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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT WADE PRESLEY — APPELLANT

V. — NO. 2008-KA-0455-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Justin T. Cook, MS Bar No. [redacted]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for Robert Wade Presley

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STATE OF MISSISSIPPI **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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Robert Wade Presley, Appellant
3. Honorable John R. Young, District Attorney
4. Honorable James Seth Andrew Pounds, Circuit Court Judge

This the 14th day of July, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
Justin T. Cook
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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STATEMENT OF ISSUES

ISSUE ONE:

WHETHER MONROE COUNTY'S JURY SELECTION PROCESS IS IN VIOLATION OF TITLE 13, SECTION 5 OF THE MISSISSIPPI CODE.

ISSUE TWO:

WHETHER MONROE COUNTY'S JURY SELECTION PROCESS IS IN VIOLATION OF THE FAIR CROSS-SECTION REQUIREMENT OF SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

STATEMENT OF INCARCERATION

Robert Wade Presley, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Monroe County, Mississippi and a

judgment of Aggravated Driving Under the Influence, following a trial on February 19th, 2008, honorable James Bounds, Circuit Judge, presiding. On March 5th 2008, Mr. Presley was sentenced to twenty (20) years imprisonment in the custody of the Mississippi Department of Corrections.

STATEMENT OF FACTS

On April 4, 2004, around 1:00, there was a traffic collision at Butler Road and Highway 6 in Monroe County, Mississippi. (T. 117). Three vehicles were involved in the collision; a 2003 Mercury Sable driven by Tubtim Holloway (Holloway), a 2004 Ford Crown Victoria driven by Rodney Starling (Starling) and a 1994 Oldsmobile Cutlass with three individuals inside.

The Mercury driven by Holloway came into contact with the Cutlass in the intersection. (T. 107). After the vehicles hit, Holloway's vehicle came into contact with the Crown Victoria driven by Deputy Rodney Starling of the Monroe County Sheriff's Department. (T. 193-94). The Oldsmobile Cutless careened into a ditch down the hill from the intersection. (T. 197). The three individuals in the Oldsmobile were identified as Robert Wade Presley, Greg Thrasher (Thrasher) and Edgar Taylor (Taylor). (T. 198-203).

According to testimony, two individuals in the front seat of the vehicle, Taylor and Presley, were trapped due to the collision. (T. 176). All three individuals in the car, however, were taken to the hospital. (T. 218). It is unclear from the record the exact extent of the injuries to Taylor or the time and ultimate cause of his death.

On March 21, 2006, Robert Wade Presley was indicted for two (2) counts of aggravated DUI against Taylor. Count one was for Taylor's death, while count 2 was for the mutilation or disfigurement of Taylor. (C.P. 10-11). Prior to trial, the state chose to proceed with the second count of the indictment and made a motion to dismiss the first count, which was granted. (C.P.

85-86, R.E. 18-19).

It was agreed, prior to trial, that both parties would stipulate that Taylor had been mutilated and disfigured and that Presley was under the influence of an intoxicating liquor. (Exib. 3).

During pre-trial motions, defense counsel sought to quash the venire based on the improper methods by which the Monroe County Circuit Clerk's office placed registered voters from the master list onto the jury wheel. When called to the stand the circuit clerk, Judy Butler (Butler), explained that names were taken from the master list and placed onto the jury wheel in alphabetical order. (T. 8).

Butler further testified that the Senior Circuit Court Judge directed the clerk's office to draw eight thousand names from the voter's list to be included on the jury wheel. (T. 9). Butler testified that the computer program picked the first eight thousand (8,000) names in alphabetical order and excluded those with names later in the alphabet from being on the jury wheel. (T. 10-11).

Butler testified that there were approximately twenty four thousand (24,000) registered voters in Monroe County. (T. 16). After some argument from both sides, the trial court concluded that the jury "looked very diverse" and denied the motion to quash the venire. (T. 21).

The Appellant was tried, taking the stand in his own defense and maintaining that he was not the driver of the vehicle and that it was, in fact, Thrasher. (T. 272). Thrasher was available to testify at trial, and, as evidenced by the note sent to the judge, gave the jury some concern. (T. 336-337, EXIB.20).

After deliberating, a jury returned a guilty verdict against the Appellant. (C.P. 63, R.E. 10). The Appellant was subsequently sentenced to twenty (20) years imprisonment in the

custody of the Mississippi Department of Corrections. (C.P. 76-78, R.E. 14-16).

