IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FELIX PERKINS — APPELLANT

VS. — NO. 2008-KA-1387-COA

STATE OF MISSISSIPPI — APPELLEE

# BRIEF FOR THE APPELLEE

## APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY L. GORE
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

**STATE STATUTES**

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**FELIX PERKINS** **APPELLANT**

**VS.** **NO. 2008-KA-1387-COA**

**STATE OF MISSISSIPPI** **APPELLEE**

## BRIEF FOR THE APPELLEE

## STATEMENT OF THE CASE

This is another tale of a guy selling dope, *viz.*, 0.55 grams of cocaine, to a police informant for the purchase price of $40.00. (R. 85)

Felix Perkins, who testified he sold a piece of "sheetrock," not cocaine (R. 104-05), has been convicted of the sale of 0.55 grams of crack cocaine to James Hollingsworth in Coahoma County. The indictment charged Perkins as a habitual offender and with church enhancement since the sale took place within 1500 feet of a house of worship. (R. 73)

During sentencing, counsel for the defense beseeched the court not to apply the double enhancement provision authorized by statute. The judge looked with favor upon trial counsel's plea and did not impose additional punishment based upon the enhancement provisions of Miss.Code Ann. §41-29-142.

Perkins's conviction for sale was based largely, but not entirely, upon the testimony of Hollingsworth, a testifying paid informant working for money (R. 56) and a prior convicted felon.

(R. 57) Hollingsworth sold the cocaine to Perkins during a daytime transaction which was audio and videotaped. The credibility of James Hollingsworth, according to Felix Perkins, was substantially impeached because, as a prior convicted felon and a paid informant, his veracity was "questionable." (Brief of the Appellant at 5)

FELIX PERKINS, a forty-four (44) year old African-American male (R. 92, 103), prior convicted felon, resident of Clarksdale, and testifying defendant (R. 103), prosecutes a criminal appeal from his convictions of the sale of cocaine and recidivism following trial by judge and jury conducted on July 24, 2008, in the Circuit Court of Coahoma County, Charles E. Webster, Circuit Judge, presiding.

Perkins was indicted on May 29, 2007, for the sale of cocaine within 1500 feet of a church on August 31, 2006, in violation of Miss.Code. Ann. §41-29-115(A)(a)(4). (C.P. at 3-4)

Perkins was also charged with recidivism under Miss.Code Ann. §99-19-81. (C.P. at 4-5)

Following the guilt-finding phase of the bifurcated trial, Perkins was adjudicated a habitual offender. (R. 152-53) He was thereafter sentenced to serve thirty (30) years in the custody of the MDOC to be served without the benefit of probation or parole. (R. 152-53; C.P. at 30-32)

At the request of defense counsel, Judge Webster declined to follow the prosecutor's recommendation for sentence-enhancement, i.e., doubling of the penalty, authorized by statute. (R. 152)

Perkins, who assails the weight of the evidence used to convict him and the effectiveness of his trial lawyer, seeks a new trial as well as a new lawyer. (Brief of the Appellant at 12)

Two (2) individual issues are raised by Perkins on appeal to this Court:

**ISSUE No. 1:** "Whether the verdict [of the jury] was against the overwhelming weight of the evidence."

**ISSUE No. 2:** "Whether the appellant was deprived of effective assistance of counsel, depriving appellant of his constitutional right to a fair trial."

These two issues are controlled fully, fairly, and finally by the law found in the following two decisions recently handed down by the Court of Appeals: **Wynn v. State,** 964 So.2d 1196 (Ct.App.Miss. September 4, 2007); **Jones v. State,** 961 So.2d 730 (Ct.App.Miss. February 20, 2007).

Perkins has filed, *pro se*, a supplemental brief and an amended supplemental brief wherein he has raised three additional issues targeting the chain of custody, the admission of certain testimony, and the alleged denial of a speedy trial. Insofar as we can tell, Perkins has neither requested nor received leave of this Court, i.e., permission, to file a supplemental brief.

We respectfully submit it cannot be considered here. Perkins is not entitled to hybrid representation. *See* **Myers v. Johnson,** 76 F.3d 1330 (5th Cir. 1996).

"[I]t would be unfair to require the state's attorneys to respond to the myriad questions which can be dreamed up by an incarcerated individual who is not an attorney." **Johnson v. State,** 449 So.2d 225 (Miss. 1984). *See also* **Edlin v. State,** 533 So.2d 403, 411 (Miss. 1988), *cert den.* 489 U.S. 1086, 109 S.Ct. 1547, 103 L.Ed.2d 851 (1989) ["In his attempt to file a supplemental brief, Edlin demonstrates that he is either ignorant of or unwilling to obey this Court's rules of procedure."]

## STATEMENT OF FACTS

On August 31, 2006, James Hollingsworth, an informant and prior convicted felon who ". . . was locked up for about 20 years" (R. 96), went to a pre-buy location where he was searched, supplied with money, and wired for sound and video surveillance by members of the Clarksdale Police Department. (R. 58-59, 91-92, 97-98) Hollingsworth then drove around the Clarksdale area

in search of illegal drug activity.

Hollingsworth found it in the person of Felix Perkins.

> Q. [BY PROSECUTOR:] Okay. And after all this got done, what did you do next?
>
> A. I made a - - I rode around the Clarksdale area in a place that's known for drug activity and approximately, I don't know, 15 or 20 minutes, I guess, and come upon a black male and asked him what's up and he said, "What you want?" I told him 40. 40 hard. Talking about of crack cocaine. He said, "Make a block." And I did.
>
> * * * * * *
>
> I made a block, came back, he came up to my window, looked in at me, stared at me, had a little package in his hand, a little paper package, and he says, "You ain't a - - you ain't no informant or nothing are you?" I said, "No, man, I'm just trying to get high." The[n] he tried to hand me a little paper. I said, "No, open the paper up and let me look at it and make sure it's dope." So he opened up the package and I looked in there, got it, seen it, I got it, I handed him $40 and I put the packet into the bag, evidence bag number one, put it in front of the camera, and I went back to the post-buy location and they took it. And that's all we had time for that day. So we only got that one buy.
>
> Q. You said this was in Clarksdale. Is that correct?
>
> A. Yes, sir.
>
> Q. What county is that in?
>
> A. Coahoma.
>
> Q. And what State?
>
> A. Mississippi.
>
> Q. The person that sold that cocaine to you, that crack to you, do you see him in the courtroom today?
>
> A. Yes, sir. Yes, sir.
> Q. Can you point him out please?

