IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DENNIS DOBBS — APPELLANT

VS. — NO. 2008-CP-0234-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DENNIS DOBBS **APPELLANT**

VERSUS **NO. 2008-CP-00234-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

In this appeal from his quest in a state trial court for out-of-time post-conviction relief sought in the wake of his guilty plea to a single count of false pretense (passing a bad check), DENNIS DOBBS, proceeding *pro se*, seeks to exempt himself from a time bar based upon "exceptions in §99-39-5 MCA (1992)." *See* cover sheet to appellant's brief.

The exceptions relied upon involve issues targeting **(1)** alleged violation of Fifth Amendment rights, **(2)** ineffective counsel; **(3)** involuntary plea; **(4)** violation of Due Process rights, and **(5)** violation of rights "under an ex-post-facto law." (Appellant's Brief at 1)

STATEMENT OF FACTS

Dennis Dobbs, a criminal entrepreneur, is back again. *See* appellees exhibits A-E which reflect a number of Dobbs's previous encounters with both the trial and appellate courts. Needless to say, this is not Dobbs's first rodeo. The trial court's docket of pleadings, exhibits, and orders

found in the clerk's papers consists of seven (7) pages with dates reflecting a time frame beginning August 2, 2002, and ending August 21, 2008. A great deal of litigation even preceded that.

Dobbs's plea of guilty in state court to one (1) of thirteen (13) individual counts of false pretenses, third offense (C.P. at 61), was entered on January 16, 1990. (C.P. at 58-71; Appellant's Brief at 2) According to Dobbs and the trial record he was placed on probation for a period of five (5) years. (C.P. at 70, 72-73) Counts 2 through 13 were retired to the files. (C.P. at 73)

But all was not well.

There is every indication that Dobbs was convicted of another crime in 1994, and this conviction was affirmed on appeal in 1995. On December 6, 2007, this Court denied post-conviction relief as "procedurally time barred." *See* appellee's exhibit C, attached.

On July 18, 2002, Dobbs entered a guilty plea to uttering another bad check at a Wal*Mart store. Post-conviction relief sought in the wake of this conviction was denied by the Court of Appeals on March 7, 2006. *See* **Dobbs v. State,** 932 So.2d 878 (Ct.App.Miss. 2006), attached as appellee's exhibit D.

Following a trial by judge and jury on or about July 22, 2004, Dobbs was convicted of simple assault on a law enforcement officer and recidivism. (C.P. at 95) The assault took place while Dobbs was a prisoner on trusty status in the Clay County Jail in West Point. Dobbs's conviction for this offense was affirmed by the Court of Appeals on April 11, 2006. *See* **Dobbs v. State,** 936 So.2d 322 (Ct.App.Miss. 2006), reh denied, attached as appellee's exhibit E.

Dobbs was convicted as a habitual offender with the State apparently relying, in part, upon Dobbs's earlier false pretense conviction(s) to enhance his punishment. Dobbs, at this late date, now claims he has new evidence demonstrating he was indicted under the wrong statute " . . . concerning bad checks, for the crime of false pretense." (C.P. at 21)

On November 13, 2007, Dobbs filed in the Circuit Court of Clay County a pleading styled "Motion to Permission to Proceed Out of Time Pursuant [to] §99-39-5(1)(g)." (C.P. at 10, 14-18)

The circuit court, Lee J. Howard, presiding, dismissed summarily Dobbs's motion on the basis of, *inter alia*, a time bar. (C.P. at 34; appellee's exhibit A, attached) Specifically, he found that Dobbs's motions were all frivolous and, in addition, ". . . the Petitioner's motions are time barred and meet none of the exceptions outlined in Section 99-39-5 MCA (1972)." *See* appellee's exhibit A, attached.

We concur.

The Supreme Court of Mississippi apparently would concur as well. *See* appellee's exhibit C, attached, where Justice Dickinson denied as time barred Dobbs's motion for post-conviction relief filed in the wake of Dobbs's conviction in 1994 of an unidentified offense.

Here and now Dobbs invites this Court to reverse the trial judge's summary dismissal and discharge him from custody. (Appellant's Brief at 13)

We respectfully submit Judge Howard correctly found no error involving fundamental rights, or any other rights, sufficient to exempt Dobbs from the statute barring his belated claims. In this posture, Dobbs's motion for post-conviction relief was correctly denied by the lower court as time-barred. (C.P. at 34; appellee's exhibit A, attached) This ruling was both judicious and correct.

SUMMARY OF ARGUMENT

Dobbs's claims were clearly time-barred by virtue of Miss.Code Ann. § 99-39-5(2). **Trotter v. State,** 907 So.2d 397 (Ct.App.Miss. 2005); **Sones v. State,** 828 So.2d 216 (Ct.App.Miss. 2002).

The fundamental rights exemption provides no basis for relief.

ARGUMENT

DOBBS'S MOTION FOR OUT-OF-TIME POST-CONVICTION RELIEF BASED UPON, *INTER ALIA*, ALLEGEDLY INVOLUNTARY GUILTY PLEAS ENTERED IN 1990, WAS TIME-BARRED BY VIRTUE OF THE THREE (3) YEAR STATUTE OF LIMITATIONS SET FORTH IN SECTION 99-39-5(2).

IT WAS SUCCESSIVE WRIT BARRED AS WELL.

We respectfully submit the trial judge was eminently correct in denying the requested relief on the basis of a time bar. Indeed, there should be no legitimate question about it. (C.P. at 34; appellee's exhibit A, attached)

We assert with great vigor that post-conviction relief claims based on allegedly involuntary guilty pleas are subject to the three (3) year statute of limitations and the time bar. **Luckett v. State,** 582 So.2d 428 (Miss. 1991); **Wallace v. State,** 823 So.2d 580 (Ct.App.Miss. 2002). *See also* **Austin v. State,** 863 So.2d 59 (Ct.App.Miss. 2003), reh denied [Claim that defendant's guilty plea to rape was not knowing, intelligent, and voluntary was the type of claim that fell squarely within the three-year statute of limitations governing post-conviction relief.]

Dobbs's complaints are controlled by the following language found in **Trotter v. State,** *supra*, 907 So.2d 397, 402 (Ct.App.Miss. 2005), reh denied, cert denied.

