IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-IA-01049-SCT

AMERICAN STATES INSURANCE COMPANY **APPELLANT**

VS. **NO. 2008-IA-01049-SCT**

ELLIS R. ROGILLIO **APPELLEE**

CERTIFICATE OF INTERESTED 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. **Ellis Randy Rogillio, appellee**
2. **Hollis McGehee and Ronald L. Whittington, counsel for appellee**
3. **American States Insurance Company, appellant**
4. **W. Wright Hill, Jr. And Jan F. Gadow with Page, Kruger & Holland, P.A., counsel for appellant**
5. **Hon. Forrest A. Johnson, Circuit Court Judge of Amite County, Mississippi**

This the 8th **Day of December, 2008.**

HOLLIS McGEHEE, COUNSEL FOR APPELLEE

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STATEMENT OF ISSUES

The trial court, after having taken the matter under advisement and giving lengthy consideration to the same, properly denied American States' Motion to Set Aside Default Judgment. The Court, after having considered the Three-Prong Test used in determining whether to set aside a default judgment properly found that the default judgment should not be set aside. The Court exercised proper discretion in denying American States' Motion to Set Aside Default Judgment.

I. STATEMENT OF THE CASE

Ellis R. Rogillio (Randy) filed his complaint on March 9, 2007 against American States Insurance Company (American States) and others. (C.P. 1-11) American States was properly served with process on March 12, 2007. In addition, American States received additional copies of the complaint from its agent as well as from undersigned counsel for Randy Rogillio. Randy waited more than four months for American States to respond to the complaint and after having failed to respond, Randy, pursuant to Rule 55 M.R.C.P. filed a Motion for Entry of Default (C.P. 16) and a Default Judgment was issued on July 18, 2007 (C.P. 19).

American States filed its Answer and Affirmative Defenses on August 6, 2007 (C.P. 21) and its Motion to Set Aside Default Judgment on August 23, 2007.(C.P. 26) Following a hearing held on September 4, 2007, the trial court, after having taken the matter under consideration for an extended period of time, entered an order denying American States' Motion to Set Aside Default Judgment on or about May 29, 2008. (C.P. 173) This Court subsequently granted American States' Petition for Interlocutory Appeal and to Stay Proceedings by Order entered on July 23, 2008. (C.P. 175)

II. STATEMENT OF THE FACTS

Randy is 36 years of age and on March 20, 2004, was employed by and working for J & N Timber. (C.P. 151) J & N Timber is a timber company owned and operated by W. B. Netterville. Clover Hill is a corporation formed by W. B. Netterville and several other persons. At that time, Clover Hill existed on paper only, the only asset it had was a used Ford pickup truck which was being driven by Randy at the time of his accident. (C.P. 152)

Bi-County Insurance is a local insurance agency located in

Centreville, Mississippi through which W. B. Netterville / J & N Timber acquired coverage for all automobiles owned by J & N Timber. (C.P. 152) The policy issued to J & N Timber was written through American States. American States issued a policy that provided $600,000 in UM coverage. (C.P. 37-124)

On Saturday, March 20, 2004, Randy, who was then working for J & N Timber, Inc., was driving on Louisiana Highway 10 at approximately 6:30 in the morning. While traveling along in a normal manner suddenly, without warning, a 70-pound table vise came off of an oncoming vehicle, went through the windshield of appellee's truck, hitting him in the right shoulder area, then passed through the rear window of the truck, knocking off the tailgate, and came to rest somewhere behind him. The owner/driver of the oncoming vehicle has never been found nor identified. (C.P. 153)

Randy was severely and permanently injured. The vise essentially severed his arm except for a small bit of skin that retained it. It severed the bone in his upper arm, cutting it off just below the ball part of the shoulder socket. Randy was flown to University Medical Center, where through the diligent work of good doctors, his arm was reattached. The

bone fragments were pieced together and pinned back to the ball part of the upper joint, and his arm was saved. While his arm was saved, Randy was unable to have any use of his arm because all of the muscles, tendons and nerves around that area had been completely destroyed. Subsequently, Randy went to the Mayo Clinic in Minnesota where a team of experts, through multiple surgeries, were able to create some muscle structure and some nerve that now allows Randy to have some use of his right arm. (C.P. 154)

