IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HOWARD MONTEVILLE NEAL — APPELLANT

VS. — NO. 2008-KA-1295

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HOWARD MONTEVILLE NEAL — APPELLANT

vs. — CAUSE No. 2008-KA-01295-COA

THE STATE OF MISSISSIPPI — APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of Lamar County in which the prisoner's sentence of death was vacated and a sentence of life imprisonment without the possibility of parole imposed.

STATEMENT OF FACTS

The prisoner was convicted and sentenced to death for the January 25th, 1981 capital murder of Amanda Joy Neal. (R. Vol. 1, pp. 5 - 7). The prisoner's conviction and sentence of death were affirmed by the Mississippi Supreme Court. *Neal v. State*, 451 So.2d 743 (Miss. 1984). For the next twenty - five years, the prisoner was a frequent customer in the courts of this State as well as in the federal courts. It is, however, unnecessary to recite that litigation in detail

in view of the issue presented on this appeal.[1]

Relevant to the issue in the case at bar is the fact that the prisoner's sentence of death was vacated by Order of the Circuit Court of Lamar County filed on 14 August 2007. (R. Vol. 2, pp. 203 - 204). This Order was in response to the State's motion to vacate the prisoner's death sentence, which motion had been prompted by a report by the forensic staff at the State Hospital to the effect that the prisoner was mentally retarded within the meaning of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The State's motion also sought re-sentencing to life without parole for the prisoner. (R. Vol. 2, pp. 183 - 188).

The prisoner filed a response to the State's motion, admitting that the death sentence should be vacated but asserting that he should be sentenced to life with the possibility of parole. (R. Vol. 2, pp. 195 - 200). The Circuit Court granted relief on the State's motion to the extent of vacating the sentence of death, but set the issue of re-sentencing down for a hearing. (R. Vol. 2, pp. 203 - 204).

At the hearing, the prisoner asserted that it would be a violation of the proscriptions against the ex post facto provisions of the State and federal constitutions to impose a sentence of life without the possibility of parole. It was the prisoner's position that, in 1981, the only options as to sentencing in a capital murder case were death and life with the possibility of parole. (R. Vol. 3, pg. 3). In his brief in the Circuit Court, the prisoner elaborated upon this claim, stating that at the time of his conviction, said to have been 2 February 1982, Miss. Code Ann. Section 97-3-21 provided these two sentencing options only. According to the prisoner, Section 97-3-21

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[1] If, however, the Court finds it necessary or desirable to review the history of this litigation, then we adopt here the State's statement concerning this litigation set out in Her "Motion to Vacate Sentence of Death and Resentence Petitioner to Life Without Parole". (R. Vol. 2, pp. 183 - 187).

was amended in 1994 to include life without parole as a sentencing option.

The prisoner did, however, acknowledge the Mississippi Supreme Court's decision in *Foster v. State*, 961 So.2d 670 (Miss. 2007), in which the Court held, in a case of a murderer who was under the age of eighteen at the time of the capital murder, that that appellant was subject to re - sentencing under Miss. Code Ann. Section 99-19-107 (Rev. 2006). He attempted to distinguish *Foster* by alleging that Section 99-19-107 was not in effect until some five months after the prisoner was convicted of the murder in the case at bar. (R. Vol. 2, pp. 195 - 200).

The Circuit Court sentenced the prisoner to life without parole, to be served consecutively with the sentence imposed in another of his murder convictions. (R. Vol. 3, pp. 4 - 6).

STATEMENT OF ISSUES

1. DOES THE SENTENCE IMPOSED BY THE CIRCUIT COURT VIOLATE THE EX POST FACTO CLAUSES OF THE MISSISSIPPI AND FEDERAL CONSTITUTIONS?

