

SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JUDY WILBANKS

Plaintiffs - Appellant

VS.

Supreme Court No. 2008-CA-00119-COA

STATE OF MISSISSIPPI

Defendant - Appellees

BRIEF FOR APPELLANT

APPEALED FROM:

TIPPAH COUNTY CIRCUIT COURT  
THIRD JUDICIAL DISTRICT MISSISSIPPI

ATTORNEY FOR APPELLANT  
JAMES D. MOORE  
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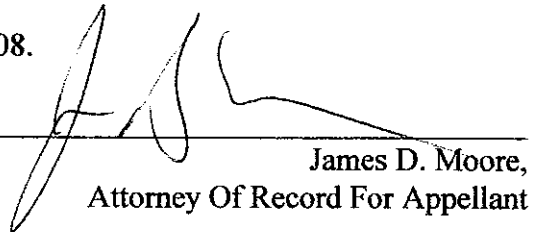
CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the judge of this court may evaluate possible disqualification or recusal.

- |    |                 |   |                        |
|----|-----------------|---|------------------------|
| 1. | Judy Wilbanks   | - | Appellant              |
| 2. | James D. Moore  | - | Attorney for Appellant |
| 3. | John Creekmoore | - | Attorney for Appellee  |
| 4. | Imogene Hardin  | - | Victim                 |

Respectfully submitted on this 15 day of July 2008.

By: \_\_\_\_\_

  
James D. Moore,  
Attorney Of Record For Appellant

## STATEMENT REGARDING ORAL ARGUMENT

### Oral Argument Is Requested

Plaintiff-Appellant, Judy Wilbanks respectfully requests an oral argument. Given the complexity of the matter, Appellant believes oral argument would be helpful to the court.

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### ISSUE I:

WHETHER APPELLANT PLEA OF GUILT WAS COERCED. WHETHER IT WAS VOLUNTARY OR INTELLIGENTLY AND KNOWINGLY ENTERED INTO.

### ISSUE II

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THAT:

- a. APPELLANT'S ATTORNEY FAILED TO ADEQUATELY INVESTIGATE THE CHARGES AGAINST HER OR TO INVESTIGATE ANY DEFENSES SHE MIGHT HAVE TO THOSE CHARGES.
- b. APPELLANT'S ATTORNEY FAILED TO CONFER WITH HER REGARDING THE FACTUAL BASIS FOR THE CHARGES AGAINST HER.
- c. APPELLANT'S ATTORNEY THREATENED, BERATED, AND COERCED HER INTO ENTERING PLEAS OF GUILTY.
- d. APPELLANT'S ATTORNEY INCORRECTLY ADVISED HER REGARDING POST-CONVICTION RELIEF.
- e. APPELLANT'S ATTORNEY INCORRECTLY ADVISED HER OF CONSEQUENCES OF ENTERING A GUILTY PLEA.

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**I. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

**ISSUE I:**

**WHETER APPELLANT PLEA OF GUILT WAS COERCED. WHETHER IT WAS VOLUNTARY OR INTELLIGENTLY AND KNOWINGLY ENTERED INTO.**

**ISSUE II**

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- e. APPELLANT'S ATTORNEY INCORRECTLY ADVISED HER OF CONSEQUENCES OF ENTERING A GUILTY PLEA.

## **I. STATEMENT OF THE CASE**

### **THE COURT PROCEEDINGS**

1. On May 21, 2003, Judy appeared before Circuit Judge Henry L. Lackey, Third Circuit Court District, Tippah County, Mississippi, ostensibly to enter her pleas of guilty to one count of capital murder and one count of aggravated assault. Because of Judy's responses to questions asked by the Court, her pleas were not accepted and the charges against her were set for trial.
2. On May 22, 2003, Judy appeared before Circuit Judge Andrew Howorth, Third Circuit Court District, Tippah County, Mississippi, and entered her pleas of guilty to one count of capital murder and one count of aggravated assault.
3. Judge Howorth accepted Judy's pleas and sentenced her to a term of natural life, without the possibility of early release, probation, or parole on the charge of capital murder and to a term of 20 years on the charge of aggravated assault. The sentences imposed by the Court were to run concurrently.
4. Judy Wilbanks filed a Post Conviction Relief Motion, which was denied by the Tippah County Circuit Court on the 12<sup>th</sup> day of December 2007. Judy Wilbanks filed a Notice of Appeal was filed on January 14<sup>th</sup> 2008.