A. Yes, sir. It's the defendant.

Q. Can you describe what he's wearing today?

A. Yeah, he's got, looks like a gray and white or black and white shirt on. But when I seen him, when I seen him, he had an Afro and a beard. And look like he weighed a whole lot less.

Q. He weighed less?

A. Yeah.

BY MR. KIRKHAM: Your Honor, at this time the State would ask that the record has identified the defendant.

BY THE COURT: That the witness has identified the defendant?

BY MR. KIRKHAM: I'm sorry, that the witness has identified the defendant.

BY THE COURT: The record will so reflect. (R. 93-94)

A videotape of the transaction was thereafter played for the benefit of the jury. (R. 96)

Three (3) witnesses testified for the State of Mississippi during its case-in-chief, including James Hollingsworth, a not-so-confidential informant because his identity has been revealed, who testified he purchased a single rock of what appeared to him to be crack cocaine from Felix Perkins for $40. (R. 91-95, 99)

**Ricky Bridges**, a member of the Clarksdale Police Department working in the narcotics division, testified that James Hollings worth was a paid informant working for money. (R. 56) Hollingsworth had a prior conviction for armed robbery. (R. 56)

On August 31, 2006, Hollingsworth and his motor vehicle were searched at a pre-buy location in Coahoma County and both were wired for sound and video surveillance. (R. 58-59) Hollingsworth was given $80 in twenty-dollar bills and sent on his way. (R. 58-59)

Bridges was listening in over the audio surveillance equipment when Hollingsworth engaged in a "buy-walk" transaction with a black male known to Bridges as Felix Perkins. (R. 51-52, 55, 59-60) During a post-buy rendevous, Hollingsworth surrendered the cocaine purchased from Perkins to Sergeant Bridges who " . . . sealed it up, initialed it, asked the informant to initial it, I dated it, transported it to the Clarksdale Police Department evidence locker so it could be transported to the Crime Lab and on to the proper courts." (R. 61)

It was a typical "buy-walk" undercover operation (R. 55) which took place " . . . just west of the intersection of Sixth and Barnes." (R. 72)

> Q. [BY PROSECUTOR KIRKHAM] What measurements, if any, did you take at that location?
>
> A. I took a measurement, without looking and reading word for word from my report - -
>
> Q. - - With the Court's permission, you may refresh your memory from your report.
>
> BY THE COURT: He can refresh his memory.
>
> A. (reviews report) This offense occurred approximately 147 feet from the Calvary Missionary Baptist Church located at Barnes and Sixth.
>
> Q. (By Mr. Kirkham:) Did you measure that distance?
>
> A. Yes, I did.
>
> Q. How did you measure that distance?
>
> A. I measured it with an electronic range finder.
>
> Q. 147 feet?
>
> A. Yes, sir.
>
> Q. And which church?

A. I believe it's the Calvary Missionary Baptist Church located at the intersection of Barnes and Sixth. (R. 70)

**Teresia Hickmon**, a forensic scientist specializing in the field of forensic drug identification and analysis, testified she tested the exhibit in question and identified it as containing "cocaine base, the crack form of cocaine, and there were 0.55 grams submitted to our laboratory." (R. 85)

**James Hollingsworth**, the State's informant at the time of the sale, testified he had a prior conviction for armed robbery and " . . .was locked up for about 20 years." Since his release he had been working for the narcotics program. (R. 96)

On August 31, 2006, around 4:45 p.m., he purchased cocaine from Perkins at what he believed was "Sixth and Page." (R. 97)

During cross-examination, Hollingsworth testified he was always concerned when he made a buy because " . . . there's times when you will be sold something other than cocaine." (R. 99)

At the close of the State's case-in-chief, the defendant moved for a directed verdict on the ground that " . . . the State has failed to set out a *prima facie* case against Felix Perkins for the sale of a controlled substance, to-wit: cocaine, in that it has failed to show that this individual, this defendant, sold to Mr. Hollingsworth crack cocaine." (R. 100)

This motion was overruled with the following rhetoric:

> BY THE COURT: All right. Well, the court, of course, has listened to the testimony and viewed the videotape that has been introduced. The Court is of the view that the State has met at least a *prima facie* case worthy enough for jury consideration. There are certainly issues that will have to be decided by the jury, but the court does find that the State has presented sufficient evidence to withstand such a motion. Therefore the Court will deny that motion. * * * (R. 101)

After opening statements made by defense counsel, **Felix Perkins** testified in his on behalf. (R. 103-07) He did not deny making a sale to James Hollingsworth at the time and in the

neighborhood testified about. (R. 103-07)

Perkins did, on the other hand, dispute the nature and character of the substance sold to Hollingsworth.

> Q. [BY DEFENSE COUNSEL:] Okay. Have you ever sold dope?
>
> A. No, sir. No.
>
> Q. And did you sell any dope on August 31st, 2006?
>
> A. No, sir. I only sold sheetrock August 31st, 2006.
>
> Q. All right, I know you're under oath. Are you telling the truth?
>
> A. Yes, sir. I am telling the truth.
>
> Q. And it's your testimony you did not sell any crack cocaine to Mr. Hollingsworth?
>
> A. No, sir, I did not.
>
> Q. Have you ever sold any crack cocaine?
>
> A. No, sir, I have not. (R. 105-06)

The state thereafter called Clarksdale police officer **Joseph Wide** in rebuttal. (R. 110)

During the post-buy meeting with Hollingsworth, Corporal Wide observed with his own two eyes the substance purchased from Perkins.