On February 27, 2008, the Appellant filed a Motion for New Trial and J.N.O.V. (C.P. 69-70, R.E. 12–13). On March 5 2008 the trial court denied the motion. (C.P. 84, R.E. 17). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a timely notice of appeal. (C.P. 87, R.E. 20).

SUMMARY OF THE ARGUMENT

The process by which the Monroe County Circuit Clerk placed registered voters on the jury wheel was impermissible. The Mississippi Code requires that the methods through which individuals are placed on the jury wheel from the master list be random. By the circuit clerk's own testimony, the process employed by Monroe County lacks any semblance of randomness. This practice is in conflict with the statutory provisions of section five of title thirteen of the Mississippi Code and is a radical departure from the policy statement contained therein.

Furthermore, Monroe County's jury selection process is in violation of the fair-cross section requirement of the Eighth Amendment of the United States Constitution. A clear and distinct group is not allowed to serve on juries in Monroe County; therefore, the Appellant was tried by a jury that did not consist of a fair cross-section of the community. By the clerk's own testimony, two-thirds of registered voters were not permitted the chance to serve on a jury because of the systematic alphabetical order in which members of the jury wheel were selected.

ARGUMENT:

ISSUE ONE: WHETHER MONROE COUNTY'S JURY SELECTION PROCESS IS IN VIOLATION OF TITLE 13, SECTION 5 OF THE MISSISSIPPI CODE.

i. Standard of Review

The decision to quash the venire is a matter entrusted to the sound discretion of the trial

court. ***Evans v. State***, 725 So. 2d 613, 649 (Miss. 1997); ***Street v. State***, 754 So. 2d 497, 505 (Miss. Ct. App. 1999). Therefore, the standard of review for reversal is whether the trial court abused its discretion in denying defense counsel's motion to quash the venire.

ii. By the testimony of the Monroe County Circuit Clerk, the county's placement of citizens on the jury wheel is non-random.

During pre-trial motions, trial counsel sought to quash the venire based on the improper methods by which the Monroe County Circuit Clerk's office placed registered voters from the master list onto the jury wheel. During the course of its motion, the Circuit Clerk, Judy Butler (Ms. Butler) was called to the stand to testify. Trial counsel questioned Ms. Butler concerning the method in which the jury panel report was generated;

> Q. Can you tell the Court how that jury panel report is generated?
>
> A. It's generated through a computer system.
>
> Q. And that computer system is – are all voters – are all qualified voters in Monroe County contained in that computer system?
>
> A. Are you asking is it contained in the jury wheel for this year?
>
> Q. Yes.
>
> A. No, sir, it is not. It does not go all the way through the alphabet.
>
> Q. It does not go all the way through the alphabet.
>
> A. No, sir.
>
> Q. Why is that?

(T. 8).

Ms. Butler then explained that there was a signed order by the Senior Circuit Court Judge directing the clerk's office to draw eight thousand (8000) names from the voter's list to be included on the jury wheel. (T. 9). Trial counsel then questioned the manner in which these

eight thousand (8000) people were chosen for the jury wheel.

> Q. So the Court is aware, that means that jurors who may be after S-T-A, that is their name may begin – their last name, begin with S-T-A, that's the last person who is on that jury list, correct?
>
> A. On this particular one, yes, sir.
>
> . . .
>
> Q. And those automatic exclusion there is no way for this Circuit Court to place those back into the jury pool?
>
> A. No, sir.
>
> . . .
>
> Q. As a result of a computer program that somebody generated?
>
> A. Yes, sir.

(T. 9-10).

After a short line of questioning regarding the computer program, Ms. Butler interjected a more lengthy explanation of the computer program selecting jurors for the jury wheel;

> A. This is not a computer glitch by any means. It is strictly because the number of voters that were ordered to be put into the jury wheel. Had there been 15,000 ordered to be put in there I'm sure it would have gone all the way through the alphabet. It's strictly because of the number that was ordered by the Senior Circuit Judge. And when the computer reached that number based upon the formula it certainly could not go any further. We were ordered to put 8,000 names in there and when those 8,000 names were met it could not go any further and add the other names through the other letters of the alphabet.
>
> Q. So those people that are voters in Monroe voters (sic) were excluded?
>
> A. Yes, sir.

(T. 10).

During cross-examination, the State questioned Ms. Butler regarding the master list and the manner in which the jury wheel was picked from it.

