IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DEBRA S. FIELD — APPELLANT

VS. — NO. 2008-KA-0793

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DEBRA S. FIELDS **APPELLANT**

vs. **CAUSE No. 2008-KA-0793-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Newton County, Mississippi in which the Appellant was convicted and sentenced for her felony of **POSSESSION OF COCAINE**.

STATEMENT OF FACTS

Toby R. Pinson was employed by the Newton County Sheriff's Department on 10 June 2006. At about three o'clock on that day, he participated in license and safety checkpoint on McDonald Road. This roadblock had been authorized by the chief deputy. Pinson was accompanied by a Jeremy Pinson.

At about twenty minutes past three, a truck driven by the Appellant came through the checkpoint. The Appellant stopped. When she was asked for her drivers' licence, she responded that her license was suspended. The Appellant was redolent of an intoxicating beverage. He

instructed her to pull over to the side of the road, which she did.

At the side of the road, Pinson instructed the Appellant to step out of the truck. The Appellant complied with that instruction. When he asked her whether she had had anything to drink, she stated that she had had "a couple" while at the river. He then asked her if she had anything in the truck the possession of which would be illegal. She denied having contraband. When asked whether he could look inside the truck, the Appellant stated that she did not care whether he did since it was not her truck.

Toby Pinson looked into the truck to see if there were any alcoholic beverages in the truck. He noticed a purse. Inside the purse was a cigarette case. In plain view he saw a marijuana cigarette. Pinson then went to the Appellant and gave her the *Miranda* rights. The Appellant admitted that the cigarette case belonged to her and further stated that she had forgotten about the marijuana cigarette.

Pinson then pulled out the cigarette case. When he did so, he saw a plastic bag containing a white substance inside the cigarette case. The Appellant denied that the plastic bag and contents therein belonged to her. There was no one in the truck besides the Appellant. (R. Vol. 2, pp. 62 - 72).

The Appellant's purse was open when Pinson saw it in the truck. (R. Vol. 2, pp. 90 - 91).

Keith McMahan, a forensic scientist employed by the Mississippi Crime Laboratory, analyzed the substance found in the bag. That substance contained cocaine and weighed .38 grams. (R. Vol. 2, pp. 93 - 104).

The Appellant testified on behalf of the defense. She stated that prior to having encountered the checkpoint she had been at the Pearl River in Carthage, camping for the

weekend with others. Her van had broken down while she was camping on the Pearl River, so she borrowed a truck from a neighbor.

She admitted that she gave consent for the search of the truck. She admitted that the cigarette case belonged to her. However, she stated that other people had been inside her cigarette case while she was camping on the Pearl River.

She denied that the bag and contents found in her case belonged to her and stated that she did not know how they got there. She admitted to having had something to drink while camping but denied knowledge of anyone using crack cocaine.

STATEMENT OF THE ISSUES[1]

1. DID THE TRIAL COURT ERR IN SENTENCING THE APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT?

2. DID THE TRIAL COURT ERR IN REFUSING INSTRUCTION D-2?

3. DID THE TRIAL COURT ERR IN ADMITTING EVIDENCE THAT THE APPELLANT WAS IN POSSESSION OF MARIJUANA; DID THE TRIAL COURT ERR IN REFUSING THE DEFENSE TO INTRODUCE INTO EVIDENCE THE FACT THAT A JURY IN A PREVIOUS TRIAL WAS UNABLE TO AGREE AS TO A VERDICT AS TO WHETHER THE APPELLANT HAD BEEN IN POSSESSION OF MARIJUANA?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN SENTENCING THE APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT

2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING INSTRUCTION D-2

---

[1] It appears that the Appellant has attempted to argue an issue that he did not designate as an issue in his "Statement of Issues". Specifically, he has attempted to argue that the search of the truck was unreasonable, beginning at page 14 of his brief. Because he did not designate this issue in the "Statement of Issues", the Court should not entertain that claim. *See* Rule 28(a)(3) MRAP(No issue not distinctly identified shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not identified or distinctly specified). The Court has not requested argument concerning the search, nor is plain error suggested by the record. The putative fourth issue asserted by the Appellant is not properly before the Court.

3. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE THAT THE APPELLANT WAS IN POSSESSION OF A MARIJUANA CIGARETTE

4. THAT THE SEARCH OF THE TRUCK WAS NOT UNREASONABLE

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN SENTENCING THE APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT

In the course of the sentencing hearing, the court noted that the Appellant had no prior felony convictions. The probation officer was also unaware of any pending charges against the Appellant that might result in felony convictions.