Randy suffered horrible injuries, including those outlined above, as well as a very serious injury to his spine that makes him very susceptible to spinal injuries in the future because of the compromised nature of his spinal canal. Randy's medical expenses to date are in the approximate amount of $113,009.54. Randy will continue to have medical needs in the future, but there is no way to accurately predict those at this time. There are many activities, both work and leisure, that Randy enjoyed throughout his life up to the date of this accident which he can no longer participate in or enjoy. (C.P. 154)

On March 9, 2007, Randy filed his Complaint in the Circuit Court of Amite County, Mississippi, styled, "Ellis R. Rogillio vs. Mississippi Farm

Bureau Casualty Insurance Company, et al". (C.P. 1-10) Summons was issued for all defendants and said defendants, including but not limited to American States, were properly served with process on March 12, 2007, Proofs of Service was filed on March 15, 2007.

American States claims that it was "unbeknownst" to it that it had been served with process. There is absolutely no basis for this claim. American States was properly served by service of process on its registered agent, C. T. Corporation. Additionally, Bi-County Insurance, American States' agent, sent a copy to the American States Claims Agent, Keith Anderson; and, Randy's undersigned counsel also provided a separate copy to the claims agent.

The following is a time line of relevant events:

a. 03/20/04 Date of accident.

b. 03/09/07 *Complaint* filed in the Circuit Court of Amite County, Mississippi.

c. 03/09/07 *Summons* issued for all named Defendants.

d. 03/12/07 Process was served on all named Defendants.

e. 03/14/07 American States, through its litigation specialist Keith Anderson, received both a telephone call and a copy of

the *Complaint* and *Summons* from Bryan Berry, an agent at Bi-County insurance agency, the agent of American States.

f. 03/15/07 Return of process on all named defendants filed in the office of the Circuit Clerk of Amite County, Mississippi.

g. 03/15/07 Keith Anderson, litigation specialist with American States, contacted the undersigned Counsel for Randy and advised that he had received a filed copy of the Complaint and knew of the lawsuit.

h. 03/26/07 The undersigned faxed a copy of *Complaint* to Keith Anderson with a cover sheet explaining what was enclosed.

i. 07/17/07 Randy filed his application to Circuit Clerk for *Entry of Default* and supporting affidavit.

j. 07/18/07 *Default Judgment* entered by Court and filed in the office of the Circuit Clerk of Amite County, Mississippi.

k. 08/06/07 American States filed its *"Answer and Affirmative Defenses".*

l. 08/23/07 American States filed its *Motion to Set Aside Default* .

m. 09/04/07 The Trial Court considered the parties respective briefs, heard arguments of American States and Randy and took the matter under advisement.

n. 05/29/08 Trial Court entered its order denying the Motion to Set Aside Default Judgment.

III. SUMMARY OF THE ARGUMENT

The Circuit Court of Amite County, Mississippi, properly ruled that the Motion to Set Aside Default Judgment was not well founded and therefore properly denied the same. American States had ample notice, both the legally required service of process as well as multiple notices to its claims agent. When American States did not file an answer as required pursuant to Rule 12 M.R.C.P. over four months later and a default judgment was entered against American States. American States showed complete indifference and disregard toward its obligations by not making any response until over five months later and after a default judgment had been entered.

American States' claim of a colorable defense is self-serving and dubious. Randy has established that he was named in the policy and that at best there is an ambiguity which, as a matter of law, must be resolved

in favor of coverage.

If this Court were to overturn the lower court's ruling and set aside the default judgment, it would considerably prejudice Randy. The prejudice to Randy would include the fact that if the default judgment is set aside, then litigation must proceed involving Bi-County Insurance as well as American States (it has been stipulated that if this default judgment is upheld, then the litigation as to Bi-County will be dismissed). (T. 14 and T. 24) Randy will be further prejudiced by the additional extended time periods that would result from a setting aside of the default judgment which was entered because of the neglect of American States. In addition, the complaint against Bi-County, upon confirmation of the court's default judgment will be dismissed, but if the default judgment is set aside, it will necessitate litigation against Bi-County Insurance.

