civilian clothing for Ames in the court house but could not do so.

The trial court delayed the trial by some twenty minutes. He allowed time to look for clothing as well as for time for Ames' mother, who according to Ames was supposedly bringing him some civilian clothes. He also allowed for Ames' to change clothes "at a break" should the mother arrive after the jury was seated. R. 8-13.

Under these circumstances, the trial court can not be said to have "forced" Ames into being tried in prison attire. It is also to be noted that there was no evidence that Ames was either handcuffed nor shackled during the trial.

The record reflects that the trial court pointed out that Ames was not "in shackles." R. 9. He was wearing "a jump suit that the jail issues." R. 7. The record reflects that although Ames' trial had been set for three months, he apparently made inadequate arrangements to have any civilian clothing available the day of his trial. Although he thought his mother was going to bring him some

clothes, and the court delayed the trial for her to arrive with clothing, she apparently did not appear prior to jury being brought in for voir dire.

The Appellee can find no record evidence indicating what happened after voir dire as far as what clothes Ames was wearing thereafter. R. 2-100.. To the best of our knowledge, this issue was not raised in any of Ames' post conviction motions. C.P. 79.

In **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983) the court stated facts which are not supported by record evidence should be ignored on appeal.

> (Discussion at the bench)
>
> Court: Mr. Ames has been set for trial for three months. He is in jail attire. He had indicated that he told his mother all last week to bring him clothes. She has not done so. This Court has no clothing for him to wear up here, other than the clothing that the sheriff's department has given him. I've made–I even recessed the jury for another 15 or 20 minutes to give his mother time to be here, and she has apparently not shown up. **If she does show up and has some regular clothing for him, then I will allow him to change at a break, but until she does, I cannot continue this case any further.** He has indicated, "he" being Mr Ames, has indicated to the court that she knew several times last week that she was supposed to bring clothes. Okay. R. 12. (Emphasis by Appellee).

In **Jackson v. State** 860 So. 2d 653, 668 (¶ 49) (Miss. 2003), the Supreme Court found that there was no prejudice to Jackson where he wore MDOC prison attire. There was evidence, as there was in the instant cause, that the trial court gave the defendant an opportunity to wear other clothes but none was available at the time of trial.

In addition, in **Jackson, supra**, there was an objection to the clothing as being sufficient for prejudicing him in the eyes of the jury.

> ¶ 49. Although raised, the prison attire issue was not addressed in the direct appeal opinion. Jackson now argues that his trial attire precipitated a "substantial danger of destruction in the minds of the jury of the presumption of innocence." (quoting **Hickson v. State**, 472 So.2d 379, 383 (Miss.1979)) (concerning a handcuffed defendant). However, there is no merit to this claim as Jackson was not dressed in attire that would necessarily conjure up the image of "prisoner." The Supreme Court

> of the United States has stated that prejudicial attire is "distinctive, identifiable attire," that may affect a juror's judgment. **Estelle v. Williams**, 425 U.S. 501, 504-05, 96 S. Ct. 1691, 1693, 48 L. Ed.2d 126, 131 (1976). Further, a constitutional violation may occur where a judge compels a defendant to wear such attire, thus resulting in prejudice. Id. The record reveals that Jackson's attire consisted of ordinary navy pants and a blue chambray shirt. Jackson's counsel objected at trial since the clothing was provided by the Department of Corrections, but was overruled on the basis that the clothing was not distinguishable from ordinary, everyday clothing. Further, the trial judge did not deny Jackson the opportunity to change his clothing, but recognized and explained on record that no other clothing was available.

The Appellee would submit that this issue was not only waived for failure to object on the grounds being raised on appeal but that it is also lacking in merit without record support.

PROPOSITION VI

THIS ISSUE WAS WAIVED. AND THE IMPEACHMENT OF BRIGGS WAS PROPER UNDER THE FACTS OF THIS CASE.

Ames believes that co-defendant, Briggs, was subjected to improper impeachment during his trial. Since Briggs had been tried previously, and there was a transcript of his testimony, his prior testimony was allegedly improperly used. It was improper because he thinks Briggs testimony at his trial was not actually contradictory of his testimony in the instant cause. Ames thinks this prejudiced his defense in the instant cause. Appellant's brief page 26-27.

To the contrary, the record reflects there was no specific objection by Ames or his counsel to the cross examination of Briggs on the grounds being argued on appeal. R. 301-307; C.P. 79. Ames counsel merely stated that she thought the relevant portions of the record should not be "re-read into the record." R. 362.

In **Burns v. State** , 729 So. 2d 203, 219 (¶ 67)(Miss 1998), this court stated that one could not expand upon an objection made at trail on appeal.

