

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STATE OF MISSISSIPPI

APPELLANT

VS

CAUSE NO. 2009-CA-01640

JOHNNY DELANEY

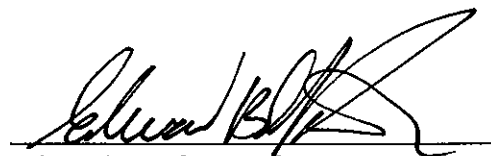
APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following list persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Edward Blackmon, Jr., Blackmon & Blackmon, PLLC, P. O. Drawer 105, Canton, Mississippi 39046, attorney of record for the Appellee, Johnny Delaney.
2. Office of the District Attorney for the 21st Circuit Court District, through James H. Powell, III, District Attorney and Steven Waldrup, Assistant District Attorney on behalf of Appellant, the State of Mississippi in this cause
3. Mitchell J. Creel, Creel Law Firm, P. O. Box 276, Greenville, MS 38702, attorney of record for the Appellee, Johnny Delaney.
4. Johnny Delaney, Appellee herein.
5. Honorable Jannie L. Lewis, Holmes County Circuit Court Judge, P. O. Box 149, Lexington, MS 39095-0149

This the 21st day of April, 2010.


Edward Blackmon, Jr.

STATEMENT OF THE ISSUES

1. THE COURT DID NOT ERROR IN FINDING THAT SECTION 99-3-28 APPLIED TO THE GRAND JURY PROCEEDINGS AND INDICTMENT
2. THE INDICTMENT OF APPELLEE DID NOT RENDER THE PROVISIONS OF SECTION 99-3-28 MOOT
3. SECTION 99-3-28 DOES NOT CONTRAVENE THE CONSTITUTIONAL MANDATES IMPOSED UPON THE JUDICIARY FOR THE FAIR ADMINISTRATION OF JUSTICE
4. THE COURT DID NOT ERROR IN DISMISSING THE INDICTMENT AGAINST APPELLEE WITH PREJUDICE

TABLE OF CASES AND STATUTES

Case Law:

<i>Gilmer v. State</i> , 955 So.2d 829, 834 (Miss. 2007).....	10
<i>Kirby v. Illinois</i> , 406 N.5. 682 (1972).....	12
<i>Hall v. State</i> , 539 So.2d 1338 (1989).....	14
<i>Hudspeth v. State Highway Commission of Mississippi</i> , 534 So.2d 210, 213 (Miss.1988).....	14
<i>Deeds v. State</i> , 2008-KA-00146-SCT (Miss. 2009).....	15

Statutes:

Mississippi Code Annotated, 1972, Section 97-3-7.....	12, 13
Mississippi Code Annotated, Section 97-9-53.....	12
Mississippi Code Annotated, 1972, Section 99-1-5.....	14
Mississippi Code Annotated, Section 99-3-8(1)(a).....	11
Mississippi Code Annotated, Section 99-3-8(2).....	10
Mississippi Code of 1972, as Amended Section 99-3-28.....	5-14
Mississippi Code Annotated, 1972, Section 99-7-2.....	14
Mississippi Code Annotated, Section 99-9-35.....	14

STATEMENT OF THE CASE

The Appellee was indicted by a Homes County Grand Jury on December 1, 2008, and charged with the following: (CP p4)

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful men and women of Holmes County, Mississippi, being duly selected, empaneled, sworn and charged in the Circuit Court of Holmes County, Mississippi, upon their oaths, present that, JOHNNY DELANEY, a Mississippi Highway Patrol Trooper, did, on or about or between August 29, 2008, and September 30, 2008, unlawfully, willfully, feloniously and knowingly demand and collect, under the color of his office, a money fee or reward not authorize by law, to-wit: obtained cash money from Jessie Jordan in exchange for JOHNNY DELANEY's promise to dismiss Traffic Ticket No. 907741 53, given to Jessie Jordan by JOHNNY DELANEY for speeding, in violation of Section 97- 11-33 of the Mississippi Code of 1972, as amended, against the peace and dignity of the State of Mississippi.

As is clearly set forth in the indictment, Appellee, is accused of having committed the crime of extortion while in the performance of his duties as a law enforcement officer, i.e., Miss Highway Patrol Trooper.