For these reasons the ruling of the Circuit Court of Amite County, Mississippi by Honorable Forrest A. Johnson denying American States' Motion to Set Aside Default Judgment should be upheld.

IV. LEGAL ARGUMENT

A. THE LOWER COURT DID NOT ERR IN DENYING AMERICAN STATES'

MOTION TO SET ASIDE CLERK'S ENTRY OF DEFAULT AND/OR DEFAULT JUDGMENT

1. **American States has no good cause for its default, does not have a colorable defense to the merits of the claim, and Ellis R. Rogillio will be prejudiced if the default is set aside.**

Randy Rogillio agrees that in determining whether to set aside a default judgment, the Mississippi Supreme Court has employed the use of a Three Prong Balancing Test and weighed those factors under Rule 60(b) of the Mississippi Rules of Civil Procedure, to-wit: (1) the nature and legitimacy of the defendant's reasons for its default, i.e. whether defendant has good cause for a default; (2) whether defendant in fact has a colorable defense to the merits of the claim; and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default judgment is set aside. This Three Prong Balancing Test is set forth in *Stanford v. Parker,* 822 S.2d 886 (Miss. 2002).

a. **American States' default was a result of complete disregard of multiple notices of service of process as well as complete indifference to service.**

The Entry of Default and Default Judgment resulted from American States' complete disregard of this action. American States' assertion that it and its employees believed this Complaint related to its Clover Hill

policy defies common sense and the undisputed fact that its claim agent received the complaint. American States acknowledges that it had received a copy of the Complaint right after it was filed, not to mention the service of process on it through its registered agent, C. T. Corporation. American States has no sensible or believable reason or excuse for its failure to timely answer and defend this action.

Further, American States' claim representative, Keith Anderson, received a copy of Randy Rogillio's Complaint from its agent and co-defendant Bi-County Insurance Agency, Inc., on March 15, 2007. Clearly, Mr. Anderson knew that this did not relate to the Clover Hill policy, a previously settled claim. Additionally, on March 15, 2007, Mr. Anderson personally discussed the claim with counsel for Randy, Hollis McGehee. In that conversation, Mr. Anderson clearly acknowledged that he understood Randy had filed suit against American States. Mr. Anderson was specifically advised by Randy's counsel in the March 15, 2007, conversation that the Complaint had been filed and even if you believe what American States says, he had a duty to determine from the court file if and when American States had been served. Further, American States appointed an agent and that agent was served, and notice to that

agent is notice to American States.

On March 26, 2007, Mr. Anderson was reminded of this pending litigation by a facsimile-transmitted copy of the summons and complaint sent to him by Randy's counsel. This was the second copy of the summons and complaint provided to American States (in addition to having been served with process).

Even though it was served with process and received at least two other actual notices of the pending litigation, American States did nothing. On July 18, 2007, over four months after American States was served, Randy obtained a default judgment against American States.

American States claims that it first became aware that it had been served with process on August 2, 2007. (C.P. 29 and Page 4 of Appellant's Brief) American States contends in its brief as well as in its initial pleading that Counsel for another defendant contacted American States' counsel on August 2, 2007 to advise American States' counsel that a default judgment had been entered against it. Four days later, American States filed its "Answer and Affirmative Defenses" even though a default judgment had already been entered. Seventeen days after that, American States first filed its Motion to Set Aside Default Judgment. Hon. Wright

Hill, the attorney for American States, made the following statement in the oral argument presented to Judge Johnson: (T. 7)

> "Subsequently, about a month later (referring to a month later from the time the default was entered), I got a call, not from one of the defense lawyers sitting here, but from one of the other attorneys from Farm Bureau, saying, "Hey, we're going to set Mr. Rogillio's deposition. Are you coming? What's going on with default judgment?" Needless to say, I was surprised because I wasn't aware of the default judgment. I didn't know we had been served yet. According to Mr. Anderson, we still hadn't been served. Actually, they had been; he just didn't think it was service. He was thinking that was a courtesy copy that he got from the agent. So I, of course, filed the motion to set it aside."