> There is one judicially-created exception to the three-year time bar imposed on most post-conviction relief motions. "Errors affecting fundamental constitutional rights may be excepted from procedural bars which would otherwise prohibit their consideration." Smith v. State, 477 So.2d 191, 195-96 (Miss. 1985). The circuit court dismissed as time-barred Trotter's claim that he was subjected to double jeopardy, his claim that his guilty plea was involuntary, and his claim that he received ineffective assistance of counsel. In dismissing these claims as time-barred, the court found that these claims affected none of Trotter's fundamental rights. The court cited *Luckett v. State,* 582 So.2d 428, 430 (Miss. 1991), which dismissed as time-barred the defendant's assignment of errors concerning the

> validity of the indictment, claims of double jeopardy, claims that his guilty plea was involuntary, and claims of ineffective assistance of counsel. The judge's application of the law was correct, and we affirm.

Miss.Code Ann. §99-39-5(2) identifies, in plain and ordinary English, the time limitations for motions to vacate guilty pleas, judgments of conviction obtained other than by plea, and erroneous sentences filed under the Mississippi Uniform Post-Conviction Collateral Relief Act. It reads as follows:

> (2) **A motion for relief under this chapter shall be made** within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the supreme court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or **in case of a guilty plea, within three (3) years after entry of the judgment of conviction.** Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. [emphasis supplied]

The post-conviction relief act applies prospectively from its date of enactment, April 17, 1984. Individuals such as Dennis Dobbs who entered pleas of guilty or were otherwise convicted *after* April 17, 1984, have three (3) years from the date of the entry of their conviction via guilty plea to file their petition for post-conviction relief. **Lockett v. State,** 656 So.2d 68, 71 (Miss. 1995); **Lockett v. State,** 656 So.2d 76, 78-79 (Miss. 1995); **Freelon v. State,** 569 So.2d 1168, 1169 (Miss. 1990); **Jackson v. State,** 506 So.2d 994, 995 (Miss. 1987); **Odom v. State,** 483 So.2d 343, 344 (Miss. 1986).

In **Odom,** *supra,* we find the following language:

> * * * * * This act applies *prospectively* from its date of enactment, April 17, 1984. Individuals convicted prior to April 17, 1984, have three (3) years from April 17, 1984, to file their petition for post conviction relief. **Those individuals convicted after April 17, 1984, generally have three (3) years in which to file a petition for relief as provided for in the UPCCRA, Miss. Code Ann. §99-39-5(2) (Supp. 1985),** . . . [emphasis supplied]

The case of **Luckett v. State,** *supra,* 582 So.2d 428, 430 (Miss. 1991), is applicable to a great extent even though Luckett entered his plea of guilty *prior* to April 17, 1984. We quote:

> Issue Numbers II, III, IV and V are time barred. Miss.Code Ann. § 99-39-5(2) (Supp. 1990). Individuals (as Luckett) convicted prior to April 17, 1984, had three (3) years from April 17, 1984, to file their petition for post-conviction relief. **Freelon v. State,** 569 So.2d 1168 (Miss. 1990); **Odom v. State,** 483 So.2d 343 (Miss. 1986). Luckett's application was filed more than nine (9) years subsequent to the entry of his guilty pleas. No appeal or other pleading for relief was filed by him prior to the application presented, and no exceptions to this procedural bar are applicable.

The subject matter of Issues II, III, IV, and V that were time barred in **Luckett** were fatally defective indictments (issue II); double jeopardy (issue III); coerced, *involuntary, and unintelligent pleas of guilty* (issue IV); and the *ineffective assistance of counsel* (issue V). Accordingly, Dobbs's claim that his plea was neither knowing nor intelligent because of ineffective counsel is time barred by virtue of **Luckett** alone. *See also* **Kelly v. State,** 797 So.2d 1003 (Miss. 2001); **Crawford v. State,** 787 So.2d 1236 (Miss. 2001); **Kirk v. State,** 798 So.2d 345 (Miss. 2000); **Jones v. State,** 700 So.2d 631 (Miss. 1997); **Harris v. State,** 819 So.2d 1286 (Ct.App.Miss. 2002); **Beamon v. State,** 816 So.2d 409 (Ct.App.Miss. 2002); **Creel v. State,** 814 So.2d 176 (Ct.App. 2002); **Thomas v. State,** 798 So.2d 597 (Ct.App.Miss. 2001), reh denied; **Isaac v. State,** 793 So.2d 688 (Ct.App.Miss. 2001); **Williams v. State,** 726 So.2d 1229 (Ct.App.Miss. 1998); **Sanford v. State,**

726 So.2d 221 (Ct.App.Miss 1998).

Dobbs entered his plea of guilty to false pretenses on January 16, 1990, well *after* the enactment on April 17, 1984, of the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), Miss.Code Ann. §99-39-1 *et seq.* (C.P. at 58-71) Pursuant to a recommendation by the State, Dobbs was sentenced to five (5) years, suspended, with five (5) years of supervised probation, and ordered to make restitution to the victims of all of his bad checks. (C.P. at 70)

It is no secret that Dobbs had three (3) years from January 16, 1990, the date of the entry of the judgment of conviction for false pretense, to file in the trial court his motion to vacate or to otherwise seek post-conviction collateral relief.

Consequently, the deadline for filing Dobbs's post-conviction papers was on or about January 16, 1993.

Dobbs's motion for post-conviction relief was not filed, however, until on or about November 13, 2007, fourteen (14) years after the time for assailing his conviction by way of guilty plea had expired. This was excruciatingly tardy and too little too late. The old adage that "it's better late than never," once again, does not apply here.

The post-conviction relief act provided Dobbs with a statutory procedure for assailing his guilty plea within a reasonable time. Dobbs, however, missed the window of opportunity by well over a decade.

The three year statute of limitations bars a post-conviction relief motion absent a showing the case falls within any one of the three statutory exceptions. **Phillips v. State,** 856 So.2d 568 (Ct.App.Miss. 2003).

We concur with the finding made implicitly by the trial judge that the case at bar clearly does not exist in this posture. *See* appellee's exhibit A, attached.