> Q. [BY PROSECUTOR:] Was it sheetrock?
>
> A. [BY WIDE:] No, sir.
>
> Q. How do you know?
>
> A. You can tell a difference in the texture of the cocaine and sheetrock.
>
> Q. Have you performed a lot of these kind of operations?

A. Yes, sir.

Q. Like what?

A. Sheetrock, soap, wax.

Q. When you receive substances like that, do you proceed with charges against the people that sold them? Sale of a controlled substance charges?

A. With the fake dope?

Q. Right?

A. No, sir.

Q. You do not?

A. No sir. (R. 111-12)

At the close of all the evidence, Perkins's renewed motion for a directed verdict was overruled. (R. 116)

Peremptory instruction was denied. (R. 116; C.P. at 53)

Following closing arguments, the jury retired to deliberate at 3:45 p.m. (R. 139) One hour and fifteen minutes later, at 5:00 p.m., it returned a verdict of "We, the jury, find the defendant Felix Perkins guilty of sale, transfer or delivery of cocaine within 1500 feet of a church." (R. 139; C.P. at 42)

A poll of the jurors, individually by number, reflected the verdict returned was unanimous. (R. 140)

The sentence-determination phase of the bifurcated trial was thereafter conducted before the court. (R. 141-153) At its conclusion Judge Webster adjudicated Perkins a habitual offender. (R. 152) Judge Webster, at defense counsel's request, rejected the State's request for enhancement of punishment, i.e., doubling from 30 years to 60 years, authorized by statute for the sale of dope within

1500 feet of a church. (R. 152-53) Instead, a sentence of thirty (30) years without the benefit of probation or parole was imposed. (R. 152-53)

On July 29, 2008, Perkins filed his motion for a new trial alleging, *inter alia*, the verdict of the jury was against the overwhelming weight of the evidence. (C.P. at 33-34) The motion was overruled on August 1, 2008. (C.P. at 35)

David Tisdell, a practicing attorney in Tunica, represented Perkins with a great deal of skill and expertise during the trial of this cause.

Leslie Lee of the Mississippi Office of Indigent Appeals has been substituted on appeal. Her representation has been equally effective.

## SUMMARY OF THE ARGUMENT

**Issue No. 1.** The trial judge did not abuse his judicial discretion in overruling Perkins's motion for a new trial based, in part, on the ground the verdict of the jury was against the overwhelming weight of the evidence.

The verdict of the jury was supported by sufficient credible testimony and evidence identifying Perkins as the purveyor of cocaine and not merely "sheetrock" removed from the ground while Hollingsworth was making the block. Testimony and evidence suggesting otherwise does not preponderate in favor of Perkins. Allowing the verdict to stand would not sanction an unconscionable injustice.

Hollingsworth's testimony identifying Felix Perkins as the seller of cocaine was corroborated by the testimony of Officer Bridges, Teresia Hickmon, and the rebuttal testimony of Officer Wide. Both Hickmon and Wide identified the substance as cocaine, not sheetrock. In the end, the testimony of Perkins identifying the substance as sheetrock does not outweigh the State's proof demonstrating otherwise.

In addition, the testimony of Sergeant Bridges that the transaction took place " . . . just west of the intersection of Sixth and Barnes" and was measured to be a distance of 147 feet from " . . . the Calvary Missionary Baptist Church located at the intersection of Barnes and Sixth," was proof enough it occurred within 1500 feet of a church. (R. 70)

But even if it was not and the evidence on this point preponderates in favor of the defendant, Perkins's conviction for sale of cocaine, absent other error, may still be affirmed because the sale or transfer at any location is by definition a lesser included offense of a sale or transfer taking place within 1,500 feet of a church.

Ordinarily, this appeal would be a prime candidate for application of the remand for re-sentencing rule.

"A jury verdict may be affirmed as to guilt, but the case remanded for re-sentencing when the proof is not sufficient to sustain a conviction for the crime charged, but is sufficient to sustain a conviction for a lesser included offense." **Biles v. State**, 338 So.2d 1004, 1005 (Miss. 1976); **Wells v. State**, 305 So.2d 333 (Miss. 1974); **Anderson v. State**, 290 So.2d 628 (Miss. 1974). *See also* **Gibby v. State,** 744 So.2d 244 (Miss. 1999).

In the case at bar, however, affirmation minus remand is the order of the day because the trial judge, as noted by Perkins in footnote 1 of his excellent brief, " . . . elected not to impose any additional sentence based on the enhancement allowed in Miss.Code Ann. §41-29-142 for the sale occurring near a church." (Brief of the Appellant at 1)

In this posture, assuming, as Perkins claims, the evidence, because of numerous factual discrepancies, " . . . failed to establish beyond a reasonable doubt Perkins actually sold cocaine to a violent prior convicted felon within 1500 feet of a church," Perkins's conviction of sale at any location in the county may be affirmed as a lesser included offense. By finding Perkins guilty of a

sale within 1500 feet of a church, the jury necessarily found Perkins guilty of a sale. This conclusion is indisputable.

Finally, the fact Hollingsworth may have been impeached with evidence of his prior conviction and his "play for pay" relationship with law enforcement went to the weight for the jury to give his testimony and not to its admissibility. All of this was covered at some length during Perkins's cross-examination of Hollingsworth. (R. 96-99) The credibility of James Hollingsworth, of course, was a matter for the jury and not for the reviewing Court. *See* jury instruction C-1 at C.P. 48.

"The jury is the *sole* judge of the weight and credibility of the evidence." **Byrd v. State**, 522 So.2d 756, 760 (Miss. 1988) [emphasis supplied].

