IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DEREK NATIONS — APPELLANT

v. — CAUSE NO: 2008-CA-02126

LAFAYETTE COUNTY METRO NARCOTICS UNIT — APPELLEE

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

JUSTICE & ALEXANDER, P.A.
James B. Justice, MSB # 102029
Alan Alexander, MSB # 100070
426 South Lamar Blvd., Suite 19
P.O. Box 1550
Oxford, MS 38655
P: (662) 234-4747
F: (662) 234-4798

Kevin Frye, Esq., MSB #101871
428 North Lamar, Suite 112
Mail to: P.O. Box 2456
Oxford, MS 38655
P: (662) 638-4089
F: (866) 710-3841

ATTORNEYS FOR APPELLANT

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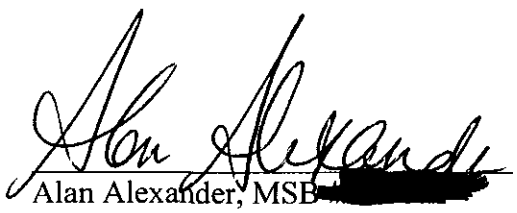
CERTIFICATE OF INTEREST PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Derek Nations, Appellant
2. Kevin Frye, Counsel for Appellant
3. Justice & Alexander, P.A., James B. Justice, Alan T. Alexander, Counsel for Appellant
4. Ben Creekmore, District Attorney, Third Judicial District
5. Honorable Andrew Howarth, Circuit Court Judge, Third Circuit Court District



Alan Alexander, MSB[redacted]

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COMES NOW, Derek Nations, Appellant herein and Plaintiff in the court below, and respectfully requests this Honorable Court grant this appeal from an Order of Forfeiture dated December 10, 2008, and entered by the Honorable Andrew K. Howarth, in the Lafayette County Circuit Court in the case of State of Mississippi, ex rel, Ben Creekmore, District Attorney, Oxford Police Department, and Lafayette County Metro Narcotics Unit v. Four Thousand Eight Hundred One Dollars ($4,801) and Derek Nations, Cause No. L08-781.

STATEMENT OF ISSUES

WAS THE MONEY TAKEN FROM THE APPELLANT'S BEDROOM SUBJECT TO FORFEITURE?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal of the December 10, 2008, order of the Lafayette County Circuit Court, the Hon. Andrew K. Howarth, presiding, which ordered that funds in the amount of four-thousand, eight-hundred, one dollars ($4,801.00) discovered in the Appellant's bedroom by agents of the Lafayette Metro Narcotics Unit be forfeited.

II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On December 8, 2008, Appellant Derek Nations filed a petition in the Circuit Court of

Lafayette County, Mississippi, contesting the forfeiture of certain monies seized on or about December 4, 2008. Subsequently, the State of Mississippi *ex rel* Ben Creekmore, District Attorney, Oxford Police Department and Lafayette County Metro Narcotics Unit filed a petition seeking forfeiture of four thousand eight hundred one dollars ($4,801.00) in which Appellant Nations has an interest. On December 10, 2008, the Lafayette County Circuit Court, Honorable Andrew K. Howorth presiding, held a hearing in vacation concerning the State of Mississippi's petition to forfeit said money. The lower court held that the State of Mississippi had met its burden of proof under Mississippi Code Annotated § 41-29-101 to forfeit said monies and entered an *Order of Forfeiture* dated December 10, 2008, forfeiting said money pursuant to Mississippi Code Annotated § 41-29-179 (4) and § 41-29-181 (2). It is from that order that this appeal follows.

III. STATEMENT OF FACTS

The Appellant is Derek Edward Nations, a resident of Lafayette County, Mississippi. In 2008, Mr. Nations was the owner of a 2008 Honda Accord automobile. [R. at Exhibit 1.] On December 1, 2008, Mr. Nations entered into a transaction with Paul Moak Automotive, Inc. of Jackson, Mississippi, whereby he exchanged his 2008 Honda Accord for a 1998 Honda Accord and a check from Paul Moak Automotive for nine thousand nine hundred ninety dollars ($9,990.00). [Id.] Mr. Nations took the check to the bank, negotiated it for cash, and used the money to purchase a large flat screen television and a television stand. [T. at 19-20.] Mr. Nations then returned to Oxford, Mississippi with the balance of his money and his newly acquired vehicle and other purchases. [Id.]