SUMMARY OF ARGUMENT

THAT THE SENTENCE IMPOSED BY THE CIRCUIT COURT DOES NOT OFFEND THE EX POST FACTO CLAUSES OF THE MISSISSIPPI AND FEDERAL CONSTITUTIONS

ARGUMENT

THAT THE SENTENCE IMPOSED BY THE CIRCUIT COURT DOES NOT OFFEND THE EX POST FACTO CLAUSES OF THE MISSISSIPPI AND FEDERAL CONSTITUTIONS

The prisoner appears to tender two arguments in support of his claim that the Circuit Court erred in sentencing him to life without the possibility of parole. It is said, first, that the trial court should not have resorted to the present form of Miss. Code Ann. Section 97-3-21 (Rev. 2006) which, *inter alia*, provides for a life sentence without possibility of parole upon conviction of capital murder. It is said that there was no provision for a sentence of life without parole under Section 97-3-21 as that statute existed at the time the prisoner committed the capital

murder at bar. Secondly, it is said that Miss. Code Ann. Section 99-19-107 (Rev. 2007) has no application to the case at bar because: (1) it was intended by the legislature to apply only in an instance where the death penalty in its entirety may be struck down by the Mississippi or federal supreme court; (2) the statute, as construed by the Mississippi Supreme Court until *Foster v. State*, 961 So.2d 670 (Miss. 2007), would not have been applied under the facts of the case at bar, and (3) that application here of *Foster*'s understanding of Section 99-19-107 would amount to a violation of due process.

MISS. CODE ANN. SECTION 97-3-21

Why the prisoner has attempted to allege error on the part of the Circuit Court, by allegedly having re-sentenced him under the provisions of Miss. Code Ann. Section 97-3-21 (Rev. 2006) is something which, we suppose, will remain a mystery. The fact of the matter is that the Circuit Court did not re-sentence the prisoner under authority of this statute, and in fact did not in its re-sentencing order or in the hearing so much as mention this statute. (R. Vol. 2, pp. 209 - 213; Vol. 3, pg. 6). It is true that the court mentioned a *Watts v. State*, perhaps intending to cite *Watts v. State*, 733 So.2d 214 (Miss. 1999), a decision that did involve a discussion of Section 97-3-21. (R. Vol. 2, pp. 3 - 4). But even so, it is very clear that the prisoner was re - sentenced under authority of Miss. Code Ann. Section 99-19-107 (Rev. 2007). (R. Vol. 2, pg. 212). Since the Appellant was not re-sentenced under Section 97-3-21, there is no need and no purpose in discussing the statute, or whether application of an amendment to it, said to have occurred in 1994, would be applicable under the circumstances in the case at bar.[2]

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[2] The prisoner claims that he committed this murder in February of 1981. This is untrue: it is true that the body of the victim was found then, but as the indictment and the Mississippi Supreme Court's opinion in the direct appeal of the case show, the murder occurred on 25 January 1981.

There was no ex post facto application of a 1994 amendment to Section 99-3-21 in the case at bar.

MISS. CODE ANN. SECTION 99-19-107

The prisoner's argument in support of his claim that Section 99-19-107 should not have been availed of in his re-sentencing is mostly a complaint about the Mississippi Supreme Court's decision in *Foster v. State*, 961 So.2d 670 (Miss. 2007). In that decision, the Court held that Section 99-19-107 was properly applied in the re - sentencing of a prisoner then under sentence of death who committed his capital murder when he was under the age of eighteen, overruling *Abram v. State*, 606 So.2d 1015 (Miss. 1992) to the extent that *dicta* in *Abram* indicated that Section 99-19-107 applies only if and when the State's death penalty scheme is wholly invalidated. The Court in *Foster* specifically held that there was no violation of the ex post facto clauses in applying Section 99-19-107 in cases in which the federal supreme court has invalidated the death penalty as to particular classes of persons.[3]

Section 99-19-107 was enacted in the 1977 term of the legislature. In 1977, the statute provided:

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[3] The prisoner notes this Court's decision in *Randall v. State*, 987 So.2d 453 (Miss. Ct. App. 2008), and asserts that *Randall* has no bearing upon the issues in the case at bar "for reasons explained below". (Brief for the prisoner, at 13, fn. 3). He never explains why that decision has no bearing in the case at bar, but we do agree with him. Although citing *Foster*, *Randall* involved Section 99-3-21, not Section 99-19-107. *Randall* is no authority here because it did not concern Section 99-19-107 and because the instant case did not involve Section 99-3-21.