### **STATEMENT OF REVELENT FACTS**

1. Judy was arrested in August of 2001, after voluntarily entering the Tippah County Sheriff's Department to report a theft of personal property. Interestingly, posted at the entrance to the Sheriff's department, and in clear view to Judy when she entered the building, was a poster which contained a composite drawing of a woman who purportedly resembled Judy and who, according to the poster, was wanted for murder. Judy was initially held for questioning in connection with that murder allegation and was subsequently charged with capital murder and aggravated assault.
2. After her arrest, Judy hired an attorney to represent her. Thereafter, she released her first attorney and hired a different attorney (hereinafter "attorney") to represent her at the trial of this

cause.

3. The attorney conducted an initial interview with Judy. However, notwithstanding repeated efforts by Judy, Judy's mother, and Judy's daughter, the attorney thereafter failed to adequately communicate with her. The attorney's failure to communicate became so severe that the attorney had no communications with Judy for seven months prior to the first trial setting in this cause in February 2003, despite the repeated requests by Judy and her family members on her behalf.
4. After this seven month hiatus, and through May 8, 2003, the attorney, in furtherance of his efforts to coerce Judy into entering a plea of guilty in this cause, started visiting her in jail.
5. Judy reported, on at least two occasions, the problems she was encountering with the attorney to the Mississippi Bar. The bar responded to her complaints on January 27, 2003, and February 14, 2003. See ROA PG 51-52 Exhibit to PCR "F" and "G".
6. When the attorney re-commenced his communications with Judy, his efforts were directed solely at convincing her, by whatever means available, to disavow her innocence and to enter a guilty plea. The attorney's actions included telling her that, if she pleaded guilty, she would receive a new attorney when she pursued her post conviction relief rights and that the new attorney would see that she got a new trial. Further, the attorney advised her that if she entered a guilty plea then she would be allowed to have visitors in prison, but if she insisted on a trial and was convicted and then sentenced to either prison or death, that she would be forever barred from having any visitors, including visits from her children.
7. On or about May 8, 2006, the attorney consulted with her at the Tippah County Jail. At that time, he advised her to plead guilty to the charges against her, notwithstanding her protestations of innocence. The attorney presented her with a hand written letter which he required her to sign and in which she acknowledged her rejection of a proffered plea offer. ROA PG 49 Exhibit to PCR "D".
8. On May 21, 2003, the attorney, confident that his coercive efforts since May 8, 2006, had been successful, appeared with Judy before Judge Lackey so that she could enter pleas of guilty to the charges against her. However, as the record of this proceeding reflects, Judy stated, "...I didn't do it..." that she wanted another lawyer, and that her current attorney was "... the one trying to get me to do this. Oh, God." ROA PG 29 PCR Exhibit "A"



9. At the May 21 hearing, the attorney, in a most unusual soliloquy to the Court, made a number of statements, including an *ore tenus* Motion that he be relieved as counsel, stating, *inter alia*, to the court that **"It is beyond my power, I believe, to adequately represent her at this point."** (emphasis added) Notwithstanding the statements made to the Court by Judy and the request of the attorney to be relieved as counsel, the Court denied the attorney's motion and continue Judy's trial on the pending charges for May 27, 2003, only 6 days from the date of the instant hearing. See ROA pg. 24 Exhibit "A", p. 8, l. 1-2, p. 9, l. 3-6.
10. Immediately after the conclusion of this hearing before Judge Lackey, the attorney again met with Judy at the Tippah County Jail and made a number of statements to her, including: "You dumb bitch, you are going to die.... I do not have a defense for you and you better get one before trial." These comments so upset Judy that she fled from the attorney visiting room and went back to her cell. Thereafter, she had to be escorted back into the presence of the attorney who recommenced his verbal attack on her.
11. On May 22, 2003, the attorney met again with Judy. At that meeting, the attorney reiterated his earlier representations to Judy that she would receive a new attorney through the post conviction relief process, advising her that an attorney would be automatically provided to her. This attorney even went so far as to make telephonic contact with another attorney who was a past acquaintance of Judy's, allowing Judy to talk, albeit briefly, to this other attorney. The attorney's purpose in initiating this contact was to get the other attorney to advise Judy that she would get a new attorney through the post conviction relief process and to convince her that she should plead guilty to crimes that she denied committing. The other attorney did not have the opportunity to give Judy any advice and he certainly did not advise Judy that she would get a new attorney through the post conviction relief process or that she should plead guilty to crimes that she denied committing. That other attorney's affidavit is attached hereto and clearly shows that Judy steadfastly proclaimed her innocence to him and adamantly stated that she did not want to plead guilty. See ROA pg 109.
12. On May 22, 2003, after all of the above communications between Judy and the attorney, and after the telephone call to the other attorney, the attorney, again confident that his coercive efforts had been successful, appeared with Judy before a different Circuit Judge, Judge Andrew

