IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROBERT LEE TYLER, JR. — APPELLANT

VS. — NO. 2008-CA-0750

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROBERT LEE TYLER **APPELLANT**

vs. **CAUSE No. 2008-CA-00750-SCT**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of DeSoto County, Mississippi in which relief was denied on the prisoner's motion in post - conviction relief.

STATEMENT OF FACTS

By Order filed on 5 December 2007 in *Tyler v. State*, 2007-M-01600, this Honorable Court granted relief in part on the prisoner's application to proceed in post - conviction relief. Specifically, the Circuit Court of DeSoto County was directed to conduct an evidentiary hearing on issues II and III(1) contained in the prisoner's application for leave to proceed in post - conviction relief. Those issues were: (1) Whether the trial court erred in the manner it instructed the jury to continue deliberations; and (2) Was counsel for the prisoner ineffective for having failed to raise an alleged due process violation by the trial court in instructing the jury in the absence of the defense lawyer and the prisoner. In due course the Circuit Court granted an

evidentiary hearing to the prisoner.

It was stipulated that the court reporter who served at the prisoner's trial would state, if called to testify, that she had reviewed the transcript, her written record and the audio of the trial and that she had no record of any colloquy between the trial judge and the jury concerning a note sent out by the jury to the court.

The prisoner then testified. He stated that he was represented by Johnny Walls at trial, but not on appeal. Among those present during the trial were his then - wife, mother, father and brother. When the jury retired to consider a verdict, the prisoner remained on the courthouse grounds. He did not know where his attorney went. The prisoner did not return to the courtroom until the jury was prepared to announce its verdict. He was not aware that the jury had at one point stated that it was deadlocked on all charges until he spoke with his lawyer's secretary at some point after jury announced its verdict.

The prisoner claimed that he did not hear the comment his father said he heard concerning what the judge said to the jury until he began pursuing post - conviction relief. He admitted, though, that he had seen the note the jury sent out, apparently while his appellate attorney was preparing his direct appeal. That note was filed in the criminal case on 10 July 2003.

So far as the prisoner knew, his mother and father also left the courtroom when the jury retired to deliberate and went to sit in their car beneath a large tree.

A bailiff dressed in a uniform told the prisoner that the jury had reached a verdict. The prisoner did not re-enter the courtroom at any time from the time the jury retired to the time it indicated it had reached a verdict. (R. Vol. 2, pp. 2 - 17).

The prisoner's father testified. He testified that he was present for the prisoner's trial and

that he testified on behalf of the prisoner. After he finished his trial testimony, he remained in the courtroom and sat on the third bench behind his son.

After the jury retired, the prisoner's father and mother left the courtroom but remained on the courthouse grounds. The prisoner's attorney went to lunch. The prisoner's father and mother had their lunch in their car. After having eaten, they returned to the courtroom. At first, they were the only people in the courtroom. But then the bailiff and the jury came into the courtroom. The bailiff passed a note to the judge, who read it. Then, according to the prisoner's father, the judge told the bailiff "Go back and tell them do not come out until they have a verdict". The judge left the bench; the prisoner's parents then left the courtroom. About thirty minutes or an hour later the jury returned with a verdict.

According to the prisoner's father, the prosecutor was present at that time, his son's attorney was not. But then on cross - examination, he stated that he could not remember if the prosecutor was present when the note was given to the judge. The prisoner's father testified that the bailiff in the courtroom during the hearing was the person who gave the judge the note from the jury. The prisoner was confused over which courtroom in which the trial occurred. (R. Vol. 2, pp. 18 - 20).

Sergeant Lynn Allen Fry of the DeSoto County sheriff's department testified that he had served as bailiff for the Circuit Court for some seven years prior to hearing. His job was to provide security for the judges and officers of the court. It was not his duty to take notes to and from a judge, that duty falling to the clerk or a "civilian bailiff". Fly never wore civilian clothes when providing courtroom security. Sergeant Fly had no recollection of the prisoner's trial. (R. Vol. 2, pp. 32 - 35).