In the final analysis, none of the exceptions, statutory or judicially created, to the time bar, which is alive and well, apply to this case. The findings and conclusions made by the trial judge in his order denying relief were eminently correct and not clearly erroneous.

Moreover, Dobbs's plea of guilty operated to waive and/or forfeit all non-jurisdictional rights and defects incident to trial. **Rowe v. State,** 735 So.2d 399 (Miss. 1999); **Anderson v. State,** 577 So.2d 390, 392 (Miss. 1991); **Dennis v. State,** 873 So.2d 1045 (Ct.App.Miss. 2004).

We find in **Anderson v. State,** *supra*, 577 So.2d 390, 391 (Miss. 1991), the following language applicable to Dobbs's complaint:

> Moreover, **we have recognized that a valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial.** *Ellzey v. State*, 196 So.2d 889, 892 (Miss. 1967). We have generally included in this class "those [rights] secured by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as those comparable rights secured by Sections 14 and 26, Article 3, of the Mississippi Constitution of 1890." *Sanders v. State*, 440 So.2d 278, 283 (Miss. 1983); *see also Jefferson v. State*, 556 So.2d 1016, 1019 (Miss. 1989). We take this opportunity to specifically include in that class of waivable or forfeitable rights the right to a speedy trial, whether of constitutional or statutory origin.
>
> This view is in accord with that of our sister states. [citations omitted]
>
> This rule also prevails in the federal arena. [citations omitted; emphasis ours]

See also **Bishop v. State,** 812 So.2d 934, 945 (Miss. 2002); **Turner v. State,** 961 So.2d 734 (Ct.App. Miss. 2007), reh denied [Voluntary and knowing guilty plea operates as a waiver of all non-jurisdictional defects or rights incident to trial, and this includes a defendant's right to a speedy trial.]

Stated differently, Dennis Dobbs's voluntary plea of guilty waived and forfeited all rights and non-jurisdictional defects incident to trial, including any Fifth Amendment and Due Process rights

raised in his motion for out-of-time appeal. **Drennan v. State,** 695 So.2d 581 (Miss. 1997); **Luckett v. State,** 582 So.2d 428 (Miss. 1991); **Anderson v. State,** *supra*, 577 So.2d 390 (Miss. 1991).

Because Dobbs entered a plea of guilty, he also waived any defenses he might have had to the charge. **Taylor v. State,** 766 So.2d 830, 835 (Ct.App.Miss. 2000).

Finally, Dobbs's post-conviction claims, by his own admission, are successive writ barred. He admits in his pleading "[t]hat petitioner is late in filing his *successive* Post-Conviction because of the following reasons . . . *et cetera.*" (C.P. at 14) [emphasis ours] *See also* appellee's exhibits B and C, attached.

Miss.Code Ann. § 99-39-11 (Supp. 1999) reads, in its entirety, as follows:

> (1) The original motion together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.
>
> **(2) *If it plainly appears* from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, *the judge may make an order* for its dismissal and *cause the prisoner to be notified.***
>
> (3) If the motion is not dismissed under subsection 2 of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.
>
> (4) This section shall not be applicable where an application for leave to proceed is granted by the supreme court under section 99-39-27. [emphasis added]

It does. He did. And he was.

Dobbs's belated claims were both time-barred and successive writ barred. They were manifestly without merit as well.

CONCLUSION

Not every motion for post-conviction relief filed in the trial court must be afforded an adversarial hearing. **Rodolfich v. State,** 858 So.2d 221 (Ct.App.Miss. 2003).

Put another way, the right to an evidentiary hearing is not guaranteed in every case. **Brister v. State,** 858 So.2d 181 (Ct.App.Miss. 2003).

"This Court reviews the denial of post-conviction relief under an abuse of discretion standard." **Phillips v. State,** *supra,* 856 So.2d 568, 570 (Ct.App.Miss. 2003). No abuse of judicial discretion has been demonstrated here.

Dobbs is time barred from bringing his claims at this late date. He failed to file his motion for post-conviction relief within the three-year time frame prescribed by Miss.Code Ann. §99-39-5(2), and he fails to make a claim falling under any of the recognized exceptions to the time or successive writ bars.

Appellee respectfully submits this case is devoid of error. Accordingly, summary dismissal, as time-barred, of Dobbs's motion to proceed out-of-time for post-conviction relief should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

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2-23

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSISSIPPI
JANUARY TERM, 2007

DENNIS DOBBS — PETITIONER

VS. — CAUSE NO. 2002-0152

STATE OF MISSISSIPPI — RESPONDENT

ORDER

Came on to be heard this day the above styled and numbered post conviction matter; and the Court after having reviewed the record of proceedings in the trial court, the petition to enter guilty plea, the plea colloquy, the sentencing order and the pleadings herein; is of the opinion that petitioner's Motions are all frivolous and that these petitions are not well taken and that no hearing is necessary. The Court has repeatedly reviewed Petitioner's post-conviction motions, which now fill two overflowing civil files, and the Court once again finds that Petitioner's motions are subsequent filing which have been previously ruled upon by this Court. The Petitioner was revoked in Clay County Criminal Cause Number 6539 on July 18, 1991, and the Petitioner was sentenced in Clay County Criminal Cause Number 6874 on January 27, 1994. Therefore, the Petitioner's motions are time barred and meet none of the exceptions outlined in Section 99-39-5 MCA (1972).

IT IS THEREFORE ORDERED, that these petitions be hereby dismissed as frivolous filings without the necessity of a hearing. Any subsequent filings of the same nature will also be considered as frivolous and such sanctions imposed upon Petitioner as permitted by authority of law. Further, the Circuit Clerk is directed to send a copy of this Order to all parties.

SO ORDERED, this the 15th day of Jan, 2008.

EXHIBIT

FILED CLAY COUNTY
JAN 15 2008
Robert D Hansard Jr

125-710

CIRCUIT JUDGE

034

Serial: 144203

IN THE SUPREME COURT OF MISSISSIPPI

2002-152

No. 2004-CT-01638-COA

DENNIS DOBBS — *Appellant*

v.