Counsel for American States doesn't specify when Counsel was employed but obviously from his statement it was sometime well prior to August 2, 2007. Hon. Wright Hill, counsel for American States, confirms in American States' initial pleading that American States had already employed counsel prior to the time it claims it because aware of the filing of this action. So, not only was American States properly served with process, received two additional copies of the complaint, it employed an attorney and neither American States, its claims agent nor its attorney bothered to determine that it had in fact been served with process back

on March 12, 2007. If ever there was a case in which a defendant was not entitled to be excused for its neglect the case before the Court is it.

Even though it knew that a default judgment had been entered against it, American States filed an "Answer and Affirmative Defenses" as its first pleading as opposed to an effort to set aside the default judgment. Seventeen days later, defendant American Stated finally filed a Motion to Set Aside the Default Judgment.

The Circuit Court of Amite County heard this matter on September 4, 2007. At the conclusions of the hearing, the Court took the matter under advisement and kept the matter under advisement for approximately eight (8) months, obviously having given the matter serious and extended consideration. On May 29, 2008, the Court entered its order denying American States' Motion to Set Aside Default Judgment.

The default judgment not only had the effect of substantially ending the litigation between Randy and American States, as a result of the court's ruling Bi-County Insurance was to be dismissed by an agreement of the parties. (T. 14-15) Farm Bureau has already been dismissed and thus the only issue remaining is the damages which Randy Rogillio is

entitled to recover from American States. (T. 24)

No one disputes that Randy Rogillio suffered extremely painful and traumatic debilitating injuries on March 20, 2004. It has now been over four (4) years since the accident in question, and Randy Rogillio is entitled to have this matter, as to which he bears no blame whatsoever, finally brought to a close. The Trial Court's ruling results in the effective end of this litigation because it is obvious that his injuries exceed the UM coverage available.

Although American States cites as an authority in its support *International Paper Company v. Basila*, 460 S. 2d 2, 1204 (Miss. 1984), Randy respectfully submits that its reliance is misplaced. In fact, as stated in *Basila*, where the default is occasioned by simple disregard of the service of process or indifference, it is not appropriate to set aside the default. Randy submits that the fact that American States' agent advised Randy's counsel of its intent to defend the suit on or about March 15, 2007, and thereafter did nothing until August 6, 2007, demonstrates the total indifference of American States. Further, as already noted, American States, based upon the statement of its counsel referenced above, obviously employed an attorney yet neither it, nor its claim agent,

nor its attorney saw fit to file an answer or defend this matter or even to look to determine that it had been served with process.

Rule 60(b) of Mississippi Rules of Civil Procedure provides that a Court may relieve a party from a final judgment for the following reasons: (1) fraud, misrepresentation, or other misconduct of an adverse party; (2) accident or mistake; (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective applications; (6) any other reason justifying relief from the judgment.

American States does not claim that the judgment was entered by fraud, misrepresentation or misconduct, by accident or mistake, nor does it claim that there is newly discovered evidence, that the judgment is void or that the judgment has been satisfied. Therefore, it can only request that the judgment be set aside for some other reason justifying relief from the judgment. The Mississippi Supreme Court has held that relief under Rule 60(b) (6) "is reserved for exceptional and compelling

circumstances." *Bryant v. Walters*, 493 S. 2d 933, 939 (Miss. 1986) and *Stanford v. Parker*, 822 S. 2d 886, 888 (Miss. 2001).

In *Guaranty National Insurance Co. v. Pittman*, 501 S. 2d 377, 378 (Miss. 1987), the Mississippi Supreme Court upheld the Circuit Court judge's refusal to set aside a default judgment. The Supreme Court, writing through Justice Robertson, found that even though the defendant "made a substantial showing at the hearing below that he did in fact have a colorable defense on the merits," the lengthy delay in answering without good excuse and the substantial prejudice to the Plaintiff outweighed the Defendant's colorable defense. In *Pittman*, the Complaint was filed on November 5, 1984, in the Circuit Court of DeSoto County, Mississippi. On November 12, 1984, Mr. Hardin, the defendant, was served with process. In January 1985, Hardin spoke by telephone with Pittman's counsel. Pittman's attorney advised Hardin that the suit was going forward and that he needed to employ an attorney. This verbal instruction simply confirmed what the summons advised Hardin. Similarly, in this case American States was served with a summons that gave specific, clear instruction as to the requirement of an answer to the Complaint. On March 14, 2007, American States insurance agent, Bi-

County, personally advised and provided it with a copy of the complaint and summons. On March 15, 2007, counsel for Randy advised American States' claim representative that the Complaint had been filed and followed up by giving yet another copy of the filed complaint to American States on March 26, 2007.