It is true that the appellant in *Foster* asserted that it was a violation of the proscriptions against ex post facto laws to apply an amendment to Section 99-3-21 retroactively. But it is very clear that the holding in *Foster* was based entirely upon Section 99-19-107. The Supreme Court said nothing in *Foster* concerning retroactive application of Section 99-3-21 or any amendments thereto.

> In the event the death penalty is held to be unconstitutional by the Mississippi Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death shall cause such person to be brought before the court and the court shall sentence such person to imprisonment for life, and such person shall not be eligible for work release or parole.

Miss. Laws, 1977, Ch. 458, Section 5. In 1982, this statute was amended so as to strike the statement concerning ineligibility for work release; otherwise the statute was unchanged. Consequently, Section 99-19-107, as relevant in the case at bar, was in effect prior to the time the prisoner committed this capital murder and was in effect at the time he was sentenced. There was no violation of the prohibitions concerning ex post facto laws in applying this statute here, just as there was not in *Foster*.

The ex post facto clauses are directed to acts of the legislature, not to interpretations of statutes by the judiciary. *Rogers v. Tennessee*, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed. 2d 697 (2001). The prisoner's argument is not so much concerned with Section 99-19-107 as it is with the Mississippi Supreme Court's interpretation of Section 99-19-107. The question presented on this appeal is essentially a claim of a violation of due process, rather than a claim of a violation of the proscriptions against ex post facto statutes.

It may be that there is authority to the effect that judicial interpretations of statutes, applied retroactively can, in certain instances, violate the due process clause of the Fourteenth Amendment. *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). The prisoner does assert here that the decision in *Foster* was a violation of due process, but this ground was not alleged in the Circuit Court so far as we can see, and the circuit court did not address any such claim. That being so, it may not be raised here. *Jones v. State*, 856 So.2d 389, 392 (Miss. Ct. App. 2003). Since the question presented is not an ex post facto question and since the prisoner did not raise a due process issue in the circuit court, there is no basis to reverse

the circuit court's decision as to sentence.[4]

Assuming for argument, however, that this Court finds that the ex post facto clauses are implicated in this appeal or that the due process issue has somehow been preserved for review, notwithstanding the foregoing reasons why it should not so find, there is no merit in the prisoner's claims.

The heart of the prisoner's claim is that Section 99-19-107 was intended by the legislature to apply only in the event that the State or federal supreme court invalidated the State's death penalty in its entirety. In considering this claim, two decisions of the federal supreme court should be kept in mind.

In *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), five members of the United States Supreme Court decided that to impose the death penalty upon a person who committed capital murder when he was under the age of eighteen years offended their ideas about the federal constitution, or, if not their ideas, their standards of decency. It was this decision that resulted in the vacation of the death sentence imposed in *Foster*, *supra*. The holding in *Roper* invalidated the death penalty for a class of persons, namely those who committed their capital murders when they were under the age of eighteen years.

In *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), a majority of the members of the supreme court decided that it offended their view of the federal constitution to execute the mentally retarded. By doing so, they excluded another class of persons convicted of capital murder from the prospect of facing the death penalty.

It may be that the legislature in Section 99-19-107 did not explicitly address this death-

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[4] And to the extent that the prisoner would have this Court ignore or overrule *Foster*, it is hardly necessary to point out that this Honorable Court does not possess the authority to do so.

by-a-thousand-cuts approach taken by the supreme court concerning the death penalty. However, the intention of the legislature was quite clear in that where the supreme court does invalidate the death penalty in and of itself, and not because of some reason of law specific to a particular case, those affected by such a decision are to be sentenced to life without the possibility of parole. In the case at bar, the prisoner's death sentence was vacated not because of some evidentiary or other defect at his trial. It was invalidated because he and others similarly situated simply may not be executed, according to the federal supreme court. It is perfectly consistent with the evident intention of the legislature to understand Section 99-19-107 as being as applicable to instances in which entire classes of persons have been judicially held not to be subject to the death penalty. As to them, the federal supreme court has invalidated the death penalty.