**Issue No. 2.** Perkins has failed on direct appeal to make out a claim *prima facie* of ineffective assistance of trial counsel. The record fails to affirmatively reflect ineffectiveness of constitutional dimensions. In this posture, this Court should decline to rule on the merits of Perkins's ineffective assistance of counsel claim without prejudice to Perkins to raise the issue *de novo* in a motion for post-conviction relief. *See* **Wynn v. State,** *supra,* 964 So.2d 1196 (Ct.App.Miss. September 4, 2007); **Jones v. State,** *supra,* 961 So.2d 730 (Ct.App.Miss. February 20, 2007).

In any event, lapses of counsel, if any, were not of sufficient gravity to render counsel's performance ineffective in the constitutional sense. Accordingly, resolution of this question must await a new horizon in a post-conviction environment.

## ARGUMENT

### ISSUE NO. 1.

**THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN OVERRULING THE DEFENDANT'S MOTION FOR A NEW TRIAL BASED, IN PART, ON THE GROUND THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

The evidence implicating Felix Perkins in the sale of cocaine consisted of the testimony of Officer Bridges and Hollingsworth identifying Felix Perkins as the seller, the testimony of James Hollingsworth who exchanged $40 for a rock of crack, i.e., "hard," cocaine in a transaction that was hand to hand, and the videotape itself which was viewed by the jury during the testimony of Hollingsworth. (R. 95-96)

Felix Perkins sought to convince the jury he sold sheetrock, not cocaine. He contends on appeal the identification testimony of the State's star witness, James Hollingsworth, a paid informant acting as an agent for the State, was sufficiently impeached at trial and was unworthy of belief. (Brief of the Appellant at 5 )

Perkins also contends the State failed to prove the transaction took place with 1500 feet of a church. According to Perkins the State was hide-bound to prove this element of the offense charged and that its failure to do so should work an acquittal. In short, Perkins claims his motion for a new trial should have been granted.

Perkins points to "numerous factual discrepancies," identifies "several holes in the evidence" allegedly conveying serious doubt on the verdict, and describes "other problems with the evidence." (Brief of the Appellant at 3, 4, and 5, respectively) Although he quotes the "unconscionable injustice" standard on page 4, we cannot find any argument in his brief that affirmation of the jury's verdict *in his case* would sanction an unconscionable injustice.

We respectfully submit this Court, in reviewing Perkins's weight of the evidence complaint, must look to the strength of the State's case and weigh the evidence in the light most favorable to the verdict.

This Court, of course, reviews the trial court's denial of a post-trial motion under the abuse of discretion standard. **Flowers v. State**, 601 So.2d 828, 833 (Miss. 1992); **Robinson v. State**, 566 So.2d 1240, 1242 (Miss. 1990). No abuse of judicial discretion has been demonstrated here because the testimony of the witnesses for the State fully supports the verdict. Put another way, the evidence does not preponderate in favor of Perkins.

The applicable standard of review is found in **McCallum v. State**, No. 2007-KA-00992-COA decided December 9, 2008 (¶¶ 23-24) [Not Yet Reported] where we find the following language:

> McCallum also argues that the trial judge erred in denying his motion for a new trial because he claims that his conviction was against the overwhelming weight of the evidence. "Motions for [a] new trial challenge the weight of the evidence supporting the verdict." *Bridges v. State,* 807 So.2d 1228, 1231 (¶14)(Miss. 2002). In *Chambliss v. State,* 919 So.2d 30, 33-34 (¶10) (Miss. 2005) (quoting *Bush*, 895 So.2d at 844 (¶18)), the Mississippi Supreme Court held that:
>
> > When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State,* 691 So.2d 948, 957 (Miss. 1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Amiker v. Drugs for Less, Inc.*, 796 So.2d 942, 947 (Miss. 2000). However, the evidence should be weighed

> in the light most favorable to the verdict. *Herring,* 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *McQueen v. State,* 423 So.2d 800, 803 (Miss. 1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial.
>
> We conclude that the jury's verdict was not against the overwhelming weight of the evidence. Additionally, as previously stated, Clark testified as to what happened on the day of the shooting, and Butler testified that he witnessed McCallum shoot Clark. McCallum's testimony is not sufficient to support a finding that the jury's verdict was against the overwhelming weight of the evidence. Given the weight of the evidence supporting McCallum's conviction, allowing the jury's verdict to stand will not "sanction an unconscionable injustice." There is no merit to this issue. (¶¶ 23-24, Slip Opinion at 11-12]

**The Credibility of Hollingsworth.**

It is elementary that the jury, not the trial or reviewing Court, is the **sole judge of** the weight and credibility of evidence. **Harris v. State**, 532 So.2d 602 (Miss. 1988); **Byrd v. State**, *supra*, 522 So.2d 756, 760 (Miss. 1988). "Under our system, the jury is charged with the responsibility for weighing and considering . . . the credibility of witnesses." **Harris v. State**, 527 So.2d 647, 649 (Miss. 1988).

The testimony of James Hollingsworth, the State's undercover source, was not so substantially impeached and discredited as to be unworthy of belief. To the contrary, it was corroborated to the maximum degree by a video tape recording of the transaction, and the leading role was played by Felix Perkins. (R. 95-96)

Perkins testified the substance sold was sheetrock. However, no break in the chain of custody was demonstrated, and Ms Hickmon testified the substance contained "cocaine base, the crack form of cocaine." (R. 85)

The imperfection of Hollingsworth, admittedly a person of questionable repute, is not particularly relevant in this case because Perkins freely admitted he sold a substance to Hollingsworth at the time and place testified about. In any event, any imperfections went to the "weight" to give his testimony and not to its admissibility. It was a matter of credibility, and, without a doubt, the credibility of James Hollingsworth was a matter for the jury to resolve. *See* **Jones v. State,** *supra*, 961 So.2d 730, 732 (¶8) (Ct.App. 2007).

On appeal, of course, all the evidence, as a matter of law, is viewed in a light most favorable to the State's theory of the case. **McClain v. State**, 625 So.2d 774 (Miss. 1993).