In the *Pittman* case Hardin, like American States, did nothing to protect his rights. A default judgment was entered on February 6, 1985, and the Supreme Court upheld the Circuit Court's refusal to set aside that judgment.

On March 15, 2007, American States was served with a summons which advised it in no uncertain terms that it must answer within thirty (30) days or suffer default. The Court is well familiar with the operative language of a civil summons in Mississippi. The court record in this case demonstrates the clarity with which American States was advised of its responsibilities in this litigation and the consequences of its failure to act. As in *Pittman*, this Court can assume that American States and its agent could count to thirty (30) and that American States and its agent had "some rudimentary familiarity with the Julian calendar" and American States therefore appreciated that its answer was due on or

before April 15, 2007. The record in this case demonstrates that American States, notwithstanding its proper service and the actual notice conveyed to American States by co-defendants and by Randy's counsel, did nothing for a period of some four (4) months other than employ counsel who also did not look to determine that American States had already been served which in fact it had. Six (6) months later American States is asking this Court to forgive it for its absolute indifference to its legal responsibilities in complying with the Mississippi Rules of Civil Procedure and the intended consequences thereof. From the record in this case, as in *Pittman* and *International Paper Co. v. Basila*, 460 S. 2d, 1202, 1204 (Miss. 1984), this Court can only conclude that American States has no bonafide excuse for its failure to answer timely.

Both the decisions in *Pittman* and *Stanford v. Parker*, as well as the dissent in *All-State Insurance Company v. Green*, 794 S. 2d, 170 (Miss. 2001), demonstrate that if there is to be any meaning accorded to a defendant's Rule 12 (a) duty to answer ". . .it may be that people will miss fewer trains if they know the engineer will leave without them rather than delay even a few seconds. . . at some point the train must leave."

Pittman, 501 S. 2d, 377, 388 (Miss. 1987).

b. American States does not have a colorable defense on the merits of this claim.

Randy worked for J & N Timber. J & N Timber had uninsured motorist insurance coverage through American States and that policy specifically names Randy. By American States' own admission in its brief, at the very least there is a clear ambiguity as to whether he is a named insured, and those ambiguities must be resolved in favor of coverage in all uninsured motorist cases.

Randy Rogillio does not concede, nor can this Court conclude, that American States alleged colorable defense is a winning defense or even a defense with any likelihood of success on the merits. To the contrary, Randy respectfully suggests to the Court that the defense "colorably painted" in the American States' brief demonstrates on its face that American States created an ambiguous declaration sheet and an ambiguous policy of insurance by listing Randy as a driver and insured under the policy which it issued to J & N Timber. Further, Plaintiff references the affidavit of William B. Netterville which was produced to American States months ago and prior to litigation to establish for

American States' understanding the same understanding that Mr. Netterville had at the time that he purchased the subject policy of insurance affording coverage to multiple vehicles and multiple drivers.

Randy need not cite the string of cases in which the Mississippi Supreme Court has continuously ruled that ambiguities in policies of insurance are to be construed in favor of the insured and against the insurer. At best the asserted defense set forth in American States' motion demonstrates that this rule of law would apply in this case in the event the matter had been submitted to the Court on its merits rather than by the default brought about by American States failure to answer.