The prisoner's construction of the statute otherwise leads to an absurd result. As he would have this Court read the statute, Section 99-19-107 would apply if and only if the entire death penalty scheme should be stricken, in consequence of some decision by the State or federal supreme court, but would not apply if either of those courts adopted a gradualist policy of invalidating the death penalty by classes of persons. There is no good reason to suppose, and none is argued, that the legislature somehow saw a difference in result in terms of re-sentencing in consequence of a class by class invalidation of the death penalty versus a wholesale invalidation of it. There is no good reason to suppose the reasons that gave rise to the enactment of Section 99-19-107 would not be equally applicable to classes of individuals otherwise subject to the death penalty as well as the death penalty itself. The Court should not adopt an unreasonable understanding of the statute, or one which would lead to an absurd result. *Clark v. State*, 858 So.2d 882 (Miss. Ct. App. 2003).

The prisoner cites examples of death penalty cases in which the death penalty was

vacated on account of some evidentiary deficiency. Asserting that in such instances the death penalty could not be reimposed, he asks whether a life without parole sentence could be imposed under Section 99-19-107. (Brief for the prisoner, at 12). The answer would be that Section 99-19-107 is not applicable in such cases. In such an instance, it would be a defect in the evidence that would result in the vacation of a specific sentences, rather than an invalidation of the death penalty as to classes of people, regardless of how well established the evidence might have been in support of a sentence of death. If indeed the State could not again seek the death penalty, this would be on account of double jeopardy principles. Section 99-19-107 has no application where specific cases are reversed on account of insufficient evidence or trial errors; it has application only where the death penalty is banned as to specific classes of persons or banned as to all persons, regardless of how pristine their trial, or clear their guilt.

Abram v. State, 606 So.2d 1015 (Miss. 1992) is illustrative. In that decision, the circuit court of Marion County found that the State's evidence failed to show one of the *Enmund* factors beyond a reasonable doubt. The court sentenced that defendant to life imprisonment without the possibility of parole, under Section 99-19-107, it finding that the death penalty was unconstitutional with respect to that defendant. *Abram*, at 1038 - 1039. The Supreme Court found error in this. The Court found that the trial court committed error in supposing that Section 99-19-107 was applicable, after having "stayed" execution of the sentence of death. The Court indicated that the sentence to be imposed, if not death, was life imprisonment under Miss. Code Ann. Sections 99-19-101(3), 103, 105(5)(b) (Supp. 1991).

In doing so, the Court made the statement, one entirely unnecessary to the decision, that Section 99-19-107 applies only in the event of a wholesale declaration of invalidity of the death penalty. It is that statement upon which the prisoner's argument is based. *Abram* was simply a

case in which the evidence was found to be insufficient with respect to one of the *Enmund* factors, resulting in the invalidation of the sentence of death in that case. Under such a circumstance, Section 99-19-107 has no application.

The Court was correct in finding that Section 99-19-107 was inapplicable in *Abram*, but it went too far with its offhand statement concerning a wholesale declaration of invalidity, a fact recognized by the Court in *Foster*. *Abram* did not involve the invalidation of the death penalty with respect to a class of persons, of which the defendant was a member; it was simply an instance in which there was a question of whether the State had proved its case in a particular case. What was necessary to the decision in *Abram* was to decide whether Section 99-19-107 had potential application in an instance in which the State failed or may have failed in its burden of proof to support a sentence of death in a particular case. It was not necessary to the decision, though, to consider the scope of Section 99-19-107 – whether Section 99-19-107 applied only in the event of a "wholesale" invalidation of the death penalty, or whether it also applied in the instance of a "wholesale" invalidation as to particular classes of persons who would be subject to the death penalty but for a decision by the State or federal supreme courts otherwise. Section 99-19-107 was simply inapplicable in *Abram* because there was no "wholesale" declaration of invalidity of the death penalty as to a class of persons or as to all persons under sentence of death. The *Foster* Court was thus correct to characterize the language used in *Abram* as *dicta*.