Howorth, so that Judy could enter pleas of guilty to the charges. Judy, at that hearing, and pursuant the attorney's specific instructions, failed to look at Judge Howorth and, at the attorney's visual prompting responded to the Court's questions, thereby entering her pleas of guilty to the charges against her.

Subsequent to Judy's guilty pleas, and for the very first time, the attorney presented Judy with copies of the discovery that he had received from the District Attorney's office. Prior to this time, and except for telling Judy that she was going to die if she did not accept the proffered plea deal, the attorney never showed or discussed this discovery information with Judy.

#### **IV Summary of Argument**

It is clear that with the numerous times Judy Wilbanks attempted to reach out for help that she did not receive representation due her. She repeatedly wrote the Mississippi Bar, she called another attorney, and she even told a Circuit Court Judge. All these pleas fell on deaf ears. It is an attorneys' responsibility to meet with his client, or at a minimum communicate with his client. Judy Wilbanks' attorney was not ready for trial and clearly needed her to plead guilty. Further there was no factual basis for the plea. The evidence was completely circumstantial against Judy Wilbanks. Not one piece of direct evidence, no DNA match, no weapon, no valid identification of the defendant. Judy Wilbanks had to make a hard choice, she told the Judge "he is making me do this" but no one would help her. Pleading guilty on the false information that she would receive an attorney and get a new trial was her only choice. Judy Wilbanks was denied her right to a trial and that is all she is asking for, which is all she has ever asked for.

## **V. Argument**

### **ISSUE I: APPELLANT 'S PLEA OF GUILT WAS COERCED. IT WAS NOT VOLUNTARILY, INTELLIGENTLY, AND KNOWINGLY ENTERED INTO.**

A plea is considered "voluntary and intelligent" if the defendant is advised about the nature of the charge against him and the consequences of the entry of the plea. *Alexander v. State*, 605 So. 2d 1170, 1172 (Miss. 1992) Did Judy understand the consequences of the entry of her plea? The documented factual evidence regarding Judy's plea clearly shows that it was not intelligently, voluntarily and knowingly made.

The attorney started to coerce her to enter a guilty plea on May 8, 2003. The attorney presented Judy with the plea agreement, and when Judy refused to accept the plea offer, the attorney hand wrote a statement that he required Judy to sign stating the consequences of a not accepting the plea. ROA 49.

While the exact date is unknown, the attorney presented Judy with another, dated document after May 8, 2003, and prior to May 22, 2003. (ROA PG. 48) This document clearly shows that Judy will be eligible to file a P.C.C.R. with a new attorney if she plead guilty, and it also shows that an appeal would be questionable if Judy were convicted at trial. This document supports Judy's allegation that the attorney told her she would be appointed an attorney if she plead guilty. Further the documents states she would be allowed visitation if she plead guilty, but would not be allowed visitation if she demanded a trial and was given the death penalty. (ROA PG. 48)

Additionally, the attorney met with Judy's family, insisting that she plead guilty. The attorney informed Judy's mother that Judy had to plead guilty, that he had no defense

prepared for Judy, and that if Judy did not enter a guilty plea that she would receive the death penalty. Judy's mother had paid the attorney \$38,000.00 and could not afford to hire a new attorney for her daughter. (ROA pg. 53.)