George Ready, the former Circuit Court judge who presided at the prisoner's trial, was

called to testify. He stated that while he was a judge he had two types of bailiff. Sergeant Fly provided security. A civilian employee was the "jury bailiff", whose duties included seeing to the needs of jurors and transferring communications between the judge and jurors. In the prisoner's trial, the "jury bailiff" was a person by name of Wilbur Bates. Mr Bates would have been wearing civilian clothing. Ready never used the deputy sheriff to communicate with a jury.

Ready stated that he was familiar with the *Sharplin* instruction.

Ready stated that the issue concerning the note from the jury came up in a post - trial motion. Ready addressed the issue there.

Ready stated that it had been his practice as a judge to instruct a jury to continue their deliberations upon the first report of a deadlock. He would so inform the jury by either writing that instruction on the note sent to him or by telling the civilian bailiff to so instruct it.

The prisoner's attorney was not present when Ready received the report from the jury. Despite having been instructed to stay in the courthouse, he could not be found. Neither could the prisoner. An effort was made to find them, but to no avail. Ready did not recall reading the *Sharplin* charge to the jury. He did not recall whether the court reporter was present when he instructed the jury to continue deliberating.

Ready did not think he would have told the jury "do not come back out until you reach a verdict". (R. Vol. 2, pp. 36 - 50).

The Circuit Court denied relief on the prisoner's motion. It found that reasonable efforts were made to locate the prisoner and his attorney. It found that the prisoner waived his right to be present when the note was read on account of his failure to follow the court's instruction to remain within the courthouse. It further found that the oral instruction to the jury did not prejudice the prisoner. It gave credit to Ready's testimony and found that the prisoner's father's

testimony had been substantially impeached by the fact that he could not remember the bailiff nor the courtroom but could remember the exact words of a judge after several years, which he did not remember until asked by counsel while preparing a post - conviction relief motion. (R. Vol. 1, pp. 25 - 28).

STATEMENT OF ISSUES

1. DID THE CIRCUIT COURT ERR IN FINDING THAT THE PRISONER FAILED TO ESTABLISH THAT THE JURY HAD BEEN IMPROPERLY INSTRUCTED?

2. DID THE CIRCUIT COURT ERR IN FINDING THAT THE PRISONER WAIVED HIS RIGHT TO BE PRESENT WHEN THE NOTE WAS READ?

3. DID THE TRIAL AND APPELLATE ATTORNEYS FOR THE PRISONER RENDER INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO RAISE THE ISSUE CONCERNING THE NOTE ON DIRECT APPEAL?

SUMMARY OF ARGUMENT

1. THAT THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE PRISONER FAILED TO ESTABLISH THAT THE JURY HAD BEEN IMPROPERLY INSTRUCTED

2. THAT THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE PRISONER WAIVED ANY RIGHT IN HIMSELF TO BE PRESENT AT THE TIME THE JURY WAS INSTRUCTED BY THE GEORGE READY

3. THAT TRIAL AND APPELLATE COUNSEL FOR THE PRISONER WERE NOT INEFFECTIVE

ARGUMENT

1. THAT THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE PRISONER FAILED TO ESTABLISH THAT THE JURY HAD BEEN IMPROPERLY INSTRUCTED

In the First Assignment of Error, the prisoner attacks the credibility choice made by the Circuit Court concerning the testimony of the prisoner's father and the testimony of the former Circuit Court judge. Toward this end, the prisoner attempts a microscopic examination of the

testimony.

The standard of review after an evidentiary hearing in post-conviction relief cases is well-settled.