The Court also noted in *Abram* that there were, at the time, no decisions concerning Section 99-19-107. Thus, the Court's offhand language had no authority in support of it, nor was there any attempt by the Court to support the statement by an investigation into the reasons the legislature enacted the statute in order to support its unsupported statement. The statement seized upon here simply did not carry the weight of law. Moreover, at the time of the decision in

Abram, the federal supreme court had not invalidated death sentence schemes on a class by class basis. Thus the *Abram* Court did not consider the applicability of Section 99-19-107 in that circumstance and had no occasion to do so. *Foster* thus is the first decision properly construing the purpose and scope of Section 99-19-107. It is not a decision that changed a prior and different construction of the statute.

Nonetheless, the prisoner attempts to demonstrate now, though the writings of a newspaper writer, what the legislature intended when it enacted Section 99-19-107.[5] (Brief for the prisoner at 17). These newspaper articles are to be ignored since they form no part of the record before the Court. *Mason v. State*, 440 So.2d 312 (Miss. 1983). As for the rest of the prisoner's discussion of the legislature's actions after the federal supreme court got into the business of tinkering with the mechanics of death, nothing in that discussion shows that the legislature intended that Section 99-19-107 apply only in the event that the State's entire death penalty scheme is invalidated. The fact of the matter is that it was not until 2002, when the supreme court handed down the *Atkins* decision, that that court invalidated the death penalty for a specific class of people. The *Abram* Court thus had no reason to consider the applicability of Section 99-19-107 in 1992 in instances in which classes of persons were held to be ineligible for the death penalty.

The passage cited by the prisoner from The Encyclopedia of Mississippi Law (Brief for the prisoner at 17 - 18) proves nothing about the intention of the legislature with respect to Section 99-19-107 in instances in which classes of persons have been excluded from the applicability of the death penalty.

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[5] And he also cites Justice Diaz's dissent in *Foster*. However, it is unnecessary to consider Justice Diaz's dissent there in this Court since it does not constitute authority.

The prisoner attempts to tell this Court that the reason his death penalty was vacated was specific to himself, or his case, similar to the facts of *Abram*. While it may be that the prisoner was found to be sufficiently mentally retarded to avoid execution of his death sentence, the one and only reason why his mental retardation had any significance was because of the federal supreme court's decision in *Atkins*. In *Abram* it was the failure of the State's evidence in a particular regard that resulted in the vacation of that death penalty. Section 99-19-107 applies where there is a judicial declaration of invalidity of the death penalty, regardless of the fact that that sentence is otherwise supported by the evidence in the case and properly imposed.

The Court is bound by the decision in *Foster*. In the event, though, that the Court does not view the language in *Abram* as *dicta*, application of *Foster* in the case at bar works no violation of the prisoner's due process right. We note again that the due process claim was not raised in the circuit court and for that reason is not properly before this Court.

A decision by the Mississippi Supreme Court which changes a previous construction of a statute, applied retroactively, may violate the due process clause of the Fourteenth Amendment if it "is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue. . . ." (Emphasis added) *Bouie v. City of Columbia*, 378 U.S. 347, 353 - 354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); *Rogers v. Tennessee*, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001). On the other hand, it is clear that State courts are free to interpret and re-interpret State statutes and that their interpretations become as definitely a part of those statutes as if the legislature inserted them. *Garner v. Louisiana*, 368 U.S. 157, 169, 82 S.Ct. 248, 254, 7 L.Ed.2d 207, 216 (1961); *Irving v. Hargett*, 518 F. Supp 1127 (D.C. Miss. 1981). An interpretation of a statute may be given retroactive application unless it can be shown that the interpretation is both unexpected and indefensible. *State v. Redmond*, 262 Neb. 411, 631 N.W.2d

501 (2001). Again assuming that *Foster* actually changed a previous construction of Section of 99-19-107, rather than merely regarding what was said in *Abram* as being so much surplusage, the question is whether the decision in *Foster* was unexpected and indefensible.