Q. Mr. (sic) Butler, I think I understand, but just to be for sure. When you received your order setting the number of jurors, the list starts at A and then goes through Z?

A. That is correct.

Q. So once it got to S, or whatever this number is, it cut off at 8,000?

A. That is correct.

Q. So on another – say a trial next week, is there a possibility that anything after S would be there?

A. I would have to go back and look at the actual jury wheel for the year. But it is — what [defense counsel] says is true, it did not go all the way through the alphabet to generate the 8,000 names, because it reached number 8,000 prior to getting to the end of the alphabet.

(T. 11).

The State further questioned Ms. Butler regarding whether the Circuit Clerk's Office followed **Mississippi Code Annotated § 33-5-26** when it selected a venire from the jury wheel. (T. 12) **Mississippi Code Annotated § 33-5-26** concerns the methods by which the circuit clerk may select jury panels from those people in the jury wheel.

Respectfully, this line of questioning misses the ultimate question regarding the methods of jury selection of Monroe County. It is entirely possible that the clerk's office validly followed **§ 33-5-26** when it selected the panels from the jury wheel. In fact, even if the clerk's office had followed **§ 33-5-26**, it would be of no consequence. The wheel from which the panels were drawn was corrupt. That is to say, making a random selection out of a large group lacking distinct and discernable characteristics is no way random.

An accurate analogy would be to say that if one were to create a list of citizens of the United States of America, except for citizens of southern states, and randomly draw from it, no citizen of a southern state would be or could be present, thus negating any purported randomness

of those selections.

During re-direct, trial counsel sought to aim the examination back towards the heart of the issue;

> Q. He was asking you about jurors that you have now. I noticed the next week's jurors, the jurors that are called in for next week has the same problem, does it not, it stops at S-T as well?
>
> A. Yes, sir, it would.
>
> . . .
>
> Q. So I'll understand you, every person whose names begins (sic) with T through Z would be automatically excluded?
>
> A. That is correct, in this year's jury pool that is correct.
>
> Q. And there's no way – I mean a computer program has decided this essentially?
>
> A. The computer does the random selection. We have to feed the information into the computer as far as how many names to select –
>
> Q. Sure.
>
> A. – but the computer does select all those names.
>
> Q. And as we stand right here today all T through Z have been automatically excluded?
>
> A. That is correct.

(T. 14).

After continued questioning by trial counsel concerning the purported randomness of the methods used in establishing the jury wheel, Mr. Butler testified,

> A. He ordered 8,000 for this past year, which started in May of 2007 and it goes through April of 2008. By law we have to take the number of registered voters that we have, divide that by the number that the Senior circuit Judge orders that we put into the jury wheel –
>
> Q. Right.

A. – and come up with a key number. So you divide – which is approximately 24,000 and some odd voters. You divide that by 8,000 –

(T. 16)(emphasis added).

By the circuit clerk's own admission, only one third (1/3) of all registered voters in Monroe County were eligible to serve on a jury. Trial counsel further questioned Ms. Butler,

Q. Okay. So can you tell the Court why then people with the letter that end with T to Z were not randomly, they were all excluded, correct?

A. It was based upon the formula and the number of voters we were ordered to put in there.

Q. And so anybody whose last name is Taylor, or Williams, or Zoo, or anybody, they're automatically excluded?

A. For this year only, yes, sir.

Q. For this year only?

A. Yes, sir.

(T. 17.)

After examining Ms. Butler, trial counsel presented its argument in support of its motion. After doing so, trial counsel offered into evidence the jury panel report which listed the names of jurors on the panel, starting with the last name "Alim" and ending with the last name "Standifur." (T. 18, 19, Exib. 2). The State then presented its argument, contending that there was a fair cross-section of the jury present in the venire. (T. 20).

The trial court then made it's ruling;

THE COURT: I've had an opportunity this morning to seat the jury. The jury looked very diverse. I saw what appeared to be a equal number of minorities and whites, and I also saw a equal number of what appeared to be men and women.

Mr. Presley has failed to demonstrate any prejudice to him. And as far as

> the panel, I find that the panel is diverse, it does represent a cross-section of Monroe County and the motion will be denied.

(T. 21, R.E. 21).

iii. The Circuit Clerk's actions constituted a violation of the Mississippi Code's section concerning the placement of voters on the jury wheel.

In the State of Mississippi, jury selection is controlled by **Miss. Code Ann. § 13-5-1, et seq.** These sections are abundant in its theme of randomness.