> "When reviewing a lower court's decision to deny a petition for post conviction relief this Court will not disturb the trial court's factual findings unless they are found to be *clearly erroneous.*" *Brown v. State,* 731 So.2d 595, 598 (Miss.1999) (citing *Bank of Mississippi v. Southern Mem'l Park, Inc.,* 677 So.2d 186, 191 (Miss.1996)) (emphasis added). In making that determination, "[t]his Court must examine the entire record and accept 'that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact....' " *Mullins v. Ratcliff,* 515 So.2d 1183, 1189 (Miss.1987) (quoting *Cotton v. McConnell,* 435 So.2d 683, 685 (Miss.1983)). That includes deference to the circuit judge as the "sole authority for determining credibility of the witnesses." *Mullins,* 515 So.2d at 1189 (citing *Hall v. State ex rel. Waller,* 247 Miss. 896, 903, 157 So.2d 781, 784 (1963)). *Loden v. State,* 971 So.2d 548, 572-73 (Miss.2007). However, "where questions of law are raised, the applicable standard of review is de novo." *Brown v. State,* 731 So.2d 595, 598 (Miss.1999).

Doss v. State, 2007-CA-00249-SCT (Decided 11 December 2008, Not Yet Officially Reported).

According to the prisoner's father, George Ready told the bailiff, "Go back and tell them do not come out until they have a verdict". Ready testified that he merely told the jury to continue its deliberations. There were no other witnesses to the event, so far as the record is concerned. Consequently, the Circuit Court, in the process of determining which account of what was said was the true account, had to consider closely the demeanor of the witnesses, the consistency of their testimony and reasonableness of their testimony.

The prisoner's father was confused about which courtroom in which his son was tried. At the beginning of his testimony, he stated specifically where he sat in the courtroom, pointing to the particular place he sat. (R. Vol. 2, pg. 19). However, he later stated that the courtroom in which the evidentiary hearing was held was not the one in which the trial was held. (R. Vol. 2, pg. 28). Ready was quite clear about the fact that the trial occurred in the courtroom in which the evidentiary hearing was held. (R. Vol. 2, pg. 41). The internal inconsistency in the prisoner's

father's testimony on this point was not clarified.

The prisoner's father was also confusing about who was present in the courtroom when Ready was given the note. He said first that, when his wife and he returned to the courtroom, Ready and the bailiff were present. (R. Vol. 2, pg. 21). Then he said that no one was present. (R. Vol. 2, pg. 22). He then said that the jury, the bailiff and the judge came into the courtroom after his wife and he sat down in the courtroom. (R. Vol. 2, pg. 22). At some point, presumably with the jury in the courtroom in accordance with the prisoner's father's account, the bailiff gave the judge a note from the jury. According to the prisoner's father, it was at that time that the judge told the bailiff to tell the jury not to come back until they had a verdict. Yet, it was never explained, if the jury was in the courtroom, why the judge would have told the bailiff that. The jury, presumably, would not have needed an intermediary under such a circumstance.

The prisoner's father testified that the bailiff passed a note to the judge. (R. Vol. 2, pg. 24). He then testified that he never saw a note. (R. Vol. 2, pg. 25).

The prisoner's father indicated that the prosecutor was present at the time the judge spoke to the bailiff. Then he testified that he did not recall who was present. (R. Vol. 2, pp. 25 - 26).

The prisoner's father indicated that the bailiff who took the note to the Ready and who was supposedly told by Ready to tell the jury not to return until they had a verdict was Sergeant Fly. (R. Vol. 2, pg. 26). However, both Fly and Ready testified that Fly's duties did not include handling communications between juries and trial judges. (R. Vol. 2, pp. 32 - 33; 37).

Finally, the prisoner's father admitted that he said nothing about what Ready allegedly said to the bailiff until the prisoner's present counsel began working on the prisoner's application for leave to proceed. (R. Vol. 2, pg. 30). This fact of itself makes the witness' testimony rather dubious. Surely he would have mentioned it to the prisoner's trial attorney.

The prisoner would have the Court believe that his father did not testify that Sergeant Fly was the bailiff who took the note to Ready. However, given the context of the questions and answers on this point, the prisoner's father rather clearly did indicate that. He did not state that some person other than the Sergeant took the note to the judge.

The prisoner then says that the confusion about which courtroom was used for trial was a matter of insignificance. However, this confusion directly bore on what weight to give the testimony. If the witness was confused on this point, and others as well, it was reasonable to question whether he had an accurate recollection of what Ready said to the bailiff.