The fact that James Hollingsworth was a person of questionable repute was a prime topic during Perkins's cross-examination of Hollingsworth, the State's star witness. (R. 96-99)

Hollingsworth credibility was also the centerpiece of Perkins's closing argument. (R. 126-135) Try as he might, Felix Perkins cannot successfully demonstrate in this case the testimony of James Hollingsworth was so incredible, improbable, and farfetched that no reasonable, hypothetical juror could find it worthy of belief.

To reverse this case in light of the facts presented would be an invasion of the province and prerogative of the jury who decided the question of guilt or innocence against the defendant after listening to allegedly discredited testimony concerning the identity of the contraband.

**The Location of the Sale.**

The State's proof adequately demonstrated a sale within 1500 feet of a church. We respectfully point to the testimony found in our summary of the argument where Sergeant Bridges

testified the transaction took place " . . . just west of the intersection of Sixth and Barnes." (R. 72) Bridges told the jury he measured the distance "with an electronic range finder" and opined "[t]his offense occurred approximately 147 feet from the Calvary Missionary Baptist Church located at Barnes and Sixth. " (R. 70)

The testimony by Bridges identifying distance and location was not outweighed by evidence to the contrary. If not overwhelming, it was at least "whelming" and was certainly enough. *See* **Heidelberg v. State,** 584 So.2d 393, 394 (Miss. 1991) ["Corroboration of Bruns' testimony, while not overwhelming, was at least 'whelming.' " ]

But even if it was not and the evidence on this point preponderates in favor of the defendant, Perkins's conviction for sale of cocaine, absent other error, may still be affirmed because the sale or transfer at any location is by definition a lesser included offense of a sale or transfer taking place within 1,500 feet of a church.

Ordinarily, this appeal would be a prime candidate for application of the remand for re-sentencing rule.

"A jury verdict may be affirmed as to guilt, but the case remanded for re-sentencing when the proof is not sufficient to sustain a conviction for the crime charged, but is sufficient to sustain a conviction for a lesser included offense." **Biles v. State**, 338 So.2d 1004, 1005 (Miss. 1976); **Wells v. State**, 305 So.2d 333 (Miss. 1974); **Anderson v. State**, 290 So.2d 628 (Miss. 1974). *See also* **Gibby v. State,** 744 So.2d 244 (Miss. 1999).

Affirmation minus remand is the order of the day because Judge Webster, as noted by learned counsel in footnote 1 of her excellent brief, " . . . elected not to impose any additional sentence based on the enhancement allowed in Miss.Code Ann. §41-29-142 for the sale occurring near a church." (Brief of the Appellant at 1)

In this posture, assuming, as Perkins claims, the evidence, because of numerous factual discrepancies, " . . . failed to establish beyond a reasonable doubt Perkins actually sold cocaine to a violent prior convicted felon within 1500 feet of a church," Perkins's conviction of sale at any location in the county may be affirmed as a lesser included offense. By finding Perkins guilty of a sale within 1500 feet of a church, the jury necessarily found Perkins guilty of a sale. This conclusion is indisputable.

The following language found in **Hyde v. State**, 413 So.2d 1042, 1044 (Miss. 1982), quoting from **Evans v. State**, 159 Miss. 561, 132 So. 563, 564 (1931), is applicable here:

> We invite the attention of the bar to the fact that we do not reverse criminal cases where there is a straight issue of fact, or a conflict in the facts; juries are impaneled for the very purpose of passing upon such questions of disputed fact, and we do not intend to invade the province and prerogative of the jury.

In **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State,** 405 So.2d 87, 88 (Miss. 1981)] and

unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983).

Contrary to Perkins's position, the case at bar does not exist in this posture.

**ISSUE NO. 2.**

**THE DEFENDANT HAS FAILED ON DIRECT APPEAL TO MAKE OUT A CLAIM *PRIMA FACIE* OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. THE RECORD FAILS TO AFFIRMATIVELY REFLECT INEFFECTIVENESS OF CONSTITUTIONAL DIMENSIONS.**

Appellate counsel, with the refractive aid of hindsight and back-focal lenses, assails the effectiveness of trial counsel, Mr. David Tisdell whose trial strategy, according to Perkins, was unreasonable. (Brief of the Appellant at 8) Perkins laments he would have been entitled to a jury instruction authorizing the jury to find him guilty of selling to Hollingsworth a counterfeit drug, a lesser offense. (Brief of the Appellant at 9) Perkins says Tisdell was ineffective in the constitutional sense because no such instruction was requested. This alleged lapse of trial counsel, a "sin" of omission as opposed to commission, is insufficient to reflect representation lacking in constitutional sufficiency.

Because (1) the record fails to show ineffectiveness of constitutional dimensions and (2) both parties have not stipulated the record is adequate to allow the appellate court to make the necessary findings of fact, this Court need not rule on the merits of Perkins's individual ineffective assistance of counsel claims. **Wynn v. State,** *supra,* 964 So.2d 1196 (Ct.App.Miss. September 4, 2007); **Jones v. State,** *supra,* 961 So.2d 730 (Ct.App.Miss. February 20, 2007). Rather, it need only determine whether the overall performance of counsel as reflected in the record shows ineffectiveness of constitutional dimension.

It doesn't.

Needless to say, 20/20 hindsight comes easier than 20/20 foresight. We respectfully submit Perkins received representation that was constitutionally sufficient.

The following language articulated by the Court of Appeals in **Reynolds v. State,** 736 So.2d 500, 511 (Ct.App.Miss. 1999), (¶41), is *apropos* to the issue before the Court:

> "[T]here is no 'single, particular way to defend a client or to provide effective assistance.' " *Handley*, 574 So.2d at 684 (quoting *Cabello*, 524 So.2d at 317). Defense counsel is presumed competent. *Johnson v. State*, 476 So.2d 1195, 1204 (Miss. 1985). "There is no constitutional right then to errorless counsel . . . " *See Handley*, 574 So.2d at 683 (quoting *Cabello*, 524 So.2d at 315). * * * "

We agree with Perkins we must gauge counsel's performance by the applicable standard supplied by **Strickland v. Washington,** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

More on that later.