Miss Code Annotated Section 99-3-28 provides that:

99-3-28. Teachers or sworn law enforcement officers charged with committing crime while in the performance of duties; certain procedural requirements to be met prior to issuance of arrest warrant.

(1) (a) Except as provided in subsection (2) of this section, before an arrest warrant shall be issued against any teacher who is a licensed public school employee as defined in Section 37-9-1, a certified jail officer as defined in Section 45-4-9, a counselor at an adolescent offender program created under Section 43-27-201 et seq., or a sworn law enforcement officer within this state as defined in Section 45-6-3 for a criminal act, whether misdemeanor or felony, which is alleged to have occurred while the teacher, jail officer, counselor at an adolescent offender program or law enforcement officer was in the performance of official duties, a probable cause hearing shall be held before a circuit court judge. The purpose of the hearing shall be to determine if adequate probable cause exists for the issuance of a warrant. All parties testifying in these proceedings shall do so under oath. The accused

shall have the right to enter an appearance at the hearing, represented by legal counsel at his own expense, to hear the accusations and evidence against him; he may present evidence or testify in his own behalf.

(b) The authority receiving any such charge or complaint against a teacher, jail officer, counselor at an adolescent offender program or law enforcement officer shall immediately present same to the county prosecuting attorney having jurisdiction who shall immediately present the charge or complaint to a circuit judge in the judicial district where the action arose for disposition pursuant to this section.

(2) Nothing in this section shall prohibit the issuance of an arrest warrant by a circuit court judge upon presentation of probable cause, without the holding of a probable cause hearing, if adequate evidence is presented to satisfy the court that there is a significant risk that the accused will flee the court's jurisdiction or that the accused poses a threat to the safety or well being of the public.

The Appellee filed a Motion to Dismiss and/or Quash the Indictment Against him in the Circuit Court of Holmes County, Mississippi on September 16, 2009, stating in part that: (CP pp 32-33)

2. The aforesaid indictment was sought and obtained by the State of Mississippi in clear violation of Defendant's Fifth and Fourteenth Amendment rights to due process and equal protection under the Constitution of the United States. In addition, the subject indictment was sought and obtained by the State of Mississippi in violation of the requirements of §99-3-28 of the Mississippi Code of 1972, as Amended.

6. The State of Mississippi, acting by and through its law enforcement agency, the Mississippi Bureau of Investigation (Highway Patrol), conducted an investigation, which included interviewing the defendant, but chose not to seek a probable cause hearing as required by §99-3-28, but instead, by passed the same, and in absolute contravention of the statute, proceeded directly to the Holmes County, Mississippi Grand Jury.

The Circuit Court of Holmes County on September 28, 2009, called up Appellee's Motion to Dismiss for argument by counsel for the State of Mississippi and defendant, Johnny Delaney.

Appellee's counsel argued, in part, as follows: (T pp 5-8)

MR. BLACKMON: All right. Your Honor, clearly, the -- Mr. Delaney was in the performance of his official duties. He was employed as a patrolman, and this involved a matter of an issuance of traffic ticket. So it's clear that he was in performance of his duties.

Now, the statute is pretty strong in that it uses the term "shall." It doesn't provide for "shall" except when you take it to the grand jury, any of that. It says shall be provided with a probable cause hearing. And I don't believe the government can bypass this process by saying, well, we'll just let the grand jury resolve it...

There are no exceptions to this in the statute, and the exceptions were omitted for a particular reason. The legislature did not intend that there be any other way that a person in these particular capacities, this special group of people, protected class of people, let me call it that way, could be charged with a crime except that you had to first have a probable cause hearing. There is absolutely no exception to it...

And in this case, that was -- it was omitted. And I would add, Your Honor, before I yield to the State, that Mr. Delaney has been without benefit of his employment as a result of this indictment. I think the legislature intended that that not happen either until a probable cause hearing had been held. The person could not be disciplined, could not be fired, until that hearing came about.

In this case as a result of the government's failure to follow the statute, he has been deprived of his, one, obviously, of his income, his property, without due process of law.

And because of that, we would ask that the Court dismiss the indictment with prejudice because of the government's failure to follow the law as required by this special statute passed originally in 2001.