Judy knew the attorney was not adequately representing her. Judy, in an attempt to get help, wrote the Mississippi Bar at least twice. The Mississippi Bar told her to hire another attorney or ask the court to appoint another attorney. (ROA PG. 51-52)". Judy did as instructed and requested another attorney. Her request was refused. (See ROA 29.)

The attorney reiterated his earlier statements regarding the appointment of a new attorney through the post conviction relief process, advising her that an attorney would be automatically provided to her. The attorney even went so far as to make telephonic contact with a second attorney, a past acquaintance of Judy's, allowing Judy to talk, albeit briefly, to this other attorney. The attorney's purpose in initiating this contact was to get the other attorney to advise Judy that she would get a new attorney through the post conviction relief process and to convince her that she should plead guilty to crimes that she denied committing. While the other attorney did not have the opportunity to give Judy any advice and he certainly did not advise Judy that she would get a new attorney through the post conviction relief process or that she should plead guilty to crimes that she denied committing, he clearly recalls that Judy asserted her innocence and stated she did not want to plead guilty. ( ROA PG. 109)

Judy, in what proved to be her futile attempt to get relief from the Circuit Court, stated to the Court "...I didn't do it..." and that her attorney "...is not helping me..." and is "...the one trying to get me to do this. Oh, God." (ROA PG. 29, l. 19-24)

The attorney made a number of statements to the Court, including an *ore tenus* Motion that he be relieved as counsel, stating, *inter alia*, to the court that **"It is beyond my power, I believe, to adequately represent her at this point."** (emphasis added) Notwithstanding the

statements made to the Court by Judy, and the request of the attorney to be relieved as counsel, the Court denied the attorney's motion and set Judy's trial on the pending charges for May 27, 2003, only 6 days from the date of the instant hearing. (ROA PG. 30 1.26-27)

Taking the above facts and the documentation provided herein, it is clear that Judy's plea does not meet the required "voluntary and intelligent" prong. *Alexander v. State*, 605 So. 2d 1170, 1172(Miss. 1992). A plea cannot be voluntary when a defendant has been advised that she has only one choice. A plea cannot be intelligently made when it was based on incorrect and/or inadequate information. The sworn allegations of this Petition, coupled with the attached exhibits, far exceeds the prima facie evidence needed to show that Judy's plea was not intelligently and knowingly made.

**ISSUE II: APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THAT:**

- a. APPELLANT'S ATTORNEY FAILED TO ADEQUATELY INVESTIGATE THE CHARGES AGAINST HER OR TO INVESTIGATE ANY DEFENSES SHE MIGHT HAVE TO THOSE CHARGES.
- b. APPELLANT'S ATTORNEY FAILED TO CONFER WITH HER REGARDING THE FACTUAL BASIS FOR THE CHARGES AGAINST HER AND THE PURE LACK OF FACTUAL OR DIRECT EVIDENCE AGAINST HER.
- c. APPELLANT'S ATTORNEY THREATENED, BERATED, AND COERCED HER INTO ENTERING PLEAS OF GUILTY.
- d. APPELLANT'S ATTORNEY INCORRECTLY ADVISED HER REGARDING POST-CONVICTION RELIEF.
- e. APPELLANT'S ATTORNEY INCORRECTLY ADVISED HER OF THE CONSEQUENCES OF ENTERING A GUILTY PLEA.

The ineffective assistance of counsel standard is set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). The *Strickland* standard requires that the defendant show that his counsel's performance was deficient and that the deficient performance prejudiced him to the point that he was denied a fair trial. *Id.* at 687, 104 S.Ct. 2052.

The attorney clearly stated on the record that he could not adequately represent Judy. (ROA 24-29) The attorney making this statement in open court surely gives credence to Judy's assertions that this statement and many more were made to her in private by the attorney. (ROA 55-57)

Additionally, the attorney, on more than one occasion and to more than one person, stated that Judy must plead guilty and that he was not prepared for a trial. (ROA 53- 57) Judy was under a threat of the death penalty and was being represented by an attorney who had no defense prepared. (ROA 55-57) and who was telling her "unless you come up with a defense, you are going to die" and "You might as well as defend yourself (ROA 53- 57) Notably, most of the conversations between Judy and the attorney took place within nineteen (19) days of her guilty pleas.