First, we invite the Court's attention to a pre-**Strickland** case where a defendant convicted of attempted armed robbery was denied *coram nobis* relief after complaining his trial lawyer was ineffective. We find in **Berry v. State,** 345 So.2d 613, 614 (Miss. 1977), the following:

> Appellant's counsel had been practicing law five (5) months at the time of his appointment to represent appellant. He had tried civil cases, but had not tried a criminal case. Appellant argues that his counsel was ineffective in the following respects.
>
> (1) He declined to request a special venire for the case. * * *
>
> (2) He failed to file a motion and secure an order for discovery. * * *
>
> (3) He failed to file a motion to suppress an oral confession given to the police sergeant. * * *
>
> (4) He failed to make any objections during the entire trial. * * *

(5) He failed to poll the jury on its verdict. * * *

(6) He elicited from appellant the fact that he had been arrested on two other occasions. * * *

(7) He failed to request the court to allow appellant to be heard before imposing sentence. * * *

In holding, *inter alia*, that Berry "had competent and effective counsel in the trial of his case," the Supreme Court, quoting from **Rogers v. State,** 307 So.2d 551 (Miss. 1976), stated:

> "It is easy to be a Monday morning quarterback and in retrospect to pick out defects and flaws in the way the game was played the preceding Saturday. The same is true in analyzing trial tactics and strategy of trial counsel, after the trial is over and the verdict in. We all have 20/20 vision in hindsight; the difficulty is in having 20/20 vision in foresight." 307 So.2d at 552.

Also relevant here are the following observations made by Justice Cobb in **Jackson v. State,** 815 So.2d 1196, 1200 (¶ 8) (Miss. 2002):

> Our standard of review for a claim of ineffective assistance of counsel is a two part test: the defendant must prove, under the totality of the circumstances, that (1) his attorney's performance was deficient and (2) the deficiency deprived the defendant of a fair trial. *Hiter v. State*, 660 So.2d 961, 965 (Miss. 1995). This review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Id.* at 965. **With respect to the overall performance of the attorney, 'counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy' and cannot give rise to an ineffective assistance of counsel claim.** *Cole v. State*, 666 So.2d 767, 777 (Miss. 1995). [emphasis ours]

*See also* **Harris v. State,** 822 So.2d 1129 (Ct.App.Miss. 2002).

Add to this list counsel's choice of whether or not to file certain instructions and present certain defenses. The selection of a defense falls within the amorphous zone of trial and litigation strategy. "[T]here is a presumption that decisions made are strategic." **Leatherwood v. State,**

473 So.2d 964, 969 (Miss. 1985).

**Mr. Tisdell's Representation.**

Perkins's defense, as testified to by Perkins, was that the substance he sold to Hollingsworth was sheetrock, not cocaine. "And I took that opportunity to get a free $40 to sell that man sheetrock." (R. 107)

This we know.

The prosecution had a videotape of the transaction. Both Officer Bridges and James Hollingsworth, the paid informant, identified the seller depicted in the videotape as Felix Perkins. Hollingsworth, Hickmon, and Wide identified the substance as cocaine. There was not much defense counsel could do other than try to discredit the State's star witness, James Hollingsworth, and convince the jury to buy into Perkins's theory the substance was sheetrock.

During his cross-examination of Sergeant Bridges and informant Hollingsworth, Mr. Tisdell brought out the following facts inviting the jury's attention to Hollingsworth credibility and his motive for testifying:

**1.** Hollingsworth was a paid informant who was paid per transaction. (R. 71)

**2.** Hollingsworth was a prior convicted felon, having been previously convicted of armed robbery. (R. 72)

Given the strength of the prosecution's case, assailing the believability of Hollingsworth based upon his prior conviction, jail time, and play for pay was about all counsel could do.

The failure to request a lesser offense instruction was not so shocking that it should have been apparent to the trial judge of his duty to reform counsel's representation. **Wynn v. State,** *supra,* 964 So.2d 1196, 1200 (Ct.App.Miss. 2007) ["The relevant inquiry here is whether the representation of Wynn was 'so lacking in competence that it becomes apparent or should be

apparent that it is the duty of the trial judge to correct it so as to prevent a mockery of justice.' "

Nor was the trial court required to grant one *sua sponte*. "[A] trial court is under no duty to instruct the jury *sua sponte*, nor is a court required to submit instructions in addition to those prepared by the parties." **Ramsey v. State,** 959 So.2d 15, 28 (¶46) (Ct.App.Miss. 2006), reh denied, cert denied.

The defendant testified he sold sheetrock to Hollingsworth, not cocaine. By virtue of jury instruction C-12, the jury was required to find Perkins "not guilty" if the State failed to prove, *inter alia,* the controlled substance was "Cocaine." (C.P. at 51)

We see no useful purpose in the submission of an instruction authorizing the jury to find Perkins guilty of selling a counterfeit substance.

Perkins's theory of the case was adequately covered in instruction C-1 as well. C-1 instructed the jury, *inter alia,* that "[a]s sole judges of the facts in this case, you are to determine what weight and what credibility will be assigned the testimony and supporting evidence of each witness in this case." (C.P. at 48)

Perkins was clearly not denied the effective assistance of counsel during the sentencing hearing which is included in his overall performance. Mr. Tisdell made an eloquent plea for mercy before the trial judge which was accepted by Judge Webster. (R. 150-52)

Assuming one or more alleged lapses of trial counsel can be deemed a deficiency, the deficiencies, if any, failed to result in any prejudice to Perkins. **Strickland v. Washington,** *supra,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

At best, any scrutiny of trial counsel's omissions must await a new horizon in a post-conviction environment where trial counsel will have an opportunity to explain the reasons for his actions and/or inactions. It is a rare case indeed where an appellate court will find

constitutional ineffectiveness in trial counsel without granting to counsel a meaningful opportunity to be heard.