The court informed the Appellant that the maximum sentence for her felony was a term of imprisonment of eight years and that the minimum term was two years.

The Appellant stated that she was addicted to marijuana and alcohol. She stated that she had two convictions for driving under the influence of alcohol. She admitted that she had experimented with cocaine. She had been in rehabilitation. She stated that she had a son who was twenty one years of age and a daughter who was sixteen years of age. She stated that she earned $200.00 a week as a caretaker of an elderly lady.

Having heard all this, the court told the Appellant that it had no choice but to sentence her to the maximum term of imprisonment. It explained that she would probably be released earlier than in eight years and expressed the hope that she would use the time to overcome her additions. (R. Vol. 2, pp. 142 - 149).

The Appellant contends that the trial court erroneously believed that it was required to sentence her to the maximum term of imprisonment. The court clearly was not under that impression: it noted the minimum and maximum terms of imprisonment under Miss. Code Ann. Section 41-29-139(c)(1)(B) (Rev. 2005). The court's comment about having no choice, taken in

context, simply meant that it believed the maximum sentence was appropriate in view of the facts and testimony adduced during the sentencing hearing. The court clearly knew that it had discretion in what sentence to impose, within the confines of the statute.

The Appellant cites *United States v. Hurt*, 488 F.2d 970 (5th Cir. 1974) with respect to sentencing issues under federal law. The sentence here was not a federal sentence, and federal sentencing issues are not relevant. In any event, given the fact that the court held a sentencing hearing, it can hardly be said that there was anything "inflexible" about the court's approach in arriving at a sentence for the Appellant. In this State, it is a matter left to the discretion of the sentencing judge as to what sentence should be imposed. A sentencing decision is not subject to appellate review, so long as the sentence imposed is within statutory limits. *Minor v. State*, 992 So.2d 664, 666 (Miss. Ct. App. 2008).

The Appellant then says that the sentence was disproportionate *a la Solem v. Helm*, 463 U.S. 277 (1983). The Appellant did not object to her sentence on this ground; nor did she attempt to produce evidence on the *Solem* factors. The proportionality claim raised here for the first time is barred for review for these reasons. *Robinson v. State*, 784 So.2d 966, 971 (Miss. Ct. App. 2000). No *Solem* analysis could be considered here, even if the Court were inclined to do so, in view of the fact that there was no evidence on the factors to be taken into consideration when undertaking a full *Solem* analysis.

The First Assignment of Error is without merit.

2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING INSTRUCTION D-2

The Appellant sought an instruction which would have instructed the jury that she was a competent witness in her own behalf and that her testimony should not be disregarded simply because she was the accused. It then went on to instruction the jury that the Appellant was

clothed with the same mantel of credibility as all other witnesses, and that the jury were to give her testimony the same weight and credibility as they would with other witnesses in the light of the evidence. (R. Supp. Vol. 1). This instruction was refused by the trial court. (R. Vol. 2, pg. 124).

The Appellant asserts here that an accused is entitled to jury instructions on his theory of the case. That may well be true, where such instructions are supported by the evidence and are correct statements of law, but how D-2 is an instruction concerning the Appellant's theory of the case is a matter left unexplained by the Appellant. D-2 had nothing to do with a defense theory.

On the other hand, it is well established that instructions of this kind are not to be given. *E.g. Gates v. State*, 936 So.2d 336, 338 (Miss. 2006); *Outlaw v. State*, 797 So.2d 918 (Miss. 2001).

Even if this State permitted an instruction such as this to be given, the form of the instruction in the case at bar was an incorrect, confusing or misleading one in that it would have informed the jury that it was "to give [the Appellant's testimony] the same weight and credibility you would with any other witness in the light of the evidence." It is certainly a jury's task to determine what weight and credibility to give to witnesses and their testimony. But the instruction here appears to attempt to say that the jury was required to give the Appellant and her testimony the same weight and credibility as the other witnesses. The jury, however, was under no such obligation. The instruction would have been properly refused for this reason as well.

The Second Assignment of Error is without merit.

3. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE THAT THE APPELLANT WAS IN POSSESSION OF A MARIJUANA CIGARETTE

It appears that there was some kind of an agreement or ruling, prior to the production of

evidence of the Appellant's guilt for possession of cocaine, concerning her possession of a marijuana cigarette. If so, it was quite obscure. Nonetheless, there was talk of transferring the cocaine into another evidence bag, in an attempt, apparently, to separate it from the marijuana cigarette. (R. Vol. 2, pp. 33 - 36).

In the course of the trial, though, the witness Pinson testified that he found a marijuana cigarette in the Appellant's purse. The Appellant objected and moved for a mistrial; the objection and motion for a mistrial were overruled. (R. Vol. 2, pp. 67 - 68).