The Appellant countered Appellee's argument by essentially arguing that the statute §99-3-28, only applied where an arrest warrant was sought by the charging party. The District Attorney argued that: (T pp 11, 13)

No charge was filed in justice court, and no charge was filed in municipal court. This was a direct presentment like a drug case to a Holmes County grand jury. And it directs the justice court to immediately present the affidavit or the charging document to the

county prosecuting attorney. The county prosecuting attorney shall duly present the affidavit to a circuit judge for the purpose of having a probable cause hearing...

And lastly, and I'll say it again, the statute only applies before an arrest warrant shall be issued. No arrest warrant was issued in this case so the statute does not apply. That's all I have.

The Government did not dispute during argument that the Appellee had been without benefit of his employment as result of his indictment. That stated fact as argued, remains uncontradicted.

The Circuit Court of Holmes County, Mississippi, after hearing arguments of counsel for the State and defendant, ruled as follows: (T pp 19-20)

THE COURT: Before the Court is Defendant's Motion to Dismiss pursuant to Section 99-3-28. Court finds that this is a case that is subject to the probable cause hearing pursuant to 99-3-28 in that the defendant comes under Section 45--6-3. It appears that the probable cause hearing was not done. Court is -- has looked at some opinions from the Attorney General, and one opinion that is of interest states that where an indictment is done, there's no need for a probable cause hearing, but it also states that there's no need for it only if there was an arrest -- if there was an arrest warrant. But I think 99-3-28 was not -- or is not designed that you can bypass a probable cause hearing, or the Attorney General's opinion does not state that you can bypass the probable cause hearing by not issuing an arrest warrant, and I don't think that's the intent in Section 99-3-28.

Therefore, this Court finds that a probable cause hearing should have been held in this matter and that it was not held. The Court finds that this matter should be dismissed with prejudice in that the defendant would be subject to double jeopardy in order to go back and to try to remedy. Therefore, the motion to dismiss is granted.

The Court entered an Order dated September 28, 2009 adopting and incorporating its ruling, and dismissed the subject indictment with prejudice. (CP pp 81-82)

SUMMARY OF ARGUMENT

The legislative enactment of Section 99-3-28 falls within that branch of government's authority to legislate policy matters. It was clearly within the Legislators' authority to mandate

certain procedural prerequisites prior to the issuance of an arrest warrant for the class of individuals identified in Section 99-3-28.

The language of the statute and its definition are plain and easily understood. There is no need to construct the legislative intent. Section 99-3-28 very clearly states no arrest, for a criminal act, whether misdemeanor or felony can be made without a finding of probable cause by a circuit court judge. There is no provision in the statute which would allow for an end run around the requirements of the statute.

A grand jury proceeding is not a substitute for the required procedure of a probable cause hearing under the statute. The statute allows for certain due process rights to the accused. Among them are: the right to enter an appearance; be represented by counsel; to hear the accusations and evidence against him; to present evidence or testify in his own behalf. None of these rights are afforded the accused in a grand jury proceeding.

The dismissal of the indictment against the Appellee by the Circuit Court of Holmes County, Mississippi was warranted and constitutionally required because of the double jeopardy Appellee would be exposed to if the Appellant were allowed to continue its prosecution.

Appellee had already been punished by being deprived of his employment and livelihood during the period of his indictment. Any subsequent attempt to prosecute the Appellee for the same crime would violate Appellee's constitutionally protected rights under the Fifth and Fourteenth Amendment of the United States Constitution.

ARGUMENT

THE COURT DID NOT ERROR IN FINDING THAT SECTION 99-3-28 APPLIED TO THE GRAND JURY PROCEEDINGS AND INDICTMENT

The Legislature enacted Section 99-3-28 to protect police/corrections officers, teachers and counselors from being arrested for baseless, and often retaliatory, criminal charges lodged against them for acts alleged to have occurred while they were acting in their official capacities.

This selected class of individuals was deemed by the Legislature to be particularly vulnerable to false and unsupportable allegations. Thus, it was determined by the Legislature that, as a matter of public policy, these individuals could not be subject to arrest without a probable cause hearing before a Circuit Court judge.