At the time this transaction occurred, Mr. Nations was under indictment by the Lafayette County Circuit Court for the offense of sale of less than thirty (30) grams of marijuana dating

back to January of 2008. [T. at 3.] On December 2, 2008, Agent Keith Davis of the Lafayette County Metro Narcotics Unit (hereinafter "the narcotics unit") received information from a confidential informant (hereinafter "CI") that Mr. Nations was willing to sell marijuana to the CI. [T. at 3.] That same day, Agent Davis met with the CI, searched him,[1] issued him technical equipment to record the transaction, and gave him one hundred forty dollars ($140.00) in cash from the official funds of the narcotics unit. [T. at 3-4.] The narcotics unit had previously photocopied the one hundred forty dollars ($140.00) in order to later identify the serial numbers on the bills. [Id.]

Subsequently, Agent Davis, along with other narcotics officers, traveled on December 4, 2008, to Mr. Nations' apartment home to serve an arrest warrant on him. [Id.] They identified themselves as police officers and were met at the door of the apartment by a roommate of Mr. Nations, who advised them that Mr. Nations was asleep in his room inside the apartment. [T. at 4-6.] Agent Davis entered Mr. Nations bedroom and nudged him in the bed to awaken him. [T. at 6.]

Not fully awake, Mr. Nations got out of bed and walked toward the door, where he was stopped by an officer who told him that there was a warrant for his arrest. [Id.] Agent Davis read Mr. Nations his Miranda rights and obtained his consent to search the bedroom. [T. at 6-7.] Mr. Nations stated that he did not want to make any additional statements without his attorney. [T. at 7.] Agent Davis responded by stating that he and the other officers would not ask any further questions concerning his case, but would perform their search, take what they intended to seize and leave. [Id.] Mr. Nations stated that would be fine. [Id.]

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[1]The gender of the CI is not identified in the record. For clarity's sake, the CI is identified by the masculine gender in this brief.

Agent Davis recovered two boxes of sandwich bags, various pipes, bongs, pieces of bongs, money from several locations inside Mr. Nations' bedroom, a bag and a jar containing twenty-one and a half (21.5) grams of marijuana (with an estimated street value of $490.00) and a digital scale. [T. at 6-8.] In total, Agent Davis and the other officers removed four thousand eight hundred one dollars ($4,801.00) from five distinct locations inside Mr. Nations' bedroom. [T. at 8-9.] As Agent Davis and the officers assisting him found money inside Mr. Nations' bedroom, they placed it all on Mr. Nations' bed before counting it. [Id.] The agents took no steps to keep the money in separate piles based on where it was found, instead deliberately commingling money found in several different locations before placing it all into a single container. [Id.]

According to the testimony adduced at the forfeiture hearing, the money found in Mr. Nations' bedroom all came from five distinct locations. [T. at 7-9.] First, agents seized forty-four dollars ($44.00) from a jar on top of a refrigerator in Mr. Nations' bedroom. Second, the agents discovered a two dollar ($2.00) bill in a jar on top of the desk. [Id.] Third, the agents seized one-thousand, three-hundred, twenty-seven dollars ($1,327.00) from a folder discovered under Mr. Nations' mattress. [Id.] Finally, agents seized a total of three-thousand, four-hundred, twenty-eight dollars ($3,428.00) from two locations in Mr. Nations' desk. [Id.] Part of that money came from a wide pen drawer in the top of the desk, while the rest came from Agent Davis admitted was a bank envelope found inside another drawer. [Id. at 9, 12.] The agents made no effort to keep these monies separate, opting instead to simply pile all of these monies onto Mr. Nations' bed after counting it. [Id.]

After inspecting this pile of money, Agent Davis identified the one hundred forty dollars ($140.00) in official narcotics unit funds by the bills' serial numbers. [Id. at 10.] However,

since the agents commingled all of the money found in the bedroom, it is impossible to say from where in the bedroom the narcotics unit bills were seized. [Id. at 12.] After the agents seized all the money in Mr. Nations' bedroom, he filed a petition contesting the forfeiture in the Lafayette County Circuit Court, while the State of Mississippi initiated a forfeiture action against Mr. Nations, arguing that all of the money recovered from his bedroom was part of the proceeds from drug-related activity. [R. at 1-4.]