STATE OF MISSISSIPPI — *Appellee*

FILED

NOV 29 2007

SUPREME COURT CLERK

ORDER

This matter came on before the undersigned Justice on the motion to expedite petition filed pro se by Dennis Dobbs. After due consideration, this Justice finds that the motion should be denied. However, the supplemental brief that has been filed in this cause number and that the petitioner is requesting is attached to this order so that the petitioner may forward the document.

IT IS THEREFORE ORDERED that the motion to expedite is hereby denied.

SO ORDERED, this the 29th day of November, 2007.

GEORGE C. CARLSON, JR., JUSTICE

EXHIBIT

19

FILED CLAY COUNTY
DEC 03 2007
Robert D Hamilton Jr

125/508

033

Serial: 144304

IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-M-01986

2002-152

DENNIS DOBBS — ***Petitioner***

v.

STATE OF MISSISSIPPI — ***Respondent***

FILED

DEC 07 2007

SUPREME COURT CLERK

ORDER

This matter came before the panel of Diaz, P.J., Graves and Dickinson, JJ., on the application for leave to seek post-conviction relief in the trial court filed pro se by Dobbs. The panel finds that Dobbs was convicted in 1994 and that his conviction was affirmed in 1995. The panel therefore finds that the application for leave to seek for post-conviction relief is procedurally time barred.

IT IS THEREFORE ORDERED that the application for leave to seek post-conviction relief is hereby dismissed.

SO ORDERED, this the 6th day of December, 2007.

JESS H. DICKINSON, JUSTICE

FILED CLAY COUNTY
DEC 10 2007
Robert D Hamilton Jr

EXHIBIT
1

125/515 035

hurst Lumber, it's got the phone number, you could pick up the phone and say, Hey, is this real?"

A. Well, I mean, I'm saying that, and it may or may not be so. Okay? *But I know this: Before I would have sold [to Ronnie Rogers of Magnum], I would have had to have this, and I would have confirmed it more than likely in some kind of way.*

Q. And "this" being No. 24.

(Emphasis added)

¶ 47. The quoted passages clearly demonstrate that Magnum had no separate contract with SESCO whereby SESCO was obligated to furnish Magnum materials on an open account. Rather, the passages prove that there was a contract between SESCO, Magnum and HLC. The shipping of materials by SESCO constituted acceptance of HLC's promise to pay for the materials by making its check payable jointly to Magnum and SESCO. It also constituted consideration flowing to HLC, as HLC could now be assured that its project would get underway by its chosen contractor, which theretofore did not have the materials to perform the project. Such assurance was sufficient consideration for HLC's promise to make joint checks for payment of the materials. It is speculation as to whether Magnum could have obtained the materials from another supplier on an open account. For our purposes, it is sufficient that that option, if available, was never pursued. Therefore, there is no need to address this issue.

¶ 48. In summary, I would reverse and remand this case to the trial court for trial, not only on SESCO's entitlement to the $13,787.05, but also on its entitlement to the entire amount for which suit was brought. There is a genuine issue of material fact regarding the $13,787.05 check, that is, whether SESCO told HLC that SESCO had been paid and that HLC could release funds directly to Magnum. From my reading of the record, I find that, as to the remaining $33,420.35, there is also a dispute as to whether the materials which are reflected in the invoices comprising the $33,420.35 figure were in fact used on HLC's project.

¶ 49. For the reasons discussed, I respectfully dissent.

GRIFFIS, J., JOINS THIS SEPARATE WRITTEN OPINION.

Dennis DOBBS, Appellant

v.

STATE of Mississippi, Appellee.

No. 2004-CP-01751-COA.

Court of Appeals of Mississippi.

March 7, 2006.

Rehearing Denied June 27, 2006.

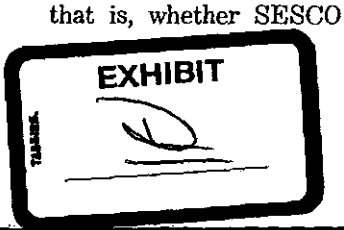
Background: After defendant pled guilty to uttering a bad check, defendant moved for postconviction relief. The Circuit Court, Clay County, Lee J. Howard, J., denied motion. Defendant appealed.

Holdings: The Court of Appeals, Barnes, J., held that:

(1) defendant's guilty plea to uttering a bad check was entered knowingly and voluntarily, and

(2) defendant was not denied effective assistance of counsel.

Affirmed.



1. Criminal Law ⇐273.1(5)

Defendant's guilty plea to uttering a bad check was entered knowingly and voluntarily; although defendant claimed that he was charged with misdemeanor, indictment and plea colloquy proved otherwise, defendant acknowledged that he understood charge against him was that he passed bad check over $100, and that he had been informed of elements of offense, he also stated that he understood that maximum sentence he could receive was sentence of up to three years of imprisonment and fine of not more than $1,000. West's A.M.C. § 97–19–39.

2. Criminal Law ⇐641.5(.5), 641.13(2.1)

Defendant was not denied effective assistance of counsel; other than purported conflict of interest, defendant failed to specifically identify how his attorney's performance was deficient, record did not reflect deficient performance on the part of counsel, as to alleged conflict of interest, defendant did not show that actual conflict existed, that his attorney actively represented other interests, or that the conflict, if any, adversely affected his attorney's performance. U.S.C.A. Const.Amend. 6.

Dennis Dobbs, Appellant, pro se.

Office of the Attorney General by Deirdre McCrory, attorney for Appellee.

Before MYERS, P.J., BARNES and ISHEE, JJ.

BARNES, J., for the Court.