As the defense began its cross-examination of Pinson, it moved for a mistrial again, asserting that the marijuana possession issue was a separate and distinct matter from the cocaine possession issue. (R. Vol. 2, pg. 73). The State responded that evidence of marijuana possession would be admissible under M.R.E 404(b) and because of the connection between the marijuana possession and cocaine possession. The State pointed out that it was the discovery of the marijuana that led to the discovery of the cocaine. The Appellant, apparently, had been previously convicted of possession of marijuana, but the State indicated that it had no intention of proving the conviction itself. After further discussion and argument, the court overruled the Appellant's motion for a mistrial. (R. Vol. 2, pp. 74 - 79).

At that point, the Appellant requested, apparently, that she be able to proved that the jury in a previous trial could not reach a verdict on the possession of cocaine charge, though it did convict her of the marijuana charge. We say apparently because it is none too clear what the defense was urging upon the trial court. The Appellant's argument in support of the admission of this evidence was, apparently, that the State, by admitting evidence of possession of marijuana, somehow "opened the door" to proof that the jury in the prior trial could not agree as to the Appellant's guilt for possession of cocaine, or maybe that it "opened the door" to the fact of

conviction for possession of marijuana. (R. Vol. Pp. 79 - 81; 86). While not clear, it appears that the trial court ruled that the Appellant could establish what she wanted to establish in this regard. (R. Vol. 2, pg. 87). What she wanted to establish may have been that she had previously admitted, in court, possession of marijuana, or that she had been so convicted, or perhaps that the jury in the previous trial could not agree as to the cocaine charge, or maybe all three.

But this was not the end of this peculiar discussion. The State then raised the issue of the relevance of the result of the previous trial with respect to possession of cocaine. To this, the defense responded that it was attempting to prevent the evidence concerning marijuana out of the trial. The defense then wandered off into some talk about prejudice. The trial court then decided that the result of the previous trial concerning possession of cocaine was irrelevant. (R. Vol. 2, pp. 88 - 89).

At long last, the Appellant cross -examined Pinson. However, nothing was mentioned about the result of the previous trial with respect to the marijuana or cocaine. (R. Vol. 2, pp. 89 - 92).

TESTIMONY THAT A MARIJUANA CIGARETTE WAS FOUND IN THE APPELLANT'S PURSE

The Appellant asserts that, prior to the production of evidence, the trial court ruled that the State would not be permitted to prove that a marijuana cigarette was found in the Appellant's purse. We do not agree that that is what the trial court ruled, though certainly there is a degree of ambiguity about the ruling. It appears to us that what the trial court was attempting to rule was that the fact of the conviction for possession of marijuana would not be admitted. To say otherwise would make the later ruling concerning the fact of possession in apparent conflict with the earlier ruling. In any event, it is a dispute of no importance.

The testimony, without conflict, was that the Appellant consented to a search of the truck. At the time, the deputy wanted to determine whether there were containers of alcohol in the truck. The Appellant's purse was in the truck, and was open, and as the deputy stated, the marijuana cigarette was in "plain view". When confronted with the marijuana cigarette, the Appellant effectively admitted possession of it. It was the discovery of this marijuana that prompted a further search of the cigarette case.

It was necessary to explain to the jury what prompted the deputy to search the cigarette case. The State had the right to present a logical, coherent story of the crime. Moreover, the possession of the marijuana and possession of cocaine was contemporaneous. This is not an instance in which some bad act or crime was temporally removed from the crime being prosecuted. The Appellant was simultaneously in possession of both drugs. Under these circumstances, there was no error in permitting the State to establish that the Appellant was in possession of marijuana. *Watson v. State*, 2007-KA-01747-COA (Miss. Ct. App., decided 25 November 2008, Not Yet Officially Reported)(State may prove another crime where, *inter alia*, the crime charged and crime offered are so connected as to constitute one transaction or closely related series of transactions or where necessary to tell the complete story of the crime).

In the case at bar, the evidence of the Appellant's possession of marijuana was necessary to explain the deputies actions subsequent to that discovery. In addition to this, since the possession of the marijuana occurred at the same time and the same place as possession of cocaine, the possession of these substances amounted to a single transaction. The evidence of the marijuana was a part of the *res gestae* of the crime of possession of cocaine.

The evidence was also admissible under rule 404(b). The Appellant, it will be recalled, testified that she knew nothing about the presence of cocaine in her cigarette case. The fact that

she was in possession of marijuana and that she admitted being in possession was probative on her knowledge of the presence of cocaine in her cigarette case.

THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO ADMIT EVIDENCE TO THE EFFECT THAT THE JURY IN THE APPELLANT'S PRIOR TRIAL COULD NOT REACH A VERDICT AS TO THE POSSESSION OF COCAINE COUNT OF THE INDICTMENT

The Appellant asserts that, because the trial court permitted the State to prove that the Appellant was in possession of marijuana, the door was opened to proof that the jury in the previous trial could not agree on a verdict on the possession of cocaine charge.

First of all, the "open door" doctrine is not applicable here. Under that rule, where the accused introduces evidence or testimony on a subject, he is said to have "opened the door" to otherwise inadmissible evidence concerning that subject. *Gunnell v. State*, 750 So.2d 1284 (Miss. Ct. App. 1999). Here, the defense did not "open the door" to evidence about possession of marijuana. What occurred was that the State introduced evidence, which the trial court determined to be admissible evidence. As demonstrated above, there was nothing improper about the admission of the evidence concerning possession of marijuana. Consequently, we completely fail to see how that evidence "opened the door" to admission of evidence concerning the result of the trial with respect to possession of cocaine.

Secondly, we fail to see any logic in the notion that the result of the previous trial vis a vis the cocaine charge became admissible for no better reason than that evidence was produced to show that the Appellant was in possession of marijuana. In fact, the idea seems to be a *non sequitur*. The issue was about the admissibility of the marijuana cigarette. That had nothing whatsoever to do with the fact that there had been a mistrial earlier concerning the cocaine charge.

Under M.R.E. 401, the result in the previous trial was simply irrelevant. It was probative

of nothing, in terms of the Appellant's guilt. The failure to agree upon a verdict could have been caused by any number of reasons having nothing to do with whether the State proved the Appellant's guilt beyond a reasonable doubt at the first trial.

We have found no case directly on point on this issue – the issue being whether the fact that a jury failed to agree upon a verdict in a prior trial of an accused is admissible in a subsequent trial of that accused. However, *Garner v. State*, 856 So.2d 729 (Miss. Ct. App. 2003) is informative. In that decision, the accused attempted to establish that his co-defendant had been acquitted of the crime for they were charged. This Court, noting that the State may not attempt to bolster its case against a defendant by establishing that his co-defendant had been convicted of the crime charged against them, found no principled reason not to apply the same rule in the instance of an acquittal of a co- defendant.

Now, of course there is no co - defendant in the case at bar. But, in *Garner*, the Court pointed out several considerations which we believe are applicable here. The Court noted:

> A jury trying a criminal case normally must sort through substantial amounts of evidence, some portions tending to indicate guilt and other portions tending to exonerate the defendant. In that situation, it would be essentially impossible to draw a direct link between the verdict of acquittal and any particular aspect of the proof. Even if it is assumed that the prior verdict speaks, in some indirect way, to that jury's assessment of the victim's credibility, it would be improper to afford the subsequent jury that information. To do that would, in effect, install the earlier jury as an advisory body offering its own view as to [the accused's] credibility and would tend to usurp, or at the very least, improperly influence the deliberations of the jury on issues that are solely within the province of the finders of fact.

Garner, at 732. The same considerations are involved here, we submit. In effect, the Appellant would have had the jury in the first trial act as something like an advisory jury. This would have been as improper as it was in *Garner*. The difference between an acquittal of a co - defendant and a hung jury in an earlier trial is a difference without significance in view of the fact that in

either case to inform the jury of what a jury in an earlier case had done would be to invade and improperly influence the jury.

The Third Assignment of Error is without merit.

4. THAT THE SEARCH OF THE TRUCK WAS NOT UNREASONABLE

In the Appellant's final assignment of error, he contends that the search of the truck was in violation of the federal constitution because the roadblock set up by law enforcement was improperly conducted. We again note that this issue was not among those set out in the appellant's "Statement of Issues". For that reason it may not be considered here, in accordance with Rule 28(a)(3) MRAP.

Assuming for argument that the Court will consider the issue, notwithstanding the clear language of Rule 28(a)(3), there is no merit in it.

The Appellant was stopped at a roadblock. Present at the roadblock were Toby and Jeremy Pinson. Toby Pinson was not a departmental supervisor. The Newton County Sheriff's Department had in place a written policy concerning roadblocks. It required, among other things, that the sheriff or his designated representative authorize a roadblock and that a departmental supervisor be present when any roadblock so authorized was set up. The roadblock was authorized by Chief Deputy Billy Pat Walker. He did not participate in it, however.