The clear and unambiguous requirement mandated by Section 99-3-28 is that for the protected class of individuals identified in the aforesaid Section, the County Prosecutor is required to present the case to the Court for a probable cause hearing.

The State artfully argues that the Circuit Court of Holmes County applied a meaning to the statute at variance with its clear wording. Although the State argues for strict construction, it seeks relief that would require the Court to first find that the statute is ambiguous, and then reconstruct the same to allow the State to bypass the statutory mandate providing for a preliminary hearing before arrest. Section 99-3-28 (1)(a) provides for only one exception which would allow an arrest without the holding of a probable cause hearing, the same being 99-3-28 (2). There is no statutory language in Section 99-3-28 which would allow the procedure advanced by the Appellant, that the statute did not apply if the charges were presented directly to a grand jury.

In the case of *Gilmer v. State*, 955 So.2d 829, 834 (Miss. 2007), this Court held that, "When a statute is unambiguous, this Court applies the plain meaning of the statute and refraining from the use of statutory construction principles." Here, the Court should likewise avoid doing so. Section 99-3-28 is clear and unambiguous and its intent can be discerned from the plain meaning of its language.

There is sound reason for the Legislature to have enacted Section 99-3-28 to protect this special class of individuals. The designated class, through its direct contact with the public in carrying out their duties and responsibilities, often are subject to false and retaliatory criminal

charges. As a matter of public policy, the Legislature was within its constitutional authority to provide for mandatory procedure to follow prior to the arrest of this protected class of individuals.

The Appellant incorrectly argues that the events in Alabama, in which a professor allegedly shot six of her co-workers, "killing three of them," would fall under the requirements of Section 99-3-28. (Appellant's Brief, p.5). This argument is more than a stretch. Section 99-3-28 is limited to those instances where the defined class member is being charged with a misdemeanor or felony, which is alleged to have occurred while the teacher, jailed officer, counselor at an adolescent offender program or law enforcement officer was in the "performance of official duties." 99-3-28 (1)(a).

The killing of co-workers could never be logically argued to be an act committed while the class member was "in the performance of official duties" 99-3-28 (1)(a). The attempt to frame these facts as being analogous is without merit.

THE INDICTMENT OF APPELLEE DID NOT RENDER THE PROVISIONS
OF SECTION 99-3-28 MOOT

The State inexplicably argues that in this instance that the grand jury proceeding which resulted in the indictment of the Appellee, was equivalent to the probable cause hearing required in Section 99-3-28. The relevant section which is applicable to Appellant's argument provides that:

... a probable cause hearing shall be held before a circuit court judge. The purpose of the hearing shall be to determine if adequate probable cause exist for the issuance of a warrant. All parties testing in these proceedings shall have the right to enter an appearance at the hearing, represented by legal counsel at his own expense, to hear the accusation and evidence against him; he may present evidence or testify in his own behalf.

The Appellant omits from its argument that in a grand jury proceeding, none of the rights granted to Appellant in Section 99-3-28 are afforded him. The accused in matters being taken up

by a grand jury, has no right to be present or enter his appearance; to be represented by counsel; to hear the accusations and evidence against him; to present evidence; or to testify in his own behalf. All of these rights are afforded a defendant in Section 99-3-28.

Grand juries in our criminal justice system are screening bodies that prosecutors use to secure indictments against criminal defendants. Witnesses who appear before the grand jury, nor potential defendants, have the right to counsel during the grand jury investigation. *Kirby v. Illinois*, 406 N.S. 682 (1972).

In fact, Section 97-9-53, Miss. Code Ann. prohibits a defendant from being told that an indictment has been returned until after he has been arrested or given bail or recognizance thereto. This hardly provides of equivalent due process to probable cause hearing afforded a defendant in Section 99-3-28.

The argument that the grand jury proceedings mooted the requirements of Section 99-3-28, is not supported by law. Clearly, the Legislature intended that the class of individuals listed in Section 99-3-28 be afforded certain due process rights that are not available in a grand jury proceeding. These due process rights cannot be simply mooted as is argued by the Appellants.

**SECTION 99-3-28 DOES NOT CONTRAVENE THE CONSTITUTIONAL MANDATES
IMPOSED UPON THE JUDICIARY FOR THE FAIR ADMINISTRATION OF JUSTICE**

The Appellant's argument that Section 99-3-28 contravenes the Constitutional Mandates Imposed Upon The Judiciary For The Fair Administration of Justice is without merit.