¶ 1. Dennis Dobbs, *pro se*, appeals the Circuit Court of Clay County's dismissal of his motion for post-conviction relief. Finding no error, we affirm.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

¶ 2. In April 2002, Dobbs was indicted for uttering a bad check in the amount of $176.40, in violation of section 97–19–55 of the Mississippi Code (Rev.2000). Dobbs signed a sworn petition to enter a guilty plea in which he acknowledged the district attorney's recommendation that he serve one year in the custody of the Mississippi Department of Corrections, with two years of post-release supervision, pay a fine to be set by the court, and pay restitution in the amount of $2,256.50.[1] Thereafter, on July 18, 2002, Dobbs pled guilty in the Circuit Court of Clay County. Prior to sentencing, Dobbs filed a motion to withdraw his guilty plea on the basis that the amount of restitution he had agreed to pay was too high.[2] At the hearing on Dobbs's motion to withdraw his plea, it became apparent that Dobbs only disputed the amount of restitution he would be ordered to pay, not any other element of his punishment. The circuit judge rejected Dobbs's motion to withdraw his plea, and stated that he would order a review to ensure that Dobbs was properly credited for restitution payments made pursuant to his prior conviction. Dobbs was subsequently sentenced to one year in the custody of the Mississippi Department of Corrections, with two years of post-release supervision, was

1. Dobbs had previously been convicted of uttering bad checks, and had been ordered to pay restitution in that case. The $2,256.50 reflected the sum of outstanding restitution payments from Dobbs's previous conviction and restitution to be paid for the more recent crime.

2. The record shows that Dobbs expressed concern that he had not been properly credited for past restitution payments, and that this was the sole basis of his petition.

fined $500, and was ordered to pay restitution in the amount of $2,256.50. After being released from confinement in 2003, Dobbs had his term of post-release supervision revoked due to an alcohol violation, and was again imprisoned. On June 21, 2004, Dobbs filed a motion for post-conviction relief in the Circuit Court of Clay County in which he asserted (1) that his guilty plea had not been entered knowingly and voluntarily; (2) that he had received ineffective assistance of counsel; and (3) that he had been exposed to double jeopardy. In an order issued July 19, 2004, the circuit court dismissed Dobbs's motion, and Dobbs timely appealed to this Court.

ISSUES AND ANALYSIS

STANDARD OF REVIEW

¶ 3. Our standard of review on a denial of a motion for post-conviction relief is well-established. We will not reverse the trial court unless we find that the court's decision was clearly erroneous. *Smith v. State,* 806 So.2d 1148, 1150(¶ 3) (Miss.Ct. App.2002).

I. WHETHER DOBBS'S GUILTY PLEA WAS ENTERED KNOWINGLY AND VOLUNTARILY.

[1] ¶ 4. Dobbs argues that it was impossible for him to knowingly and voluntarily plead guilty to a felony, as the crime with which he was charged was a misdemeanor. Dobbs asserts that he was indicted pursuant to section 97–19–39(1) of the Mississippi Code, which, in its current form, states:

> Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by another false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, with a value of less than Five Hundred Dollars ($500.00), upon conviction thereof, shall be guilty of a misdemeanor and punished by imprisonment in the county jail not exceeding six (6) months, and by fine not exceeding One Thousand Dollars ($1,000.00).

Miss.Code Ann. § 97–19–39 (Supp.2005).[3] Dobbs is mistaken. It is clear from the indictment and the record of the plea colloquy that Dobbs was charged with, and pled guilty to, uttering a bad check in violation of section 97–19–55 of the Mississippi Code. The version of section 97–19–55 that was effective at the time of the crime read as follows:

> It shall be unlawful for any person with fraudulent intent: (a) To make, draw, issue, utter or deliver any check, draft or order for the payment of money drawn on any bank, corporation, firm or person for the purpose of obtaining money, services or any article of value, or for the purpose of satisfying a preexisting debt or making a payment or payments on a past due account or accounts, knowing at the time of making, drawing, issuing, uttering or delivering said check, draft or order that the maker or drawer has not sufficient funds in or on deposit with such bank, corporation, firm or person for the payment of such check, draft or order in full, and all

3. The version of section 97–19–39 in effect at the time the crime was committed classified the crime as a felony, regardless of the value of the property wrongly procured. The distinction classifying the crime as a misdemeanor when the value of the property taken is less than $500 was introduced in a 2003 amendment to the statute. *See* Laws 2003, Ch. 499, § 5, eff. July 1, 2003. Dobbs' reliance upon a version of the statute not in effect at the time of the crime further undermines his assertion that he was actually charged with a misdemeanor under section 97–19–39.

other checks, drafts or orders upon such funds then outstanding; (b) To close an account without leaving sufficient funds to cover all outstanding checks written on such account.

Miss.Code Ann. § 97–19–55 (Rev.2000). Section 97–19–67 of the Mississippi Code prescribes the punishment for violations of section 97–19–55, and defines as a felony the violation of section 97–19–55 where the check in question is written for $100 or more. Miss.Code Ann. § 97–19–67(1)(d) (Rev.2000). In such an instance, a person found guilty of committing the offense may be fined between $100 and $1,000, may be imprisoned up to three years, or may face both a fine and prison sentence. *Id.*

¶ 5. The indictment against Dobbs tracks the statutory language set forth in section, 97–19–55, charging that:

> DENNIS DOBBS . . . unlawfully, wilfully & feloniously obtain[ed] merchandise, the property of Wal-Mart Stores, Inc., by presenting to an employee of Wal-Mart Stores, Inc., a certain check on BankFirst, Inc., well knowing at the time of issuing, signing and delivering said check, that he did not have a sufficient amount of money or funds on deposit to his credit in said bank with which to pay said check . . . .

Furthermore, at the hearing in which Dobbs pled guilty, he acknowledged that he understood the charge against him was that he passed a bad check over $100, and that he had been informed of the elements of the offense. He also stated that he understood that the maximum sentence he could receive was a sentence of up to three years of imprisonment and a fine of not more than $1,000.

¶ 6. Dobbs' assertion that he was charged with a misdemeanor and thus improperly sentenced is clearly incorrect, as shown by the indictment and plea colloquy. As this is the only ground upon which Dobbs bases his claim that his plea was not entered voluntarily and intelligently, this claim of error must fail.

II. WHETHER DOBBS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

[2] ¶ 7. Dobbs also claims that he suffered from ineffective assistance of counsel in two respects. First, Dobbs claims that his appointed defense counsel, Thad Buck, served as an assistant district attorney in prior criminal proceedings against him for uttering bad checks. Secondly, Dobbs claims that defense counsel misled him into entering a plea agreement in the present case.