> In **Conner**, this Court held that an objection on one or more specific grounds constitutes a waiver of all other grounds. Id at 1255 (citing **Stringer v. State**, 279 So. 2d 156, 158 (Miss. 1973). See also **Brown v. State**, 682 So. 2d 340, 350 (Miss. 1996). It has long been the finding of this Court that "an objection at trial cannot be enlarged in a reviewing court to embrace an omission not complained of at trial. **Brown**, 682 at 350 (citing **McGarrh v. State**, 249 Miss. 247, 148 So. 2d 494, 506 (1963). This claim is procedurally barred. Objection on one or more specific grounds at trial constitutes a waiver of all other grounds for objection on appeal. **Burns v. State**, 728 So.2d 203 (Miss. 1998).

The record reflects that Briggs testified that he saw Ames struggling with Halbert. Halbert allegedly pulled out a knife, and "going toward my cousin with a–with a knife." R. 283. He testified that Ames was "on the ground," and this was when he admitted to hitting Halbert. R. 283. He admitted that he had had "a few

beers." R. 283.

On cross examination, Briggs was questioned if in his prior testimony he had not said he had had "three or four beers." R. 299. When confronted with the transcript which had him saying "three or four," Briggs persisted in testifying that he had actually said, "a few beers." R. 301.

When Briggs was questioned about whether he heard Ames and Halbert arguing in the car, he testified , "**No, I did not.**" R. 304. (Emphasis by Appellee).

When questioned as to whether he told Mr. Faris at the Lowndes County Sheriff's Department , that he could hear Ames arguing with Halbert in the car, he denied he made such a statement. R. 304.

When Briggs was questioned about what he saw when he allegedly came around a corner, he testified he could not recall having said that he saw Ames slip and fall to the ground. R. 308. Rather he said he saw Ames "already" on the ground. R. 363.. Whereas, in his transcript testimony he saw Ames already on the ground. He did not know how he got there but "apparently, he slipped." R. 264.

The trial court's ruling that only the portions of the transcript that

> Court: **However, the entire transcript of the testimony will not go to the jury, only those portions that deal with specific denials that Mr. Briggs made to questions that Mr. Allgood proffered to him. There were a number of times when Mr Briggs either did not absolutely admit yes or no, or there was enough jousting that I've said that that–that Mr. Allgood could take that as a denial for purposes of impeachment.** So those instances will be able to be inquired of. Other than that, anything else in here I need to know about out of the presence of the jury, if it's proffered. R. 361-362. (Emphasis by Appellee).
>
> Clinkscales: Your Honor, I would object to that inasmuch as the cross examination of Mr. Briggs, those portions to which I believe he's referred have already been read and the answers have already been read into the record as well. I don't see the need to reread that into the record.
>
> Court: Your objection is noted and overruled at this time. R. 362.

In **Conley v. State** 790 So.2d 773, 786 (Miss. 2001), the Supreme Court found that using leading questions "to pin down" a witness where there was evidence of prior relevant "inconsistent statements" was permissible.

> ¶ 38. The State cites **Hughes v. State**, 735 So.2d 238, 279 (Miss.1999), in support of its argument that the re-direct of Teronda was proper. In Hughes, we held that the trial judge did not abuse his discretion in allowing the State to use leading questions when the witness "was the very paradigm of a hostile witness." The Court stated that "[h]er testimony not only deviated substantially from her pretrial prior statement, but was also inconsistent during both direct and cross-examination. The State was justified in attempting to pin [the witness] down with one version of her story or the other; and, the trial judge was correct in allowing leading questions to this effect." Id. The State contends that at this point in the trial, Teronda had become a hostile witness, closely identified with the defendant and, therefore, subject to examination by leading questions.

In **Thomas v. State**, 247 Miss 704, 159 So. 2d 77, 80 (1963), the Mississippi Supreme Court stated that "this court" should give "all reasonable presumptions in favor of the rulings of the court below."

The Appellee would submit that this issue was waived. In addition, the record cited indicates there were "contradictions" as well as "inconsistencies" in the substance of relevant testimony.

This was shown to be the case when Briggs' testimony was compared with his previous sworn testimony in his own separate trial. He had been previously convicted of aggravated assault. This issue was not only waived, it is also lacking in merit.

CONCLUSION

Ames' convictions should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

W. GLENN WATTS
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

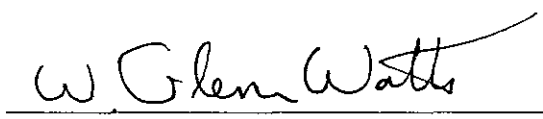
I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable James T. Kitchens
Circuit Court Judge
Post Office Box 1387
Columbus, MS 39703

Honorable Forrest Allgood
District Attorney
Post Office Box 1044
Columbus, MS 39759

George T. Holmes, Esquire
Attorney At Law
301 North Lamar St., Ste. 210
Jackson, MS 39201

This the 16th day of September, 2008.



W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

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