The prisoner's father's testimony was contradictory at points. Taken as a whole, there was a substantial basis for the judge in this hearing to question the accuracy if not the veracity of the prisoner's father's testimony. This is particularly so in view of the unexplained failure to mention what Ready had supposedly said until after the direct appeal process had been exhausted. How could it be that the prisoner's father only realized the significance of what Ready allegedly said – if he said it at all – only after the passage of so much time?

In contrast to the testimony presented by the prisoner, Ready's testimony was clear and straightforward. He explained that he used two bailiffs and explained the difference in their duties. He explained what his procedure was when presented with a first report of a deadlock by a jury, which was either to write the instruction to keep deliberating or tell the civilian bailiff to so inform the jury. He did not think he told the jury not to return until they reached a verdict. (R. Vol. 2, pg. 48)

An attempt was made to locate the prisoner and his attorney, without effect. Both ignored Ready's instructions to remain in the courthouse. (R. Vol. 2, pg. 43).

The essential factual determination for the judge in the case at bar was whether Ready

instructed the jury not to return until it had a verdict, or whether he told the jury through the bailiff to continue deliberations. The only witnesses in this hearing who had testimony to give on this point were the prisoner's father and Ready. The judge was the one with the sole authority to judge the credibility of the witnesses. His decision to accept the testimony of Ready is not clearly erroneous. The prisoner's witness' testimony was conflicting at various points. Beyond this, it was quite odd that he would not have mentioned what he said he heard to the prisoner or his trial attorney at a much earlier point in time. The Circuit Court's finding should not be disturbed.

The prisoner relies upon *Johns v. State*, 926 So.2d 188 (Miss. 2006). In that decision, a case involving an ineffective assistance of counsel claim raised in post - conviction relief, this Court held that, while the Circuit Court's finding was based on some evidence, the evidence taken as a whole left it with the firm conviction that a mistake had been made. *Id.* At 196. This decision is not on point here.

In *Johns*, the attorney failed to interview witnesses, did not go over the State's discovery with the accused, did not file pleadings, had no office or telephone, and did not create and maintain a client file, among other deficiencies. The attorney, in his testimony, stated mostly that he could not remember what he had done. He did refer to his "standard procedure" as to some matters but could provide no specifics with respect to the accused's case.

In the case at bar, there is not a host of vague references to "standard procedure". Other than not specifically recalling at the evidentiary hearing how he had instructed the jury, in terms of by note or oral instruction, the former judge was clear and specific in his answers. Moreover, the testimony given by this former judge is consistent with what he stated at the hearing on the

motion for a new trial, with respect to what he told the jury. (R. Vol. 5, pp. 363 - 364).[1] His account at that time occurred just days after the jury had been instructed, a point in time at which his recollection would have been fresh. Thus, this case does not depend entirely upon a reference to a "standard procedure."

The instruction given by Ready – continue your deliberations – is an acceptable instruction. *Sharplin v. State*, 330 So.2d 591, 596 (Miss. 1976). As the prisoner acknowledges, the mere fact that Ready gave this instruction in the absence of the prisoner's attorney is not of itself a fatal defect in the procedure. *Young v. State*, 420 So.2d 1055,1058 (Miss. 1982); *See also De la Beckwith v. State*, 707 So.2d 547, 588 (Miss. 1997).

The prisoner, though, would have this Court limit or ignore these decisions because there was testimony by the prisoner's father that Ready forced a verdict. It is not necessary or desirable that the Court do so. What the Circuit Court had in this case was an issue of fact to decide. To do as the prisoner suggests would result in a rule that, where an accused or his witnesses dispute the word of a trial judge as to what the trial judge instructed the jury in a circumstance in which there is no record to refer to, then for that reason alone the verdict should be reversed. That is too harsh and simplistic of a rule.