¶ 8. The test for ineffective assistance of counsel is stated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, the defendant bears the burden of establishing ineffective assistance of counsel. In order to meet this burden, the defendant must show (1) that defense counsel's performance was deficient when measured by the objective standard of reasonable professional competence, and (2) that the defendant was prejudiced by counsel's failure to meet that standard. *Pleas v. State*, 766 So.2d 41, 42(¶ 3) (Miss.Ct.App.2000) (citing *Wiley v. State*, 750 So.2d 1193, 1198(¶ 11) (Miss.1999)). Where a defendant enters a guilty plea, the key question is whether "there is a reasonable probability that had counsel's assistance been effective, [the defendant] would not have pled guilty, but would have insisted on going to trial." *Id.* at 43(¶ 7) (citing *Bell v. State*, 751 So.2d 1035, 1038(¶ 14) (Miss.1999)). Such a defendant "must specifically allege facts showing that effective assistance of counsel was not in fact rendered, and he must allege with specificity the fact that but for such purported actions by ineffective counsel, the results of the trial court decision would have been different." *Roby*

v. State, 861 So.2d 368, 370(¶ 8) (quoting *Smith v. State,* 434 So.2d 212, 219 (Miss. 1983)). Furthermore, in the case of a purported conflict of interest, the United States Supreme Court has stated that "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that an 'actual conflict of interest adversely affected his lawyer's performance.'" *Davis v. State,* 897 So.2d 960, 970(¶ 30) (Miss. 2004) (citing *Strickland,* 466 U.S. at 692, 104 S.Ct. 2052).

¶ 9. Other than the purported conflict of interest, Dobbs fails to specifically identify how his attorney's performance was deficient; furthermore, the record does not reflect deficient performance on the part of Dobbs's counsel. As to the alleged conflict of interest, Dobbs has not shown that an actual conflict existed, that his attorney actively represented other interests, or that the conflict (if any) adversely affected his attorney's performance. Dobbs has not met his burden of proof on this claim of error, and thus this issue is without merit.

III. WHETHER DOBBS WAS EXPOSED TO DOUBLE JEOPARDY.

¶ 10. Dobbs claims that his failure to pay restitution pursuant to a prior felony conviction for uttering bad checks was used as the reason to revoke his term of post-release supervision in the present case, and that this impermissibly exposed him to double jeopardy. In dismissing Dobbs's motion for post-conviction relief, the circuit court found that Dobbs's post-release supervision was revoked due to an alcohol violation. As there is nothing in the record to contradict the circuit court's finding, we cannot rule that this finding was clearly erroneous. Accordingly, we find this issue to be without merit.

¶ 11. THE JUDGMENT OF THE CLAY COUNTY CIRCUIT COURT DISMISSING THE MOTION FOR POST-CONVICTION RELIEF IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO CLAY COUNTY.

KING, C.J., LEE AND MYERS, P.JJ., SOUTHWICK, IRVING, CHANDLER, GRIFFIS, ISHEE AND ROBERTS, JJ., CONCUR.

Dennis DOBBS, Appellant.

v.

STATE of Mississippi, Appellee.

No. 2004-KA-01638-COA.

Supreme Court of Mississippi.

April 11, 2006.

Rehearing Denied Aug. 15, 2006.

Background: Following a jury trial, defendant was convicted in the Circuit Court, Clay County, Lee J. Howard, J., of simple assault on a law enforcement officer. Defendant appealed.

Holdings: The Supreme Court, Ishee, J., held that:

(1) jury instruction stating that jury should find defendant not guilty if defendant acted in necessary self-defense was not warranted;

(2) proposed jury instruction that required jury to find defendant not guilty if jury found that state failed to prove elements of crime beyond a reasonable doubt was not warranted; and

(3) jury instruction requiring jury to find defendant not guilty if jury believed that deputy committed unprovoked or unnecessary assault or attack on defendant was not warranted.

Affirmed.

1. Criminal Law ⇐822(1)

In determining whether error lies in the manner in which the jury was instructed, the various requested instructions are not considered in isolation; rather, the instructions actually given must be read as a whole.

2. Criminal Law ⇐822(1)

When read as a whole, if the jury instructions fairly announce the law of the case and create no injustice, then no reversible error will be found.

3. Criminal Law ⇐829(5)

Jury instruction stating that jury should find defendant not guilty of simple assault on a law enforcement officer if defendant acted in necessary self-defense was not warranted; instruction was adequately covered by another instruction, which required defendant to be found guilty if he purposely and knowingly caused bodily injury to deputy without authority of law and not in necessary self defense.

4. Criminal Law ⇐770(2), 814(2), 829(2)

Although a defendant is entitled to jury instructions which present his theory of the case, this entitlement is limited to instructions that correctly state the law, are not covered fairly elsewhere in the instructions, and have a foundation in the evidence.

5. Criminal Law ⇐829(1)

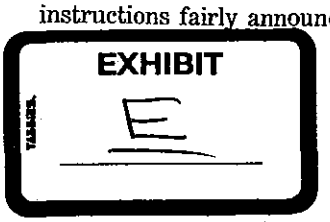
Trial court is not required to grant several jury instructions on the same question in different verbiage.

6. Criminal Law ⇐829(12)

Proposed jury instruction that required jury to find defendant not guilty of simple assault on a law enforcement officer if jury found that state failed to prove elements of crime beyond a reasonable doubt was not warranted; proposed instruction was repetitive to instruction that was granted.

7. Criminal Law ⇐829(4)

Jury instruction requiring jury to find defendant not guilty of simple assault on a law enforcement officer if jury believed that deputy committed unprovoked or unnecessary assault or attack on defendant was not warranted; instruction was adequately covered by other instructions that



effectively conveyed message that deputy's actions were not justifiable if he used excessive force.

Jeffrey J. Hosford, attorney for appellant.

Office of the Attorney General, by Deirdre McCrory, attorney for appellee.

Before LEE, P.J., IRVING and ISHEE, JJ.

ISHEE, J., for the Court.

¶ 1. Dennis Dobbs was convicted in the Clay County Circuit Court of simple assault on a law enforcement officer. He was sentenced as a habitual offender to serve a term of five years in the custody of the Mississippi Department of Corrections. The trial court denied Dobbs's motion for a new trial, or in the alternative, judgment notwithstanding of the verdict (JNOV). Aggrieved by his conviction and sentence, Dobbs appeals. Finding no error, we affirm.