Principally, the Appellant argues that the statute thwarts "the fair administration of justice because it mandates that certain classes of citizens of this state be given special treatment by the courts' (Appellants Brief, p. 15).

The Legislature, as part of its policy making authority, has on numerous occasions, created special classes of individuals to be treated and dealt with differently. For instance, Section 97-3-7 Miss. Code. Ann., 1972, provides that:

(I) A person is guilty of simple assault if he (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (c) attempts by physical menace to put another in fear of imminent serious bodily harm; and, upon conviction, he shall be punished by a fine of not more than Five Hundred Dollars (\$500.00) or by imprisonment in the county jail for not more than six (6) months, or both. * * * However, a person convicted of simple assault (a) upon a statewide elected official, law enforcement officer, fireman, emergency medical personnel, public health personnel, social worker or child protection specialist employed by the Department of Human Services or another agency, superintendent, principal, teacher or other instructional personnel, school attendance officer, school bus driver, or a judge of a circuit, chancery, county, justice or youth court or a judge of the Court of Appeals or a justice of the Supreme Court, district attorney, legal assistant to a district attorney, county prosecutor, municipal prosecutor, court reporter employed by a court, court administrator, clerk or deputy clerk of the court, or public defender, while such statewide elected official, judge or justice, law enforcement officer, fireman, emergency medical personnel, public health personnel, social worker, child protection specialist, superintendent, principal, teacher or other instructional personnel, school attendance officer, school bus driver, district attorney, legal assistant to a district attorney, county prosecutor, municipal prosecutor, court reporter employed by a court, court administrator, clerk or deputy clerk of the court, or public defender is acting within the scope of his duty, office or employment, or (b) upon a legislator while the Legislature is in regular or extraordinary session or while otherwise acting within the scope of his duty, office or employment, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00) or by imprisonment for not more than five (5) years, or both.

It is within the province of the Legislature to enact policy which in some instances, will provide special protection to individuals because of their office or duties. This is clearly a legislative function. The courts are less likely to enact rules which could address the special needs of this class of individuals. The legislative branch is better suited to address the special needs of the class of individuals indentified in Sections 99-3-28 and 97-3-7.

The Legislature is vested with the authority to legislate by statute the conduct and acts which can be charged as a crime. Simply put, it is the legislature that determines what acts constitutes a crime in the State of Mississippi. Logically, the legislature can also determine what

procedure must be followed in order to charge a person with the commission of a crime. It does so in many of the offenses which have been declared by statute to be a crime.

Examples of such procedural restrictions or prerequisites are:

Section 99-1-5 Miss. Code of Ann. 1972. Time limitation on prosecutions. This section limits prosecution for many crimes unless prosecution is commenced within two (2) years next after the commission thereof.

Section 99-7-2. When two or more offenses may be charged in single indictment; trial, verdict, and sentences. This statute directs how and when a grand jury can charge two or more offenses in the same indictment.

Section 99-9-35. Exemption from arrest and service of process. This statute exempts certain persons from arrest or service of process, civil or criminal.

These are but a few of legislative enactments which prescribe procedural prerequisites in the presentment and prosecution of crimes in this state.

The special class identified in Section 99-3-28 does not constitute an encroachment into the Rule making authority of the Court. As set forth above, the Legislature must necessarily address many policy issues involving criminal procedure, because they often, as is here, fall within the ambit of public policy issues.

This Court has recognized the necessary comity that has to exist between the two branches of government. In the case of *Hall v. State*, 539 So.2d 1338 (1989), the court held that:

This is not to say that the judiciary should give the back of its hand to every legislative enactment arguably encroaching upon its rule-making turf. Deference ought to be given such legislative expressions, not out of obligation but comity, not out of accession to authority, but in respect for the legislature as that branch of government closest to the people whom all branches have been created to serve. Where the invasion is minor and where otherwise the legislature has enacted upon a matter well within legislative authority, we may adopt the legislated rule as our own. See *Hudspeth v. State Highway Commission of Mississippi*, 534 So.2d 210, 213 (Miss.1988). For when all is said and done, law is not an end, but a means to the end of a society in which we should all want to live, and legislatures are one

structure democratic theory has devised for identifying the shape of that popularly desired society.