The Circuit Court had a straightforward issue of fact to determine. The prisoner's testimony was suspect for several reasons – the fact that he delayed so long in reporting the alleged statement by Ready, the conflicts within his testimony, and the contradictions made by other witnesses as to certain parts of his testimony. On the other hand, Ready's testimony was consistent. What is more, just days after the trial ended, when the issue of the instruction came

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[1] This record citation is to the record in the direct appeal of the prisoner's convictions. *Tyler v. State*, 911 So.2d 550 (Miss. Ct. App. 2005).

up in a post - trial motion, Ready stated the same thing there as he did in the hearing here with respect to what he told the jury.[2]

The prisoner says that Ready gave contradictory responses as to whether he gave a *Sharplin* instruction. However, this claim made by the prisoner is a misleading one. *Sharplin* establishes two forms of an instruction, a short one, which was what Ready used, or the longer one. Ready did not contradict himself: He consistently stated that he told the jury to continue its deliberations. He stated that at the hearing on the motion for a new trial, and he stated that in the evidentiary hearing on appeal here. That is a form of the *Sharplin* instruction.

A communication between a judge and jury will not amount to cause for reversal of a conviction unless it can be reasonably said that the communication influenced the jury's verdict. *Wilson v. State*, 853 So.2d 822, 824 (Miss. Ct. App. 2003)(citing *Gulf Hills Dude Ranch v. Brinson*, 191 So.2d 856 (Miss. 1966). In the case at bar, the prisoner did not establish by a preponderance of the evidence that the instruction given by Ready influenced the verdict. The only testimony produced by the prisoner to attempt to demonstrate that Ready influenced the verdict was that of his father, and that was contradictory and contradicted. The Circuit Court was the sole authority to determine the credibility of the witnesses. His decision as to which to believe and his decision as to the outcome of the motion in post - conviction relief cannot be said to be clearly erroneous.

The First Assignment of Error should be denied.

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[2] It is true that Ready told the prisoner's trial counsel at the hearing on the post - trial motion that he did not give a *Sharplin* instruction, just after he stated that he had told the jury to continue its deliberations. Given the context of these statements, and bearing in mind that there are two forms of the *Sharplin* instruction, the reasonable construction to be given to Ready's words are that he did not give the longer form of it. The longer form is often given when the jury reports for a second time that it is deadlocked.

2. THAT THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE PRISONER WAIVED ANY RIGHT IN HIMSELF TO BE PRESENT AT THE TIME THE JURY WAS INSTRUCTED BY THE GEORGE READY

The trial court found that the prisoner waived any right to be present when the jury was instructed to continue its deliberations by violating Ready's instruction to remain in the courthouse. The prisoner contends this finding was error.

The Order from this Court indicated specifically what the evidentiary hearing was to encompass. Waiver of any right to be present was not one of those issues. Nonetheless, the Circuit Court discussed the issue.

There was no error in the ruling. The Court has held that a jury instruction conference is not a "critical stage" of a trial, such that an accused has the right to be present, because the issues are entirely legal, thus there being little, if anything, an accused could do to aid his defense. *De la Beckwith v. State*, 707 So.2d 547 (Miss. 1997); *Jordan v. State*, 786 So.2d 987 (Miss. 2001). In the case at bar, the prisoner was not present when Ready instructed the jury to continue its deliberations, but here was nothing the prisoner could have done to assist his defense at that point. The issues of whether the instruction was proper or where it should have been given were issues of law.

The prisoner had been instructed to remain in the courthouse. He did not do this. Nonetheless, an unavailing attempt was made to locate him. The prisoner was on bond at the time of his trial. (R. Vol. 2, pg. 7). Under Miss. Code Ann. Section 99-17-9(b) (Rev. 2007), the presence of an accused may be waived if he is on recognizance or bail and "is in any way in default for nonappearance". The prisoner did not follow the instructions of the trial court; he was at fault for his nonappearance. He waived his presence.

Finally, if there was error in this finding by the Circuit Court, any such error was

harmless. The prisoner has not pointed out any prejudice arising from this finding. Errors without prejudice do not trigger reversal. *Nicholson ex rel Gollott v. State*, 672 So.2d 744 (Miss. 1996),

The Second Assignment of Error should be denied.