FACTS

¶ 2. On December 6, 2002, Dobbs was a prisoner on trusty status in the Clay County Jail in West Point. As a prisoner on trusty status, he worked outside the jail picking up garbage for the county sanitation department. When Dobbs returned from work that day, the dispatcher, Beth Luna, believed that he was intoxicated, due to a strong smell of alcohol. Luna called the jailer on duty and requested that Dobbs be checked for alcohol use. Dobbs was tested three times on the Intoxilyzer, and all three tests revealed that he had a blood alcohol concentration above .17.

¶ 3. After the third test was administered, the officers informed Dobbs that he would be required to enter a screening cell, or "drunk tank." Dobbs protested and argued that the tests were incorrect. He refused to go into the screening cell. Deputy Joe Huffman explained to Dobbs that the rules required him to do so, and eventually Dobbs agreed to enter the cell. When jailer Danny Banks unlocked the door, however, Dobbs refused to comply. Deputy Huffman was then summoned for assistance.

¶ 4. Deputy Huffman approached Dobbs and asked him to go into the screening cell. Dobbs adamantly refused, insisting that he had not been drinking. Deputy Huffman testified that Dobbs's "demeanor kept getting louder" and that he "kept throwing his hand in the air stating that he was not going to go in there." According to the testimony of Banks and Deputy Huffman, Dobbs initiated physical confrontation by grabbing the collar of Deputy Huffman's shirt. A scuffle ensued, as the two men wrestled from one side of the hallway to the other. Deputy Huffman gained control by wrestling Dobbs to the floor. Just as Dobbs appeared to relent, he suddenly flipped Deputy Huffman over his head. Eventually, Banks and Deputy Huffman were able to place Dobbs in the cell.

¶ 5. During the trial, Dobbs testified that Deputy Huffman intentionally struck him in the groin during the scuffle. Dobbs further testified that he threw Deputy Huffman over his head because he was being choked. According to Dobbs, he had to resist Deputy Huffman to avoid being harmed. The jury heard contrary testimony from Banks and Deputy Huffman, both of whom testified that Dobbs initiated the physical confrontation, and that he threw the deputy over his head after pretending to give up the struggle. Both the prosecution and the defense played a partially obstructed videotape of the events in ques-

tion while examining witnesses, including Dobbs. The jury also heard testimony from Luna, the jail administrator, and several inmates of the Clay County Jail.

¶ 6. On July 22, 2004, Dobbs was convicted on the charge of simple assault on a law enforcement officer. The trial court denied Dobbs's motion for a new trial or, in the alternative, a JNOV. Aggrieved by the trial court's decision, Dobbs appeals. He asserts that the trial court erred by failing to properly instruct the jury as to self-defense.

STANDARD OF REVIEW

[1, 2] ¶ 7. "In determining whether error lies in the manner in which the jury was instructed, the various requested instructions are not considered in isolation. Rather, the instructions actually given must be read as a whole." *Sheffield v. State*, 844 So.2d 519, 524(¶ 12) (Miss.Ct.App.2003) (citing *Turner v. State*, 721 So.2d 642, 648(¶ 21) (Miss.1998)). When read as a whole, if the instructions fairly announce the law of the case and create no injustice, then no reversible error will be found. *Johnson v. State*, 908 So.2d 758, 764(¶ 20) (Miss.2005) (citing *Williams v. State*, 863 So.2d 63, 65(¶ 5) (Miss.Ct.App. 2004)).

ISSUE AND ANALYSIS

I. Whether the trial court erred by failing to properly instruct the jury as to self-defense.

¶ 8. During trial, Dobbs testified that he threw Deputy Huffman over his head in self-defense, but that he did not intend to do the deputy any harm. Based on this testimony, Dobbs argues that there was credible evidence in the record to support his claim of self-defense. Consequently, Dobbs argues that the trial court denied him a fair trial when it declined to give the jury his requested instructions on self-defense, labeled D–2, D–3, and D–5.

[3–5] ¶ 9. The State argues that the trial court properly refused the jury instructions requested by Dobbs because they were repetitive. We agree. Although a defendant is entitled to jury instructions which present his theory of the case, "this entitlement is limited to instructions that correctly state the law, are not covered fairly elsewhere in the instructions, and have a foundation in the evidence." *Sproles v. State*, 815 So.2d 451, 454(¶ 9) (Miss.Ct.App.2002) (citing *Heidel v. State*, 587 So.2d 835, 842 (Miss.1991)). Furthermore, "the trial court is not required to grant several instructions on the same question in different verbiage." *Sproles*, 815 So.2d at 454(¶ 9) (citing *Ragan v. State*, 318 So.2d 879, 882 (Miss. 1975)).

¶ 10. Requested jury instruction D–2 read as follows: "[t]he Court instructs the jury that if you find that the Defendant, Denis [sic] Dobbs, on or about December [sic] 2002, acted in necessary self defense from Deputy Joe Huffman, then you SHALL FIND THE DEFENDANT NOT GUILTY of Simple Assault of a Law Enforcement Officer." The State argues that this instruction was adequately covered by instruction S–2, which was granted. Instruction S–2 stated in part that Dobbs should be found guilty as charged if the jury finds that he "unlawfully, willfully, feloniously, purposely, and knowingly [caused] or [attempted] to cause bodily injury to Deputy Joe Huffman ... without authority of law and not in necessary self defense." We find that the limited subject matter of instruction D–2 was adequately covered by S–2. Thus, the trial court did not err in denying instruction D–2.

[6] ¶ 11. Dobbs also argues that the trial court erred in refusing to grant in-

struction D–3. Requested jury instruction D–3 read as follows:

> Dennis Dobbs has been charged with the offense of Simple Assault upon a Law Enforcement Officer.
>
> If you find from the evidence in this case the State FAILED to prove in this case BEYOND A REASONABLE DOUBT that:
>
> 1. Dennis Dobbs, on or about December 6, 2002 in Clay County;
> 2. Unlawfully, willfully, purposely and knowingly cause or attempt to cause bodily injury to Joe Huffman;
> 3. By repeatedly grabbing Joe Huffman with his hands and wrestling with him;
> 4. Joe Huffman was a law enforcement office [sic];
> 5. Joe Huffman was acting within the scope of his duty as a law enforcement officer, and further;
> 6. Dennis Dobbs was not acting in self defense;
>
> then you shall find the defendant NOT GUILTY of the Charge of Simple Assault on a Law Enforcement Officer.