A grand jury investigates to determine if a crime, set forth by statute, should be charged in an indictment. The fact that there are procedural prerequisites before a crime can be charged as mandated in Section 99-3-28, does not render statute unconstitutional.¹

THE COURT DID NOT ERROR IN DISMISSING THE INDICTMENT
AGAINST APPELLEE WITH PREJUDICE

The lower court in its ruling and order of September 28, 2009 correctly found that Appellant's failure to follow the requirements of Section 99-3-28 deprived Appellee of his constitutionally protected rights under the Fifth and Fourteenth Amendment of the United States Constitution, and that as a result, Appellee suffered loss of liberty and property without due process in violation of the double jeopardy clause of Mississippi and Federal Constitution.

The deprivation of Appellee's due process rights is directly related to his suspension from employment. The *Deeds v. State*, 2008-KA-00146-SCT (Miss. 2009) case cited by the Appellant, sets forth three factors which are indicative of Double Jeopardy. It is the third factor which is applicable to the subject case, **multiple punishments for the same offense**.

Appellee, is held by the lower court, was entitled as a matter of law to the procedural prerequisite mandated in Section 99-3-28. He suffered the suspension from employment during the period of the State's denial of his statutory due process right. As a result, the State should not be allowed to extract yet another punishment of the Appellee by subjecting him to continued prosecution. The State would be at liberty to continue to pursue prosecution of the Appellee, notwithstanding the punishment it has already extracted from him, but for the dismissal of the

¹ The United States Supreme Court has recognized the "essential balance" between the legislative and judicial branches created by the separation of powers: "The Legislature would be possessed of the power to prescribe[e] the rules by which the duties and rights of every citizen are to be regulated, but the power of [t]he interpretation of the laws would be the proper and peculiar province of the courts." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222 (1995)

indictment with prejudice by the lower court. The dismissal of the indictment with prejudice, insures that the Appellee will not be subject to double jeopardy.

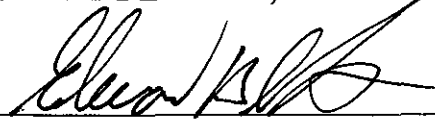
CONCLUSION

The ruling of the Circuit Court of Holmes County, Mississippi was proper and necessary, given the failure of the Appellant to follow the statutory prerequisite mandated in Section 99-3-28. The Appellant's arguments that the statute infringed upon the rule making authority of the court and that it is unconstitutional, is without merit as argued herein. Appellant has drawn from numerous citations in its effort to convince the court that it should be allowed to continue its prosecution of the Appellee. However, none of the citations provide sufficient grounds for this court to usurp the authority of the legislative branch of government to, as a matter of public policy, provide for the protection of a class of individuals who, because of their work, are more likely than others to be subject to false, unsupported and vindictive criminal charges. How else can these individuals be protected, other than through legislative enactments. To rule otherwise, would mean that the Legislature would be powerless to make policy decisions for any separate class of vulnerable citizens of this state. The court should affirm the lower court's ruling in total.

Respectfully submitted this the 21st day of April, 2010.

JOHNNY DELANEY, APPELLEE

By:


EDWARD BLACKMON, JR., ESQ.
ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

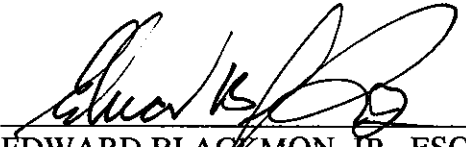
I, Edward Blackmon, Jr., Attorney for Appellee, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the Brief of the Appellee and the Appellee's Record Excerpts to the following:

James H. Powell, III, Esq.
Holmes County District Attorney
Post Office Box 311
Durant, MS 39063-0311

Honorable Jannie L. Lewis
Holmes County Circuit Court Judge
P. O. Box 149
Lexington, MS 39095-0149

Mitchell J. Creel
Creel Law Firm
P. O. Box 276
Greenville, MS 38702

This the 21st day of April, 2010.


EDWARD BLACKMON, JR., ESQ.