Every vehicle that encountered the roadblock was stopped. The purpose for the roadblock was for a "safety check" and to check driver's licenses. (R. Vol. 2, pg. 64). The other requirements of the policy were adhered to. (R. Vol. 2, pp. 39 - 48; Defendant's Exhibit 1).

The Appellant asserts that the roadblock was invalid because it was not entirely in compliance with the Sheriff's Department's policy. Specifically, the Appellant claims that the

roadblock was improper because there was no supervisor present and because there were not at least three law enforcement men present. It is also said here, for the first time, that Jeremy Pinson was not properly a part of the roadblock because he was a police officer in Hickory, Mississippi.

We bear in mind the standard of review appurtenant to this claim. *Hampton v. State*, 966 So.2d 863 (Miss. 2007).

Ordinarily, there are three factors the Court should consider when addressing a claim that a roadblock was violative of an accused's Fourth Amendment rights. Those considerations are: (1) existence of a strong public interest in maximizing success in combating the problem at hand, (2) an inability to achieve adequate results by relying on probable cause determinations, and (3) the "relatively limited invasion of the citizen's privacy" involved in the procedure in question. *Hampton, supra*, at 866. Here, however, it is not necessary to dwell at length upon these considerations – the Appellant does not base his argument upon them. His argument is simply that the stop was invalid since the officers did not follow the written policy in all respects.[2]

That the officers did not comply with each and every detail of the policy did not invalidate the roadblock. The presence or absence of a third officer would not have validated an otherwise invalid roadblock, nor invalidated a valid one. Any failure by the officers to comply with this aspect of the policy was not prejudicial to the Appellant.

---

[2] Had the Appellant based his argument on these three considerations, it would have been without merit. The officers received permission to set up the roadblock, and they stopped each driver who came through it. The courts of this State have recognized the propriety of safety checkpoints and driver's license checks. *Hampton, supra*; *McClendon v. State*, 945 So.2d 372 (Miss. 2006). The roadblock in the case at bar was not for the purpose of general crime control, nor was the Appellant randomly stopped.

The important parts of the policy were adhered to. The officers were authorized by a supervisor to set up the roadblock. They stopped every vehicle that came to the roadblock The purpose was not crime control, but was simply a safety and driver's license check. The officers were not exercising discretion as to which cars they would stop. In *McClendon v. State*, 945 So.2d 372 (Miss. 2006), the Court noted (relying upon *Dale v. State*, 785 So.2d 1102 (Miss. Ct. App. 2001)) that, where each and every vehicle is stopped, the officers' discretion has been removed, thus removing any potential unconstitutionality of the roadblock. *McClendon*, at 381. The roadblock was set up in a constitutionally acceptable fashion.

That an officer from the town of Hickory participated in the roadblock is neither here nor there. The policy did not prohibit officers from other agencies to participate in the sheriff's roadblocks, and the Appellant presents no authority to demonstrate that officers from law enforcement agencies other than the one which authorized a roadblock may not participate in the roadblock. And, of course, the Appellant does not demonstrate how she was prejudiced by his participation.

Th Appellant cites *United States v. Huguenin*, 154 F.3d 547 (1998) for the proposition that, where a policy exists regarding roadblocks, the terms of the policy should be followed. In that case, though, the officers there effectively turned a roadblock into a "roving patrol" by selectively determining which cars or drivers would be detained or questioned, in violation of policy. The failure to have a third officer at the roadblock in the case at bar is hardly similar to what was done in *Huguenin.*

The Appellant cites *Delaware v. Prouse*, 440 U.S. 648 (1979) for the proposition that random stops of motorists may be constitutionally impermissible. There is no need here to

consider that decision in view of the fact that the Appellant was not subject to a random stop. This was a roadblock at which every car approaching it was stopped.

There was no substantial deviation from the sheriff's policy concerning roadblocks, and certainly none that prejudiced the Appellant. The Fourth Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

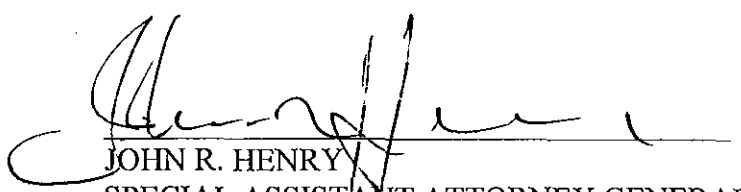
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable V. R. Cotten
Circuit Court Judge
205 Main Street
Carthage, MS 39051

Honorable Mark Duncan
District Attorney
P. O. Box 603
Philadelphia, MS 39350

Edmund J. Phillips, Jr., Esquire
Attorney At Law
Post Office Box 178
Newton, MS 39345

This the 6th day of March, 2009.



JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680