Courts must make every reasonable effort to comply with the statutory method of drawing, selecting and serving jurors; the jury system must remain untainted and beyond suspicion. ***Avery v. State***, 555 So. 2d 1039 (Miss. 1990), overruled on other grounds, ***Mayfield v. State***, 612 So. 2d 1120 (Miss. 1992).

Mississippi Code Annotated § 13-5-2 provides the public policy of the State of Mississippi in regard to jury service. It provides, in pertinent part;

> It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this chapter to be considered for jury service in this state...

Miss. Code Ann. § 13-5-2 (emphasis added).

Mississippi Code Annotated § 13-5-8 calls for each county to maintain a master list consisting of each county's voter registration. It provides,

> (1) In April of each year, the jury commission for each county shall compile and maintain a master list consisting of the voter registration list for the county.
>
> (2) The circuit clerk of the county and the registrar of voters shall have the duty to certify the commission during the month of January of each year under the seal of his office the voter registration list for the county.

Miss. Code Ann. § 13-5-8

Section 13-5-10 provides for the maintaining of a jury wheel:

> The jury commission for each county shall maintain a jury wheel into which the commission shall place the names or identifying numbers of prospective jurors taken from the master list. In April of each year, the wheel shall be emptied and refilled as prescribed in this chapter.

Miss. Code Ann. § 13-5-10

Section 13-5-12 also provides that the jury commission may use an electronic or mechanical system or device in carrying out its duties. **Miss. Code Ann. § 13-5-12** provides, in part;

> Unless all names on the master list are to be placed on the jury wheel pursuant to Section 13-5-10, the names or identifying numbers of prospective jurors to be placed in the jury wheel shall be selected by the jury commission at random from the master list...

Miss. Code Ann. § 13-5-12 (emphasis added).

Clearly, the methods used by Monroe County conflict with **Miss. Code Ann. § 13-5-12.** According to the clerk's own testimony, there are approximately twenty-four thousand registered voters in Monroe County, making the master list contain twenty-four thousand names. (T. 16). Per order of the Senior Circuit Judge in the county, the first eight thousand (8,000) names were picked, not at random, but in alphabetical order. The Appellant does concede, however, that the jury laws are directional in nature. *See* ***Posey v. State***, 38 So. 324, 326 (1905). *See also* **Miss. Code Ann. § 13-5-87** (stating that the provisions for listing, drawing summoning and impaneling jurors are merely directional). However, in the instant case there is a radical departure from the requirements outlined in the statutes that warrants reversal.

It should also be noted that the Appellant does recognize that the placement of members from the jury wheel on venire panels may be random. It is, however, the non-randomness of the wheel itself which pollutes the randomness of the venire panels.

The Mississippi Supreme Court has reversed civil judgments because of the failure of the circuit clerk to follow the rules outlined in the code. In ***Page v. Siemens Energy and***

Automation, Inc. , the court reversed a civil judgment when the circuit clerk admitted to directing the computer programmer to exclude from jury lists all those on the wheel who had been summoned to jury duty in either circuit or county courts within the preceding two years. ***Page v. Siemens Energy and Automation, Inc.*** , 728 So. 2d 1075, 1082 (Miss. 1998). The ***Page*** Court held;

> "Even if the clerk's office claims expediency as a purpose, this does nothing to change the fact that citizens who were entitled, and who may want, to serve on juries have been intentionally excluded."

Id. at 1080.

In ***Adams v. State***, the deputy clerk unilaterally struck from the jury list all persons over sixty-five years in age as well as those who had served on a jury in the preceding two years. ***Adams v. State***, 537 So. 2d 891 (Miss. 1989). The Mississippi Supreme Court recognized that it had "never condoned a venire selection process completely contrary to [the statutes] wherein the clerk did that which the law expressly prohibits." ***Id.*** at 895.

Unlike the cases noted above, two-thirds (2/3) of registered voters of Monroe County were never given the opportunity to sit. There was no way for them to be summoned. There was no way for them to be exempted from service due to either age or previous jury duty. The actions of the circuit clerk in the case *sub judice* are far more egregious. Two-thirds (2/3) of entitled citizens were denied their right to serve on a jury, a significant departure from the rules.