At the hearing, the State put forth evidence from Agent Davis regarding the search of Mr. Nations' apartment and the seizure of all the monies found in his bedroom. [See T. *passim.*] To rebut the State's claims regarding the origin of the monies, Mr. Nations introduced evidence that at least some of the seized monies came from the December 1, 2008 sale of his vehicle. [T. at 13-23.] This evidence came in the form of testimony from Johnny Glass, a salesman with Paul Moak Automotive, Inc., and from Sara Roberts, Mr. Nations' former girlfriend who had personal knowledge of Mr. Nations' sale of the car and of his purchase of a new television with the proceeds. [Id.]

After hearing testimony and oral arguments, the lower court ruled from the bench in favor of the State. In the course of handing down the ruling, the lower court stated as follows, in relevant part:

> [T]he sole question is about these funds in various places within [Mr. Nations'] room. And that has to be resolved in a logical way which is not necessarily a fair way and in the court's opinion is it probable if called on to speculate, is it probable that some of the money in these various locations was from the sale of that car? Yes, that is probable . . . . [S]ome of the money was in the court's opinion from illegal drug activity. The money was intermingled, commingled and its original source can not be discerned by the court. For the court to find that the money is not a part of illegal drug activity, the court would have to be able to segregate the funds and I can not do that. All though the burden is on the State to prove by a preponderance of the evidence that the money is from illegal drug activity. The court's opinion is that once this money is commingled it all

> becomes the fruit of the illegal activity and there is precedent for that in terms of drug activity leading to the purchase of homes and such, doesn't mean that one hundred percent of the money was from drug activity, but the fact that it was intermingled and commingled satisfies the State's burden of proving that the money is tainted.

[T. at 29-30] In response to a query from Mr. Nations attorney, Judge Howarth acknowledged that all of the commingling of funds was performed by the police and not by Mr. Nations, but that his ruling would nevertheless stand. [T. at 31.] It is from that adverse ruling that Mr. Nations now appeals.

SUMMARY OF THE ARGUMENT

The monies seized by the State which are the subject of this forfeiture action were not subject to the forfeiture provisions of § 41-29-153. The monies were not in "close proximity" to any seized drugs or drug paraphernalia as that term is defined by the statute or, in the alternative, the "close proximity" presumption of forfeitability was rebutted by the Appellant's clear evidence that the source of the money was legitimate. The State failed to put forth any relevant evidence that the forfeited monies were possessed by Mr. Nations for the purposes of facilitating an illegal narcotics scheme. In ruling in favor of the State's *Motion for Forfeiture*, the lower court applied an erroneous legal standard, improperly holding that because legitimately acquired monies were commingled by the actions of the State with drug money, all of the monies were tainted and subject to forfeiture.

ARGUMENT

I. STANDARD OF REVIEW.

Generally, this Court reviews forfeiture cases under a substantial evidence/clearly erroneous test. City of Meridian v. Hodge, 632 So.2d 1309, 1311 (Miss. 1994). Under this analysis, the lower court's findings are "clearly erroneous" when, although there may be

evidence to support those findings, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. UHS-Qualicare, Inc. v. Gulf Coast Cmty. Hosp. Inc., 525 So.2d 746, 754 (Miss. 1987). Generally, the circuit court's findings of fact are not to be disturbed unless the lower court has applied an erroneous legal standard to decide the question of fact. Hodge, 632 So.2d at 1311. *But see* Leatherwood v. State, 539 So.2d 1378, 1387 (Miss. 1989)("Factfindings made under an erroneous legal standard are not protected by our substantial evidence clearly erroneous standard of review"). In determining whether the order of forfeiture is to be upheld, the Court must decide "whether, given all of the evidence considered together, a rational trier of fact may have found by a preponderance of the evidence that [the] funds were the product of or instrumentalities of violations of this state's controlled substances act." Hickman v. State, 592 So.2d 44, 48 (Miss.1991).