3. THAT TRIAL AND APPELLATE COUNSEL FOR THE PRISONER WERE NOT INEFFECTIVE

In the final Assignment of Error, the prisoner contends that the prisoner's trial and appellate counsel were ineffective for having failed to raise what he describes as a due process issue concerning the prisoner's absence when the trial court instructed the jury to continue deliberating. We bear in mind the familiar standard by which such a claim is measured. *Jordan v. State*, 995 So.2d 94 (Miss. 2008).

The trial attorney did raise an issue in the motion for a new trial concerning this instruction, though not a due process issue. No issue was raised on appeal about the matter.

First of all, as we have pointed out above, the point in time at which Ready instructed the jury was not a "critical stage" of the prosecution. *De la Beckwith v. State*, 707 So.2d 547 (Miss. 1997). While the prisoner cites *Edlin v. State*, 523 So.2d 42 (Miss. 1988), which holds that an accused has the right to be informed of communications between the court and the jury, and to be present when they occur, the prisoner again fails to take into account what was said in *De la Beckwith, supra*. Consequently, we fail to see how a complaint on due process grounds would have been availing. There was no prejudice in having foregone this due process argument.

Secondly, to the extent that the prisoner would fault the appellate attorney for having failed to raise a due process argument on appeal, the attorney was limited to those grounds raised in the trial court. Had he attempted to raise the issue for the first time on appeal, the issue would

have been barred for review. The prisoner here makes no attempt to demonstrate "plain error".

A record was perhaps sufficient to raise the issue as to whether the Ready erred in instructing the jury outside the presence of counsel. But, at the time of the appeal, nothing was known of the claim made here as to how the jury was instructed. What appellate counsel had was the Ready's statement of what he told the jury, which, as we have pointed out above, was a proper instruction. Since appellate counsel likely knew that the mere fact of a communication between a judge and jury outside the presence of counsel is insufficient to require reversal, he likely saw no point in pursuing the issue. It is a strategic decision as to which issues to pursue on appeal.

Even if it is said that there was a due process violation, the prisoner has failed to demonstrate that he was prejudiced by it. The instruction to the jury given by the judge was a proper one, the prisoner's father's testimony notwithstanding. While it may be that the defense attorney would have made a standard motion for a mistrial, this undoubtedly would have been overruled, and properly so. Ready indicated in the hearing on the motion for a new trial that he would have overruled any such motion. In absence of any showing of harm in consequence of any putative due process violation, any such violation would be harmless. *Chapman v. California*, 386 U.S. 18 (1967). Thus, in terms of an ineffective assistance claim, the failure to raise a due process claim would not be prejudicial.

And too it must be borne in mind that the defense attorney and the prisoner violated the court's instructions to remain in the courthouse. The defense lawyer went to lunch; the prisoner went outside the courthouse for a time. An effort was made to located these two, without success. This put Ready in something of a quandary. He had a jury waiting upon a response but had no idea where the prisoner and the lawyer had run off to or when to expect their return. He

could not have simply declined to respond until the prisoner and his lawyer deigned to follow his instructions. The acts of these two in violating the court's instructions were the reason the jury was instructed outside their presence. The prisoner, having failed to follow the instructions of the court, waived his presence. This would have made a due process claim a highly dubious one. It would effectively been an attempt to hold the trial court responsible for the prisoner's and his attorney's fault. A party may not fault a court for an alleged error that he invited. *Davis v. State*, 472 So.2d 428 (Miss. 1985).

CONCLUSION

The Circuit Court had to determine whether Ready gave a proper instruction to the jury. Its decision rests upon substantial evidence and is not clearly erroneous. As for the ineffective assistance claim, the mere fact that the judge instructed the jury outside the presence of counsel is not reversible error. There was no prejudice to the prisoner that such a claim was not raised or pursued on appeal.

The Order of the Circuit Court denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, 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:

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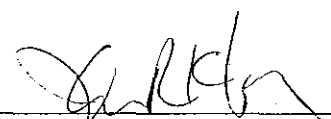
This the 19th day of February, 2009.



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