As we have pointed out above, *Abram* was decided in 1992. There was not at the time a general declaration of invalidity of the death penalty, nor such a declaration with respect to classes of persons. Beginning in 2002, though, the federal supreme court did invalidate the death penalty for certain classes. It was only at that point that the Mississippi Supreme Court would have had an occasion to consider the application of Section 99-19-107 in the context of invalidity by class of persons. So far as we can recall, the question first came up before the Court in *Foster*.

The decision in *Foster* was not unexpected. The Mississippi Supreme Court had never had occasion to consider the statute in relation to the invalidation of the death penalty as to particular classes prior to *Foster*. As we have said above, there was no sensible reason to suppose that the legislature did not intend Section 99-19-107 to apply in cases such as that at bar, but only in an instance in which the entire death penalty scheme was invalidated. *Foster* was the first case to come before the Court, to our knowledge, in which the question of whether Section 99-19-107 applied in an instance in which the death penalty had been effectively abolished as to a class or persons by the federal supreme court.

The decision in *Foster* was defensible: It was a fair and reasonable understanding of the legislature's intention. It clearly was the legislature's intention to provide for a life sentence without parole where the State or federal supreme court invalidated the death penalty. The Court's decision in *Foster* simply gave effect to the legislature's intent, and there is every reason to believe that the legislature intended the statute to apply both where the death penalty is entirely

abolished or partially abolished by judicial fiat. As *Garner, supra*, demonstrates, the Mississippi Supreme Court had the authority to interpret the statute in order to give effect to the intention behind it. This is what the Court did in *Foster*.

CONCLUSION

There was no ex post facto application of Section 99-19-107 in the case at bar. That statute was enacted in 1977 and was fully in force at the time the prisoner committed his murders.

As for the due process argument, that argument was not raised in the circuit court and may not be raised here for that reason. But even if that argument is found to be properly before the Court, there is no merit in it.

The language in *Abram* regarding the scope and meaning of Section 99-19-107 was properly found to be *dicta* by the Supreme Court in the *Foster* decision. As such, that statement in *Abram* was not authority and did not constitute a judicial interpretation of the statute. *Foster* was the first decision to authoritatively consider the application of the statute, and it did so properly in view of the evident intention of the legislature and the absurdity of supposing that the legislature only intended the statute to apply in the case of a "wholesale" invalidation of the death penalty, but not to invalidation on a class by class basis. However, even if *Abram* constituted authority, the Supreme Court was completely free to reconsider its construction of Section 99-19-107. The decision in *Foster* cannot reasonably said to have been unexpected and indefensible in view of the federal supreme court's decisions in *Atkins* and *Roper*.

In any event, this Honorable Court is bound by the decision in *Foster* and possesses no authority to overrule *Foster*. *Foster* is applicable in the case at bar because the prisoner, like the appellant in *Foster*, is a member of a class of persons that as a matter of law may not be

subjected to the death penalty.

The order of the circuit court in which the prisoner was sentenced to life imprisonment without the possibility of parole should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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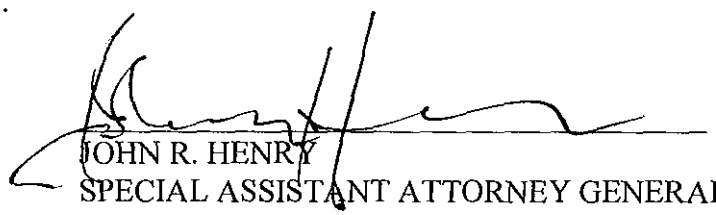
This the 23rd day of May, 2009.



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