The attorney incorrectly advised Judy on the consequences of pleading guilty. In his own handwriting, the attorney made a pro/cons list detailing all the reasons why Judy should plead guilty (ROA 48) The attorney intentionally lead Judy to believe that she would receive certain benefits if she plead guilty and would not receive certain benefits if she went to trial, including getting a trial that she was now demanding. The attorney's written analysis is misleading at best.

A review of all the factual evidence clearly establishes that the *Strickland* requirements have been met, *Id.* at 687, 104 S.Ct. 2052. Judy has shown that the attorney's performance was deficient, that the deficient performance prejudiced her to the point that she was not only

denied a fair trial, but also that she was denied any trial. But for the attorney's pressure to get Judy to plead guilty, Judy would have received a trial.

In situations where the issue of ineffective assistance of counsel is raised in a petition for post-conviction relief, the allegation must be alleged with specificity. *Ford v. State*, 708 So.2d 73, 74 (Miss.1998), (citing *Smith v. State*, 434 So.2d 212, 219 (Miss.1983)). The ongoing coercion of Judy by the attorney, including his use of misinformation that led her guilty pleas, easily meets that burden. Unlike the *Ford* case, Judy has met her burden of proof in that her allegations contain the specificity and details required to establish a prima facie showing.

Courts accord great deference to an attorney's professional judgment, including a decision that further investigation is unnecessary. *Foster v. State*, 687 So.2d 1124, 1132 (Miss.1996). The Courts employ a rebuttal presumption that defense counsel's decisions are made for strategic purposes. *Cole v. State*, 666 So.2d 767, 775 (Miss.1995). Prejudice to the defendant may be measured by the likelihood that further investigation would have resulted in the discovery of evidence sufficient to convince counsel to abandon a plea recommendation. *Cole*, 666 So.2d at 767.

Investigation includes, at a minimum, meeting with the defendant to determine the strength and weakness of a case and giving the defendant the discovery information produced by the prosecution and discussing that discovery information with the defendant. While the attorney told Judy that he had received discovery information, and repeatedly promised to see that she received that information to review. The attorney, after his employment and the completion of the initial interviews with Judy, did not meet or consult with her until he started his efforts to convince her to plead guilty.

Judy wrote the Mississippi Bar at least two times regarding the attorney. (ROA 51-52) Judy repeatedly asked the attorney to meet with her and discuss her case – she had paid for that right. And, Even though Judy was transported at least twice for change of venue and bond reduction hearings, the attorney on each occasion refused to discuss Judy's case with her except for his promise to get the discovery information to her and to come to the jail to talk to her about the trial. Judy received the discovery information **the day after** she pled guilty. It was delivered to her at the jail while she was awaiting transfer to prison.

The defendant must overcome the strong but rebuttable presumption that counsel's conduct fell within the "broad range of reasonable professional assistance." *McQuarter v. State*, 574 So. 2d 685, 687 (Miss 1990). The facts alleged by Judy clearly rebut that presumption. There is no evidence that the attorney ever interviewed any witnesses, although Judy requested several time that he talk to at least one witness, a witness whose name was not in the discovery information. In fact, the attorney admitted this deficiency only after Judy's plea. In defense of his lack of preparation, the attorney repeatedly told Judy and her mother that he was without an assistant and did not have time to conduct the necessary investigation, a fact established by the attorney's previous request for a continuance based on the lack of investigative resources.

Had Judy's case been properly investigated, a defense could have been prepared, and any defense would have been better than the total lack of a defense. The case against Judy was purely circumstantial and therefore defensible.

A PCCR claim based on nothing more than an assertion that the attorney spent insufficient time on the case is insufficient to show an entitlement to relief. *Harveston v. State*, 597 So.2d. 641, 642 (Miss. 1992) The defendant must also prove that, but for this alleged deficiency, he would not have entered a plea of guilty. *Id* Judy's claim is based on the totality of the circumstances with only one part of those circumstances being that the attorney spent insufficient time on the case. Clearly Judy



has shown a deficiency not only with the investigation, but also the overall performance of this attorney. But for these deficiencies, Judy would not have entered guilty pleas to charges she steadfastly denied.