II. WAS THE MONEY TAKEN FROM THE APPELLANT'S BEDROOM SUBJECT TO FORFEITURE?

The State's asserted authority to seize Mr. Nations' money is premised on Mississippi Code Annotated § 41-29-153(a)(5) and (7) (Supp.2008). Subsection 5 allows for the forfeiture of all money used or intended for use in violating the Controlled Substances Act. Miss. Code Ann. § 41-29-153(a)(5). Subsection 7 is broader and allows for the forfeiture of "[e]verything of value" furnished or intended to be furnished in exchange for a controlled substance, as well as all proceeds traceable from such an exchange and all monies and other things of value used or intended to be used to violated the Controlled Substances Act. Miss. Code Ann. § 41-29-153(a)(7).

More importantly for purposes of this appeal, subsection 7 also establishes a rebuttable presumption that any money, coin or currency found "in close proximity to forfeitable controlled

substances, to forfeitable drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture or distribution of controlled substances" is itself forfeitable under the statute. Id. The burden of rebutting this presumption is on the one who forfeited the money, coin or currency. Id. The procedural mechanisms which govern drug forfeiture cases are defined by Miss. Code Ann. §§ 41-29-179 and 41-29-181 of the Mississippi Code.

Like all forfeiture statutes, § 41-29-153 is penal in nature and must be strictly construed. 2004 Chevrolet Pickup v. State, 970 So.2d 186 (Miss. 2007). Mississippi law does not favor forfeitures, and before any money or property may be subject to forfeiture, it must come within the terms of the statute imposing forfeiture. Neely v. State ex rel. Tate County, 628 So.2d 1376, 1381 (Miss. 1993). The ultimate question in a cash forfeiture case (which the State has the burden of carrying) is this: is it "more likely than not that the currency was possessed by the claimant with the intent to be used in connection with an illegal narcotics trafficking scheme." One Hundred Seven Thousand Dollars ($107,000.00) U.S. Currency (Adrian Tagle) v. State ex rel Harrison County Sheriff's Dept., 643 So.2d 917, 921 Miss. 1994).

In the context of the instant case, three issues must be addressed: (a) whether the "close proximity" presumption applies, (b) whether the "close proximity" presumption was rebutted by Mr. Nations, and (c) if the "close proximity" presumption does not apply or has been rebutted, has the State proven by preponderance of the evidence that the cash seized was possessed by Mr. Nations for the purposes of facilitating an illegal narcotics scheme. The Appellant will address each of those three points in turn.

A. Does the "close proximity" presumption apply?

The Mississippi Supreme Court has consistently declined to give a precise definition of

"close proximity" as that phrase is used in § 41-29-153, except to say that "'in close proximity' simply means 'very near.'" Hodges, 632 So.2d at 1312 (adopting reasoning of Arkansas Supreme Court in Limon v. State, 685 S.W.2d 515 (Ark. 1985) in assessing "in close proximity" on a case-by-case basis and rejecting "rigid rules for fixing 'close proximity' by a particular number of feet, by reference to particular rooms, or by any rule of thumb"). In Hodges, the Court affirmed the denial of a forfeiture petition where the record was silent as to the exact location of where the money was found and its proximity to the drugs recovered at the same scene. Id. The Hodges Court also expressly rejected the implication that cash of unknown origin may be presumed to be forfeitable simply by virtue of the fact that it has been commingled with "buy money" which is identifiably the product of drug trafficking. Id.

In the case at bar, the monies seized from Mr. Nations' bedroom came from five separate locations: a jar on top of a refrigerator, another a jar on top of the desk, a folder discovered under Mr. Nations' mattress, and two different drawers in the desk. According to Agent Davis, the drug paraphernalia recovered was "scattered throughout the room." Agent Davis also observed what he identified as "buds" or very small pieces of marijuana on the desk, and one small bag of marijuana was recovered from one of the desk drawers. The record is silent as to which drawer was found to have marijuana in it or whether it was one of the two drawers found to contain cash. Drug agents also recovered two to three foot bong on the living room table and a jar of marijuana in the living room on top of a poker table.

The record before this Court makes it plain that the State failed to properly catalog from where in the bedroom the monies were recovered, from where in the room the drugs and drug paraphernalia were recovered, or where the monies and drug-trafficking paraphernalia were in relation to each other. As the forfeiture statue places the burden on the State to prove the "close

proximity" presumption's applicability by a preponderance of the evidence, the State's failure to properly record these facts in the course of the search makes it impossible for a reasonable fact-finder to say with any degree of certainty that any of the money recovered was "in close proximity" to drugs or drug paraphernalia. Consequently, the State is not entitled to the benefits of the "close proximity" presumption.