Furthermore, this denial of the right was not merely random. As indicated in the testimony of the circuit clerk, the selection of those from the master list to be placed on the wheel was not done at random, but, rather, it was done systematically starting with the first name and proceeding in alphabetical order until obtaining the desired number. This non-random exclusion of qualified citizens is in clear violation of the statutes of the State of Mississippi.

As noted above, the Mississippi Supreme Court has been willing to reverse civil judgments when the statutes involving the empaneling of juries are violated. *See e.g.* ***Page***, 728 So. 2d at 1082 Such concerns should be heightened in the criminal context when personal liberties have been deprived of an individual.

iv. Conclusion.

Two-thirds (2/3) of the voting population of Monroe County was unable to participate in jury service due to the non-random alphabetical placement of members of the master list onto the jury wheel. The Appellant was entitled to a trial by a jury of his peers. The selection of jury panels from a jury wheel consisting of one-third (1/3) of the voting population of Monroe County was no not fair cross-section of the community.

ISSUE TWO: WHETHER MONROE COUNTY'S JURY SELECTION PROCESS IS IN VIOLATION OF THE FAIR CROSS-SECTION REQUIREMENT OF SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

i. Standard of Review

The standard of review for constitutional issues is de novo. ***Bakers v. State***, 802 So. 2d 77, 80 (Miss. 2001).

The breadth of the pool from which jurors must be drawn has expanded significantly since the enactment of the Constitution, when service on a jury was limited to those who owned property, essentially including only white men. *See, e.g.*, Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1279, 1296 (2000). Through time, the United States Supreme Court has expanded the categories of individuals to be called for jury service under what is known as the "fair cross-section requirement."

In ***Taylor v. Louisiana***, the United States Supreme Court held that a provision barring women from jury service unless they volunteered violated the Sixth Amendment. The Court

reasoned, "the presence of a fair cross section of the community on venires . . . from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury." ***Taylor v. Louisiana***, 419 U.S. 522, 526 (1975).

In support of this conclusion, the ***Taylor*** Court reiterated its view that the jury's function is to protect against the arbitrary power of an overzealous prosecutor or a biased judge, and added;

> "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury trial."

Taylor, 419 U.S. at 528.

It is noteworthy that this right, despite its importance, is still a qualified one;

> "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."

Id. (internal citation omitted).

In order to make a prima facie case under the fair cross-section requirement, a defendant must show (i) that the alleged exclusion affects a "distinctive group"; (ii) that the representation of the group in venires is unreasonable in proportion to their number in the community; and (iii) that this under-representation results from "systematic exclusion." *See* ***Duren v. Missouri***, 439 U.S. 357, 364 (1979). After a defendant has made a *prima facie* showing the state can save its selection system only by demonstrating that a "significant state interest [is] manifestly and primarily advanced" by the selection process. ***Id.*** at 367. *See also* ***Lanier v. State***, 533 So. 2d

473 (Miss. 1988).

ii. The group in question constitutes a "distinctive group" for purposes of a fair cross-section analysis.

The United States Supreme Court has never precisely defined the term "distinctive group." The Supreme Court has defined it broadly saying that a claim may be made for any "economic, social, religious, racial, political and geographical groups." ***Thiel v. Southern Pacific Co.***, 328 U.S. 217, 220 (1946). *See also* ***Witcher v. Peyton***, 405 F.2d 725, 727 (4th Cir. 1969) (holding "a cross-section of the community includes person with varying degrees of training and intelligence and varying economic and social positions."). Furthermore, there is never a question of which group the petitioner identifies with – a petitioner does not have to be a member of the group which her or she claims is under-represented in order to ask the court for relief. *See* ***Taylor***, 419 U.S. at 526 (holding "there is no rule that [claims] may be made only by those defendants who are members of the group excluded from jury service.").

On the other hand, the Court has stated that "shared attitudes" do not by themselves create a distinctive group, at least when those attitudes "would . . . substantially impair" members of the group from performing their duties as jurors. *See e.g.,* ***Id.*** at 174-75 (allowing exclusion of jurors whose opposition to the death penalty left them uncertain as to whether they could follow the law in a capital case).

In the instant case, there is nothing in the record to note any "shared attitudes" among those registered voters excluded from jury service. However, it is clear that those included constitute a distinctive group.

One's name is an identifiable and distinctive aspect of ones self. One's name, barring legally changing it, is something that is immutable and not attributable to the control of an

individual.

All one would have to do is ask any citizen of Monroe County what there last name was, and immediately know whether they were allowed to serve on a jury. There would be no question that based on the first letter in a family's last name whether all of its members had been excluded from jury service for that year.

iii. The representation of people in the group on juries is unreasonable when compared to their representation in the general population.