The trial court ruled found that this instruction was repetitive to instruction D–1, which was granted. Instruction D–1 read as follows:

> The Court instructs the Jury that if you find that the STATE failed to prove beyond a REASONABLE DOUBT that the Defendant, Den[n]is Dobbs, did on or about December 6th, 2002, did unlawfully, willfully, purposely and knowingly cause or attempt to cause bodily injury to Deputy Joe Huffman, a law enforcement officer with the Clay County Sheriff's Department, at a time when the said Deputy Joe Huffman was acting with the scope of his official duties and office, by repeatedly grabbing the said Deputy Joe Huffman with his hands and wrestling with him, without authority of law not in necessary self defense, then you SHALL FIND THE DEFENDANT NOT GUILTY of Simple Assault of a Law Enforcement Officer.

We fail to see any meaningful difference between instruction D–1, which was granted by the trial court, and instruction D–2. Accordingly, we find that the trial court did not err in refusing to grant instruction D–2.

[7] ¶ 12. Finally, Dobbs argues that the trial court erred in refusing to grant instruction D–5, which read as follows:

> The Court instructs the Jury that if you believe from the evidence in this cause that Deputy Joe Huffman committed an unprovoked or unnecessary assault or attack upon the Defendant, Dennis Dobbs, while giving a Command to Mr. Dobbs a State Inmate, then in the event the defendant had the right to resist said unprovoked or unnecessary attack, and if you further believe the defendant's use of this force was not more than reasonably necessary for his own protection and that the defendant's conduct did not cause the assault, then you should find the defendant NOT GUILTY.

The trial court refused to grant instruction D–5, holding that the jury was properly instructed by instructions S–4 and D–4. Instruction D–4 required the jurors to render a verdict of not guilty if they determined that Deputy Huffman "used excessive force that was not reasonably necessary to compel Dennis Dobbs to comply with his order." Instruction S–4 stated in part that "an officer may use such force as is reasonably necessary" to compel an inmate to comply with his lawful order, but he may not use excessive force to accomplish this purpose. S–4 further instructed the jurors that if they found "beyond a reasonable doubt that Joe Huffman was

using only such force as was reasonably necessary . . . then Joe Huffman was justified in his use of that force and the defendant cannot claim a right to resist that force."

¶ 13. We find that the jury was properly instructed by instructions S–4 and D–4, which effectively conveyed the message that Deputy Huffman's actions were not justifiable if he used excessive force. If the jurors determined that Deputy Huffman used excessive force, then they were required to render a verdict of not guilty. Although instruction D–5 does not use the language "excessive force," it does ask the jurors to determine whether Deputy Huffman's actions were "unnecessary." The trial court was not required to grant several instructions that used different wording to address the same issue, i.e., whether Dobbs was subjected to excessive, or unnecessary force. Therefore, this issue is without merit.

¶ 14. **THE JUDGMENT OF THE CLAY COUNTY CIRCUIT COURT OF CONVICTION OF SIMPLE ASSAULT ON A LAW ENFORCEMENT OFFICER AND SENTENCE OF FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO CLAY COUNTY.**

KING, C.J., LEE AND MYERS, P.JJ., SOUTHWICK, IRVING, CHANDLER, GRIFFIS, BARNES AND ROBERTS, JJ., CONCUR.

Herman SIPP, Jr.

v.

STATE of Mississippi.

No. 2004–KP–02287–SCT.

Supreme Court of Mississippi.

June 22, 2006.

Rehearing Denied Aug. 31, 2006.

Background: Defendant was convicted in the Circuit Court, Jackson County, Robert P. Krebs, J., of murder. Defendant appealed.

Holdings: The Supreme Court, Waller, P.J., held that:

(1) statement made by defendant to police, which was obtained in violation of defendant's *Miranda* rights, was admissible for impeachment purposes;

(2) trial court did not abuse its discretion by denying defendant's motion to admit into evidence exhibits showing parts of crimes scene and angle overlays to demonstrate the improbability that the victim was shot from the position indicated by the State;

(3) trial court did not abuse its discretion when, after six hours of jury deliberations, it refused to declare a mistrial and recessed deliberations overnight;

(4) trial court's act in asking jury as a whole, rather than conducting individualized questioning, whether any of them had discussed the case with anyone, whether they had avoided televisions, newspapers, and radios, and whether they had read any articles concerning the case, was not improper;

(5) prosecutor's statement during closing arguments, in which prosecutor stated the exact time defendant returned to friend's house the night of murder, was not improper;

CERTIFICATE OF SERVICE

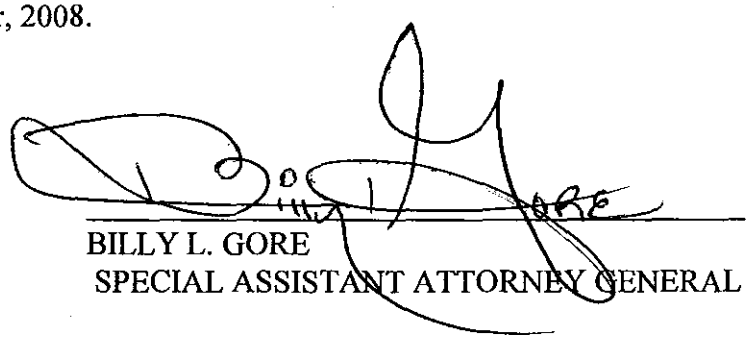
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

Honorable Lee J. Howard
Circuit Court Judge, District 16
P. O. Box 1344
Starkville, Mississippi 39760

Honorable Forrest Allgood
District Attorney, District 16
P.O. Box 1044
Columbus, Mississippi 39703

Dennis Dobbs, *Pro Se*
DCF/CA #05
3800 County Rd 540
Greenwood, Mississippi 38930

This the 19th day of November, 2008.



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