There are many reasons why defendants in criminal cases are found guilty by a jury of their peers. A majority of the time it is because they are hopelessly guilty and not because they were denied the effective assistance of trial counsel. Some cases are simply indefensible. In the case at bar, a videotape of the transaction was shown to the jury. What then is the lawyer to do in light of his client's unexplained presence at the scene of the sale other than make the best of Perkins's explanation that Perkins "passed sheetrock off as crack." (R. 105)

Our position, in a nutshell, is that Perkins has failed to demonstrate on direct appeal that any aspect of his lawyer's performance was deficient and that the deficient performance, if any, prejudiced the defense.

The record is inadequate and fails in its present posture of imperfection to affirmatively reflect ineffectiveness of constitutional dimensions. Only an evidentiary hearing in a post-conviction environment can furnish insight into the reasons for trial counsel's alleged omissions.

The ground rules for resolving this complaint are set forth in **Read v. State,** 430 So.2d 832, 841 (Miss. 1983), where this Court stated:

> (1) **Any defendant convicted of a crime may raise the issue of ineffective assistance of counsel on direct appeal, even though the matter has not first been presented to the trial court. The Court should review the entire record on appeal.** If, for example, from a review of the record, as in *Brooks v. State*, 209 Miss. 150, 46 So.2d 94 (1950) or *Stewart v. State*, 229 So.2d 53 (Miss. 1969), this Court can say that the defendant has been denied the effective assistance of counsel, the court should also adjudge and reverse and remand for a new trial. *See also*, *State v. Douglas*, 97 Idaho 878, 555 P.2d 1145, 1148 (1976).
>
> (2) Assuming that the Court is unable to conclude from the record on appeal that defendant's trial counsel was constitutionally

> ineffective, the Court should then proceed to decide the other issues in the case. Should the case be reversed on other grounds, the ineffectiveness issue, of course, would become moot. **On the other hand, if the Court should otherwise affirm, it should do so without prejudice to the defendant's right to raise the ineffective assistance of counsel issue via appropriate post-conviction proceedings.** If the Court otherwise affirms, **it may nevertheless reach the merits of the ineffectiveness issue where (a) as in paragraph (1) above, the record affirmatively shows ineffectiveness of constitutional dimensions,** or (b) the parties stipulate that the record is adequate and the court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed.
>
> (3) If, after affirmance as in paragraph (2) above, the defendant wishes to do so, he may then file an appropriate post-conviction proceeding raising the ineffective assistance of counsel issue. *See Berry v. State*, 345 So.2d 613 (Miss. 1977); *Callahan v. State, supra*. Assuming that his application states a claim, *prima facie*, he will then be entitled to an evidentiary hearing on the merits of that issue in the Circuit Court of the county wherein he was originally convicted./5 Once the issue has been formally adjudicated by the Circuit Court, of course, the defendant will have the right to appeal to this Court as in other cases. [emphasis supplied; text of note 5 omitted]

We need not respond any further to the individual shortcomings or alleged lapses of counsel, if any, because the centerpiece of our retort is that the official record, in its present posture, fails on direct appeal to affirmatively demonstrate ineffectiveness of constitutional dimensions under both **Read** and **Strickland**.

**The *Strickland* Standard.**

The standard for constitutionally effective assistance of counsel is not errorless counsel and not counsel judged ineffective by hindsight. The test to be applied in cases involving the alleged ineffectiveness of counsel is whether or not counsel's **overall performance** was **(1)** deficient and **(2)** whether or not the deficient performance, if any, prejudiced the defense [**Strickland v. Washington,** *supra*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] "in

the sense that our confidence in the correctness of the outcome is undermined." **Frierson v. State,** 606 So.2d 604, 608 (MIss. 1992). *See also* **Osborn v. State,** 695 So.2d 570, 575 (Miss. 1997); **Moore v. State,** 676 So.2d 244 (Miss. 1996).

The burden is on the defendant to demonstrate "both prongs" [**Edwards v. State,** 615 So.2d 590, 596 (Miss. 1993)], or to at least state a "claim, *prima facie*," with respect to each prong. **Read v. State,** *supra*, 430 So.2d at 841; **Moore v. State,** *supra;* 676 So.2d at 246; **Blue v. State,** 674 So.2d 1184 (Miss. 1996).

The determination of whether counsel's performance was both deficient and prejudicial must be determined from the "totality of the circumstances." **Osborn v. State,** *supra*, 695 So.2d at 575); **Frierson v. State,** *supra*, 606 So.2d at 608. In other words, the target of appellate scrutiny in evaluating the deficiency and prejudice prongs of **Strickland** is counsel's "overall" performance. **Nicolaou v. State,** 612 So.2d 1080, 1086 (Miss. 1992).

The "overall" performance in this case begins with Mr. Tisdell's demand for a speedy trial (C.P. at 21-22), moves through his voir dire examination (R. 43-50), trial on the merits (R. 53-121), counsel's closing argument (R. 126-135), sentencing (R. 141-153), and concludes with a motion for judgment notwithstanding the verdict or for a new trial. (C.P. at 33-34)

There is a strong, yet rebuttable, presumption that counsel's conduct falls within the wide range of reasonable professional assistance. **Frierson v. State,** *supra.* There is, likewise, a presumption that decisions made by defense counsel are strategic. **Leatherwood v. State,** 473 So.2d 964, 969 (Miss. 1985); **Armstrong v. State,** 573 So.2d 1329, 1334 (Miss. 1990). Trial lawyers, especially on direct appeal, should be given the benefit of these presumptions.

"Judicial scrutiny of counsel's performance [is] highly deferential." **Osborn v. State,**

*supra*, 695 So.2d at 575 quoting from **Strickland v. Washington,** 466 U.S. at 689, 104 S.Ct. at 2065.

Under the **first** or **deficiency prong,** the defendant must demonstrate that counsel was not functioning as the counsel guaranteed by the Sixth Amendment so as to provide reasonably effective assistance.