### **LACK OF EVIDENCE - FACTUAL BASIS FOR THE PLEA**

At Judy's preliminary hearing, a Tippah County Deputy Sheriff testified that Judy Wilbanks' shoes and purse had blood on them. Although the Crime Lab report was not back he felt sure prior to trial that it would show blood from the crime lab. The Deputy stated "I'm sure when we get ready for trial we will have plenty of forensic evidence." (ROA PG. 58 PCR Exhibit "J". PG 93 L 24-25

In fact, in the discover information is a crime laboratory report stating that DNA testing excluded the victim as the donor of the blood found on Judy's purse and shoes.

The Deputy further testified that he was sure that the victim would be able to identify the defendant, notwithstanding that at the time of the preliminary hearing the victim had not been given that opportunity, stating "She'll probably identify her."<sup>2</sup> In fact, the first time the victim was given the chance to identify Judy she could not identify her. All the forensic evidence which the district attorney advised the Court the prosecution was going to produce did not materialize. There is not one piece of forensic evidence in this case that implicates Judy, despite the States previous claims.

Rule 8.04(2), UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE, requires that the circuit court determine if there is substantial evidence to support the defendant's guilt in the crime for which that plea is offered. *Gaskin*, 618 So.2d at 106; *Lott*, 597 So.2d at 628; *Corley*, 585 So.2d at 767. However, the guilty plea itself is not sufficient to establish a factual basis. *Gaskin*, 618 So.2d at 106. The purpose of this "factual basis" requirement is to assure that the Court looks beyond the admission of guilt and determines independently that there is substantial evidence, that the Appellant did, in fact, commit the crime with which he was charged, and that the Appellant is not entering the plea for any reason that the law finds objectionable. *Id.* It is the duty of the Court to review the entire

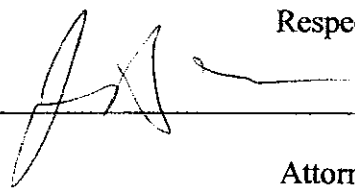
record, not just the transcript of the plea hearing, to determine whether there was, in fact, a factual basis for the ...plea of guilty. Id.; Brown, 533 So.2d at 1124.

The Assistant District Attorney read into the record facts pertaining to the plea but the factual basis is seriously lacking in actual, substantive evidence. There is no direct evidence against Judy and the circumstantial evidence allegedly available to the prosecution does not rise to the level needed for a criminal conviction. (ROA 34 -47)

## VI. CONCLUSION

It is clear that with the numerous times Judy Wilbanks' attempted to reach out for help, that she did not receive representation due her. The evidence was completely circumstantial against Judy Wilbanks. Pleading guilty on the false information that she would receive an attorney and get a new trial was her only choice. Judy Wilbanks was denied her right to a trial and that is all she is asking for, which is all she has ever asked for. Judy Wilbanks prays that her denial for Post Conviction Relief will be reversed and remanded.

Dated, this the 15 day of <sup>July</sup>~~June~~, 2008.

Respectfully Submitted,  
By,   
James D. Moore  
Attorney for Appellants

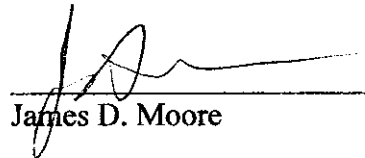
Certificate of Service

This is to certify that I, James D. Moore, have this day mailed, via first class mail, a true and correct copy of the above and foregoing brief to:

Honorable Betty Sephton  
Supreme Court Clerk  
Post Office Box 249  
Jackson, MS 39205

Hon. Ben Creekmore  
District Attorney  
Post Office Box 1478  
Oxford, MS 38655

This the 16 day of July, 2008

  
\_\_\_\_\_  
James D. Moore

**CERTIFICATE OF MAILING**

I, the undersigned hereby certify that I have this date, placed the original of the above and foregoing Brief Of The Appellant together with <sup>4</sup>~~3~~ copies of the same, in a U.S. Mailbox, postage prepaid, addressed as follows on this the 16 day of July 2008

Honorable Betty Sephton  
Supreme Court Clerk  
Post Office Box 249  
Jackson MS. 39205

Respectfully submitted this the 16 day of July, 2008.

  
\_\_\_\_\_  
James D. Moore