American States claims that Randy was not an insured under the American States policy issued to J & N Timber. However, all drive-other-car coverage endorsement "DOC" has a list of other drivers being the owner of the company and his wife, as well as Randy, and as noted in American States' brief at Page 3 it includes "any other vehicle being used." American States claims that it only covers William B. Netterville and Vicky Netterville, however, attached to that endorsement is a list of drivers which includes Randy (C.P. 39-43). Further, the listing of insured drivers specifically states "your policy has been issued based on the

drivers listing below." It then goes on to state the names of the company owner, his wife and others including but not limited to Randy and it is the only listing of insureds in the endorsement as attached to the drive-other-car "DOC" coverage. American States contends this is not a part of the policy, that it is a separate letter, but American States put it together and submitted it to the insured in this form. Further, the so-called letter which American States refers to as attached to an incomplete DOC endorsement appears a second time in the middle of what American States claims is the policy and in the same place as the DOC endorsement (C.P. 76-78). American States claims that there is no reference to the letter in the DOC endorsement, however, a review of the above referenced pages (C. P. 76-78) indicates that the only names given for the DOC endorsement are in fact the persons listed including Randy. As stated elsewhere, the established law in Mississippi is that coverage issues must, where possible, be resolved in favor of coverage and against the carrier. Further, the drafter of the policy, American States, should bear the burden for any inconsistencies. Based hereon, it is clear that in fact American States does not have a colorable defense and therefore the second prong of the test does not weigh in favor of

American States.

c. Setting aside the default judgment will result in, and in fact, has already resulted in prejudice to Ellis R. Rogillio.

Randy will suffer significant prejudice if the Court grants the relief sought by American States. The resolution of this claim against American States will be protracted and expensive for the appellee. It will involve discovery that will dictate the delay of the trial of this case for months, if not years. The real weight of these burdens will be borne by Randy Rogillio through no fault of his own but simply because of the gross negligence and indifference of American States to the process of the Court. In addition to the expense and the delay that will be suffered by Randy, the Court must also appreciate that given the severity of Randy's injuries sustained in the accident that gives rise to this litigation, he will continue to suffer financial and emotional distress growing out of those injuries, and this too constitutes extreme prejudice in the event that the Court were to set aside the default judgment. Finally, as noted previously, if the default judgment is set aside the litigation against Bi-County Insurance will continue.

B. THE TRIAL COURT EXERCISED DISCRETION IN ACCORDANCE WITH M.R.C.P. 55(C) AND 60(B)

Under the facts and circumstances of this case, there is no requirement that notice be given to a defendant who has neither entered an appearance nor filed any responsive pleading. If counsel for American States had entered its appearance, then this argument might be valid. However, Counsel neither entered its appearance for American States nor filed responsive pleadings and therefore, American States was not entitled to any notice nor was there anyone to give notice to. The fact that there was a telephone conversation between Randy's counsel and a claims representative three months prior to the entry of default does not require, by rule or in any other way, notice to a claims agent for the insurance company under these facts. American States position that the default judgment is void and should be set aside is not well founded and the appeal based thereon should be dismissed in favor of Randy Rogillio.

V. CONCLUSION

Simply put, American States had the legally required notice of this action within a few days of its being filed. It then received further notice and a copy of the complaint from its agent on March 14, 2007. Further

actual notice was given in a conversation between the undersigned and American States on March 15, 2007. And, a second copy of the complaint was transmitted by facsimile on March 26, 2007. Keith Anderson, in his affidavit, further admits that he saw the original complaint and process in one of American State' claims file but "assumed" it was a copy he had previously seen. American States ignored all of this for more than four (4) months and its counsel, employed sometime prior to August 2, 2007, likewise ignored the clearly documented service of process as well as copies of the complaint. The Court properly entered a Default Judgment against American States. American States' own pleadings show significant holes in its alleged "colorable defense". The prejudice that would result to Randy Rogillio if this Court were to set aside the default judgment would be great. This case should be the "poster child" for cases when a defendant is absolutely not entitled to relief from a properly entered Default Judgment. The appeal of American States should be dismissed with prejudice at the costs of American States and the default judgment entered by the trial court sustained.

Respectfully submitted this the 8th day of December, 2008.

ELLIS R. ROGILLIO

BY: _____

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CERTIFICATE OF SERVICE

I, Hollis McGehee, attorney for appellee, Randy Rogillio, do hereby certify that I have this day hand delivered the original and three (3) copies of the above and foregoing brief to the Supreme Court of the State of Mississippi, and by United States mail, postage prepaid, mailed a true and correct copy of the above and foregoing brief to the following:

Hon. Forrest A. Johnson
District 6, Circuit Court Judge
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Counsel for American States

SO CERTIFIED this the 8th **day of December, 2008.**

HOLLIS McGEHEE