B. Did Mr. Nations rebut the "close proximity" presumption?

In the alternative, if this Court concludes that the monies seized were in close proximity to the collected drug paraphernalia such that the monies should be presumed forfeitable, that presumption was plainly rebutted by the evidence adduced by Mr. Nations at the forfeiture hearing. In Neely, the Mississippi Supreme Court reversed an order of forfeiture where the alleged drug dealer denied that the money was in close proximity to a controlled substance and provided uncontradicted proof of an alternative, legal source for the seized funds. Neely, 628 So.2d at 1381-82. In light of evidence that the seized funds were acquired legitimately, the Court found that "the statutory presumption has been rebutted and disappears." Id.

In the case at bar, Mr. Nations has put forth strong and unchallenged evidence that a significant portion of the money seized from his bedroom came from the recent sale of his car just three days prior to search of Mr. Nations' bedroom and the seizure of all the cash found therein. This evidence included testimony from Johnny Glass regarding the timing of the sale which supported Mr. Nations' claim that he cashed a large check in Jackson before returning to Oxford just three days before the search. Even Agent Davis was forced to admit on cross-examination that part of the money taken from the desk was still in a bank envelope. With this evidence and testimony, Mr. Nations effectively rebutted the presumption, and the lower court was obligated to disregard the presumption and move on to the question of whether the State jad

proved by a preponderance of the evidence that the money seized was actually used or intended to be used for the purposes of facilitating drug trafficking. The lower court's failure to do so represents clear error and a misapplication of the relevant legal standard.

In particular, the language used by the lower court is extremely telling and perhaps dispositive of the case -- in response to the testimony and evidence regarding the car sale and the money acquired from it, the lower court judge actually conceded that it was "probable" that some of the money found in the bedroom was from the sale of the car. In other words, this is not a case where the lower court listened to the testimony of an alleged drug dealer and concluded that it was not credible. On the contrary, the lower court *believed* the evidence proffered by Mr. Nations. In fact, even the district attorney conceded that there was some dispute over "the $3400," presumably referring to the $3428.00 taken from the desk. Consequently, Mr. Nations must be seen as having rebutted the "close proximity" presumption even if it was applicable to this case.

C. If the "close proximity" presumption does not apply or has been rebutted, has the State proven by preponderance of the evidence that the cash seized was possessed by Mr. Nations for the purposes of facilitating an illegal narcotics scheme?

As discussed previously, the lower court found it probable that at least some of the money seized from Mr. Nations' apartment was unquestionably not subject to seizure. Unfortunately, the lower court failed to take the next logical step. In the absence of the "close proximity" presumption, the State must prove by preponderance of the evidence that the money was actually used or intended to be used in facilitating a drug-trafficking scheme. Miss. Code Ann. § 41-29-153; Neely 628 So.2d at 1382. The State failed to do so. Other than the mere fact of proximity to drugs and drug paraphernalia, the record is devoid of any evidence tending to

show that any of the money recovered (other than the $140 in narcotics unit funds) was actually used or intended to be used in drug trafficking.

The only evidence which even purports to show such a connection was the rebuttal testimony of Searn Lynch, Commander of the Lafayette County Narcotics Unit, who was apparently offered over objection as an expert on the habits of drug dealers and who testified that it was the normal activity of drug dealers to keep funds in different locations. Aside from the State's total failure to qualify Commander Lynch as any sort of expert, his testimony addressed the alleged practice of drug dealers to keep large sums of money in different locations (i.e some inside the home, some inside a vehicle, some buried underground). Such testimony is irrelevant given the fact that agents did not find any money outside of Mr. Nations' bedroom.

By comparing the evidence put forth at the hearing with the lower court's ultimate ruling, it is plain that the State failed to prove its case by preponderance of the evidence. Other than the $140.00 in narcotics unit funds whose serial numbers were recorded by drug agents, no evidence was put forth actually connecting any of the monies seized with actual drug trafficking. The lower court acknowledged this fact by conceding the probability that some of the money seized was actually the proceeds from the sale of Mr. Nations' care. However, rather than acknowledge the deficiency of the State's case, the lower court erroneously concluded that even money unconnected with drug trafficking was still subject to forfeit because it had been commingled with drug money such that its original source cannot be discerned.