Under the second prong of the test, a defendant must show that the representation of a group is not "fair and reasonable in relation to the number of such person in the community." ***Duren***, 439 U.S. at 364. In performing this inquiry, court generally compare the proportion of the group in the total population to proportion of the group in the jury pool. *See* ***Castaneda v. Partida***, 430 U.S. 482, 494 (1977) (concluding that "the degree of under-representation must be proved by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.")

It is also important to note that fair cross-section challenges must implicate the system used to select the jury, rather than the jury itself. *See e.g.*, ***United States v. Miller***, 771 F. 2d 1219, 11228 (9th Cir. 1985).

Under the jury selection system under which the Appellant was sentenced, not only was no person with a name ending in ST or later seated, but no person with such a name would never have been allowed to serve. There can be little argument that the representation of this distinctive group in venires is unreasonable in proportion to their number in the community. As noted from the testimony of the County Circuit Clerk, no members in the community whose last name came after the alphabetical numeration of 8000 jurors picked would be called on for jury duty.

Therefore, logically, their representation on venires was none. This zero percent representation is hardly reasonable.

iv. The exclusion of the distinctive group in question was systematic.

The third prong of the fair cross-section test requires the petitioner to show an inherent procedural deficiency by proving a causal relationship between some aspect of the system and the under-representation at issue. *See* ***Timmel v. Phillips***, 799 F.2d 1083, 1086 (5th Cir. 1986) (concluding that the defendant "must demonstrate... not only that [the group in question] were not adequately represented on his jury venire, but also that this was the general practice in other venires.").

In essence, the petitioner, in order to satisfy the third prong of this test, must prove that the flaws that occurred in the first two prongs are endemic to the jury system, and not merely a result of random chance that put together an unrepresentative jury pool. There can also be little argument that the exclusion of particular residents of Monroe County from service on a jury is systematic. Through the circuit clerk's own testimony, the exclusion of particular members from the pool of those selected to be in venires was not a "computer glitch," but rather a deliberate action done at the direction of the senior circuit judge. As she testified;

> This is not a computer glitch by any means. It is strictly because the number of voters that were ordered to be put into the jury wheel. . . . We were ordered to put 8,000 names in there and when those 8,000 names were met it could not go any further and add the other names through the other letters of the alphabet.

(T. 10).

The Appellant respectfully contends that by the circuit clerk's own testimony, the exclusion of this distinct group was systematic.

v. There was no significant state interest that is manifestly and primarily advanced by the arbitrary exclusion of two-thirds (2/3) of the voting population from the jury wheel.

It cannot be shown that there is a "significant state interest that is manifestly and primarily advanced" by Monroe County's selection process. The only feasible reason for selecting the first eight thousand (8000) registered voters for jury duty is the ease of the circuit clerk. The Appellant respectfully contends the simple ease of the jury selection process is not sufficient to impermissibly deny eligible citizens their constitutional right to serve on a jury.

There can, in fact, be little to no argument that the ease of the circuit clerk constitutes a state interest that is manifestly and primarily advanced. As noted by the Ms. Baker's on testimony, all she does is enter a number into a computer which selects those present on a jury wheel. 8,000 contains 4 digits. 24,000 contains five. Respectfully, one keystroke by the hand of a circuit clerk does not constitute a significant state interest justifying the exclusion of two thirds (2/3) of the population of Monroe County from the right to jury service.

vi. Conclusion.

The Sixth Amendment of the United States Constitution requires that criminal defendants be tried by a jury drawn from a fair cross-section of the community. The procedures employed by Monroe County systematically excluded a distinct group from service on a jury. For the above reasons, the conviction against the Appellant should not stand. The Appellant respectfully requests this honorable Court to reverse and remand this conviction so that the Appellant may be afforded the opportunity of being tried before a jury of his peers drawn from a fair cross-section of the community.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and

vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on charges of two counts of murder and arson, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

CERTIFICATE OF SERVICE

I, Justin T. Cook, Counsel for Robert Wade Presley, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable James Seth Andrew Pounds
Circuit Court Judge
123 Fulton Street
Booneville, MS 38829

Honorable John R. Young
District Attorney, District 1
Post Office Box 212
Corinth, MS 38834-0212

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 14th day of July, 2008.

Justin T. Cook
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200