Under the **second** or **prejudice prong** the defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Cabello v. State,** 524 So.2d 313, 315 (Miss. 1988).

Stated somewhat differently, the defendant must prove that "the lawyer's errors were of such a serious magnitude as to deprive the defendant of a fair trial because of a reasonable probability that, but for counselor's unprofessional errors, the results would have been different." **Martin v. State,** 609 So.2d 435, 438 (Miss. 1992).

A desirable starting point in evaluating counsel's performance - especially with respect to the prejudice prong of **Strickland** is to look at the strength of the prosecution's case. *See* **Indiviglio v. United States**, 612 F.2d 624, 629 (2d Cir. 1979).

Here the testimony elicited from James Hollingsworth was credible because it was supported by a video of the transaction. The evidence, in its entirety, was quite compelling, especially where, as here, Hollingsworth, Hickmon, and Wide testified the substance was cocaine, not sheetrock.

As stated previously, the selection of a defense falls within the amorphous zone of trial and litigation strategy. "[T]here is a presumption that decisions made are strategic."

**Leatherwood v. State**, *supra*, 473 So.2d 964, 969 (Miss. 1985).

We have reviewed the entire record and have concluded that even if Perkins's allegations pass muster under the "deficiency" prong of **Strickland**, Perkins has failed to make out a *prima facie* case with respect to the "prejudice" prong.

Put another way, he has failed to demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability," of course, is "a probability sufficient to undermine confidence in the outcome." Such does not exist here where Perkins was found guilty in the wake of testimony that was both substantial and credible.

Perkins has presented, at best, minor lapses of counsel, tactical errors, and judgment calls. He has failed to demonstrate on direct appeal that trial counsel's "over-all" performance was deficient and that the deficiency actually prejudiced the defendant. In other words, the official record fails to affirmatively reflect ineffectiveness of constitutional dimension.

After all, it was not trial counsel's performance that sealed Felix Perkins's fate. Rather, it was a videotape of the transaction coupled with the testimony of Officer Bridges, Teresia Hickmon, and Officer Wide, as well as the positive and unequivocal eyewitness identification made by James Hollingsworth, together with all reasonable inferences to be drawn from all the evidence, that pointed to guilt beyond a reasonable doubt.

## CONCLUSION

James Hollingsworth, to be sure, was no Saint. Although he testified he was working for pay, his credibility was a matter for the jury to determine.

Hollingsworth's testimony was both substantial and reasonable, as well as credible. Despite his character flaws and any other imperfections, the credibility of Hollingsworth was a matter for the jury, not a reviewing court, to resolve.

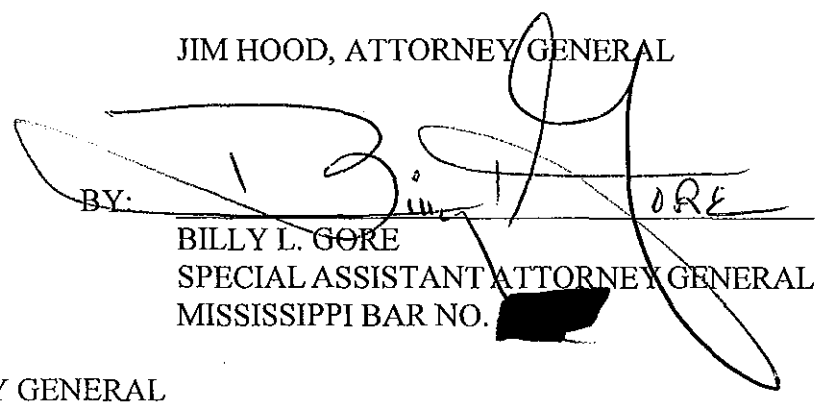
A reasonable, fairminded, and hypothetical juror could have found from the State's evidence that Hollingsworth was guilty of the sale of cocaine.

Implicit in the jury's verdict that Perkins was guilty of the sale of cocaine within 1500 feet of a church is a finding that Perkins was guilty of the sale at any location, a lesser included offense. Remand is unnecessary because enhanced punishment was not imposed.

Appellee respectfully submits that no reversible error took place during the trial of this cause. Accordingly the judgment of conviction of the sale of cocaine, together with the thirty (30) year sentence imposed in this cause, should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

BILLY L. GORE
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, Billy L. Gore, 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:

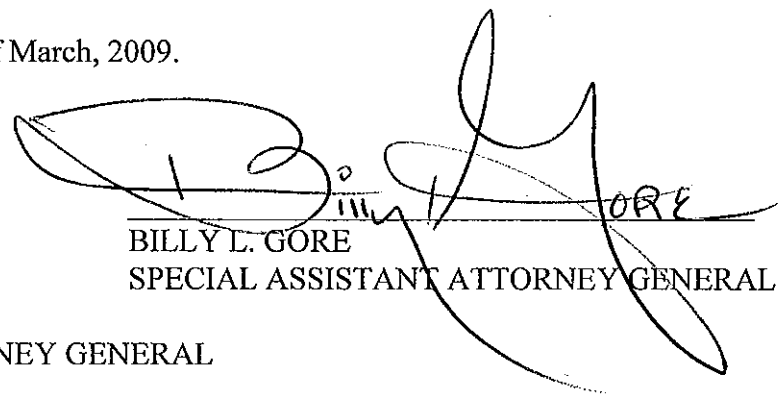
**Honorable Charles E. Webster**
Circuit Court Judge, District 11
Post Office Drawer 848
Clarksdale, MS 38614

**Honorable Laurence Y. Mellen**
District Attorney, District 11
Post Office Box 848
Cleveland, MS 38732

**Felix Perkins**, #57209
Central Mississippi Correctional Facility
P.O. Box 88550
Pearl, MS 39208

**Leslie S. Lee, Esquire**
Attorney at Law
301 North Lamar Street, Suite 210
Jackson, MS 39201

This the 19th day of March, 2009.



BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

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