As noted previously, the Mississippi Supreme Court has expressly rejected the argument that monies derived from a legitimate source (or even an unknown source) are forfeitable just because they have been commingled with drug money. Hodges, 632 So.2d at 1312. This was true even in a case where the drug suspects themselves were the ones who commingled the

funds. In the case at bar, *agents of the State* commingled the funds in question before verifying the presence of the narcotics funds within the collected pile of money. Accordingly, the lower court's order in favor of forfeiture was granted improvidently and must be vacated. As the record plainly demonstrates the State's failure to satisfy the evidentiary requirements of Miss. Code Ann. § 41-29-153, Mr. Nation respectfully request that the Court render a verdict in his favor or, in the alternative, remand this case with instructions for the lower court to rehear the evidence, this time applying the proper legal standard.

CONCLUSION

Based on the foregoing analysis, the Appellant respectfully request that the Court reverse the lower court's ruling and vacate the *Order of Forfeiture,* or, in the alternative, reverse and remand for a rehearing. The lower court wrongly held that the money seized in Mr. Nations' apartment was in close proximity to the seized drugs and drug paraphernalia or, alternatively, failed to give proper weight to Mr. Nations' rebuttal of the "close proximity" presumption. In either case, the lower court's ruling that the drug agents' commingling of Mr. Nations' legitimately acquired monies with the $140.00 in narcotics unit funds rendered all of that money subject to forfeit was wrongly decided and contrary to the law.

RESPECTFULLY SUBMITTED, this the 23rd day of February, 2009.

DEREK NATIONS.
APPELLANT

BY: _____

JUSTICE & ALEXANDER, P.A.
James B. Justice, [redacted]
Alan Alexander, [redacted]
426 South Lamar Blvd., Suite 19

P.O. Box 1550
Oxford, MS 38655
P: (662) 234-4747
F: (662) 234-4798

Kevin Frye, Esq., M[redacted]
428 North Lamar, Suite 112
Mail to: P.O. Box 2456
Oxford, MS 38655
P: (662) 638-4089
F: (866) 710-3841
ATTORNEYS FOR APPELLANT, DEREK NATIONS

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LAFAYETTE COUNTY METRO NARCOTICS UNIT **APPELLEE**

CERTIFICATE OF SERVICE

The undersigned counsel of record certifies that I have this day served, pursuant to Rule 25 of the MISSISSIPPI RULES OF APPELLATE PROCEDURE, the following listed persons with the *Appellant's Brief and Record Excerpts* in this matter via hand-delivery.

Honorable Andrew K. Howorth
Trial Court Judge
1 Courthouse Square, Suite 101
Oxford, Mississippi 38655

DATED, this the 17th day of March, 2009.

KEVIN W. FRYE, MSB # [redacted]

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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LAFAYETTE COUNTY METRO NARCOTICS UNIT **APPELLEE**

AMENDED CERTIFICATE OF SERVICE

The undersigned counsel of record certifies that I have this day served, pursuant to Rule 25 of the MISSISSIPPI RULES OF APPELLATE PROCEDURE, the following listed persons with the *Appellant's Brief and Record Excerpts* in this matter via United States Mail, postage pre-paid. The Clerk was sent the original and three copies of same pursuant to Rule 31 of the MISSISSIPPI RULES OF APPELLATE PROCEDURE.

Honorable Charles W. Maris, Jr.
Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205

Honorable Betty Sephton
Clerk, Mississippi Supreme Court
P.O. Box 117
Jackson, MS 39205

DATED, this the 17th day of March, 2009.

KEVIN W. FRYE, M[redacted]

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CERTIFICATE OF SERVICE

The undersigned counsel of record certifies that I have this day served, pursuant to Rule 25 of the MISSISSIPPI RULES OF APPELLATE PROCEDURE, the following listed persons with the *Appellant's Brief* in this matter via United States Mail, postage pre-paid. The Clerk was sent the original and three copies of same pursuant to Rule 31 of the MISSISSIPPI RULES OF APPELLATE PROCEDURE.

Honorable Charles W. Maris, Jr.
Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205

Honorable Betty Sephton
Clerk, Mississippi Supreme Court
P.O. Box 117
Jackson, MS 39205

DATED, this the 9th day of March, 2009.

KEVIN W. FRYE, [redacted]