IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

YANCE AGENT — APPELLANT

VS. — NO. 2009-CP-0111-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 4912

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

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This is an appeal from summary denial of post-conviction relief sought in Pearl River County, Prentiss Greene Harrell, Circuit Judge, presiding. (Appellee's exhibit A, attached)

YANCE AGENT has violated the terms of his post-release supervision and has been ordered to serve the remainder of his sentence imposed for statutory rape.

STATEMENT OF FACTS

On September 5, 2006, Yance Agent, a thirty-one (31) year-old Caucasian male with a GED (C.P. at 45, 52), entered a voluntary plea of guilty to statutory rape in Pearl River County. (C.P. at 44-48) The State, as a benevolent gesture, did not oppose a sentence of time served plus post-release supervision. (C.P. at 45)

Following his plea-qualification hearing before Circuit Judge Michael Eubanks, Agent was

> " . . . sentenced to Fifteen (15) years in the custody of the [MDOC] with Two Hundred Forty-Three (243) Days to be served at the [MDOC], and the remaining Fourteen (14) years and One Hundred Twenty-Two (122) Days of said sentence to be served under the post-release provisions with a Fourteen (14) year and One Hundred Twenty-Two (122) Day supervision period, pursuant to Mississippi Code 47-7-34. The defendant is to be given credit for time served in the County Jail, therefore, the defendant has served his time and shall be released to post-release supervision." (C.P. at 49)

A provision in the sentencing order stated, *inter alia*, the following:

> "The suspension of any portion of said sentence, whether under Post-Release Supervision, probation or otherwise, shall be subject to the following conditions:
>
> Defendant shall:
>
> * * * * * *
>
> (h) Possess or consume no alcoholic beverages or mood altering drugs, and possess no firearm or other deadly weapon; * * * " (C.P. at 50)

It is undisputed the possession or consumption of alcoholic beverages or mood altering drugs were conditions of Agent's post-release supervision.

Agent, by his own admission (C.P. at 93), subsequently violated the terms and conditions of his post-release supervision by testing positive for methamphetamine and marijuana on February 1, 2007, and testing positive for methamphetamine, marijuana and amphetamines on March 12, 2007.

On July 5, 2007, a revocation hearing was conducted before R. I. Prichard, III, Circuit Judge, at the conclusion of which Agent was revoked from his post-release supervision for failing to abide by the terms and conditions of his supervision. (C.P. at 89, 91-94)

Agent's suspended sentence of fourteen (14) years and one hundred twenty two (122) days was revoked, and he was ordered to serve the remainder of his sentence for statutory rape. (C.P. at

94)

During the revocation hearing Agent did not deny the test results were positive and that "everything is true." (C.P. at 93) We quote:

> THE COURT: * * * So, Yance, you're denying that the test was done and you tested positive; is that correct?
>
> THE DEFENDANT: No, sir. I'm not denying that.
>
> THE COURT: Well, then you've given a chance to waive your hearing, you admitted to the charges, I mean.
>
> THE DEFENDANT: Right, sir. I was looking for you to give me a chance to try to better myself without sending me up that road.
>
> THE COURT: Well, you were given that chance by Judge Eubanks. The only choice I've I got is if you violate your terms and conditions I've got to revoke you. So do you have anything you want to offer that it's untrue or incorrect?
>
> THE DEFENDANT: No, sir. Everything is true. (C.P. at 93)

Seventeen (17) months later, on December 10, 2008, Agent filed a motion for post-conviction collateral relief alleging he did not receive a fair revocation hearing and was denied Due Process of law because, *inter alia*, his probation officer failed to advocate his cause. (C.P. at 4-32)

On December 15, 2008, Prentiss Harrell, Circuit Judge, following a review of Agent's motion, together with all files, records, transcripts, and correspondence pertaining to the matter, entered a six (6) page order summarily dismissing Agent's motion for post-conviction relief.

It does not appear that Agent was represented by counsel at the revocation hearing. Rather, he was present with his probation officer, Ms. Charlotte Penton, a Field Officer with the MDOC, who on May 22, 2007, had filed an affidavit alleging that Agent violated the terms and conditions of his suspended sentence by testing positive for marijuana, methamphetamine, and amphetamines. (C.P. at 92)

Feeling aggrieved, Agent, on December 10, 2008, filed a motion for post-conviction collateral relief claiming, *inter alia*, he was denied a fair revocation hearing and that his probation officer failed to advocate his cause. (C.P. at 13, 20)

Agent complains on appeal the trial court erred in denying him a fundamentally fair revocation hearing, he was denied effective assistance by his probation officer, and the court erred in sentencing him to a term of imprisonment rather than imposing a less drastic punishment.

We submit Judge Harrell did not err in summarily dismissing Agent's motion for post-conviction relief. His findings of fact are neither clearly erroneous nor manifestly wrong. **Deere v. State,** 976 So.2d 977, 977-78 ¶¶ 2 and 4 (Ct.App.Miss. 2008), citing **Johnson v. State,** 925 So.2d 86 (¶11) (Miss. 2006).

SUMMARY OF ARGUMENT

Yance Agent, who has been found to be in direct violation of his suspended sentence and post-release supervision, complains on appeal in a post-conviction environment he was denied both effective counsel and a fundamentally fair revocation hearing. In contesting these claims, appellee relies quite heavily upon the beautiful opinion and order entered by the circuit judge in summarily denying relief. That opinion and order, which contains findings of fact that are not clearly erroneous, is both judicious and correct.

The facts in this case are not unlike those found in **Loisel v. State,** 995 So.2d 850 (Ct.App.Miss.2008), and **Jones v. State,** 976 So.2d 407 (Ct.App.Miss. 2008), which control, fully, fairly, and finally, the posture of the present appeal in every respect.

In **Loisel,** petitioner/probationer sought post-conviction review of a judgment revoking his probation and imposing a seven year sentence.

Citing, *inter alia*, Miss.Code Ann, § 47-7-37, the Court of Appeals held that Loisel was not denied due process of law because, *inter alia*, " . . . Loisel admitted at the revocation hearing to violating his probation, and it was this admission that served as the basis for the revocation." **Loisel v. State,** *supra*, 995 So.2d at 853.

Same here. Agent admitted violating the conditions of his suspended sentence. (C.P. at 93)

In **Jones,** petitioner/probationer sought post-conviction review of a judgment revoking his suspended sentence after he violated the terms of his post-release supervision. Jones also argued his sentence was excessive and unconstitutional.

Citing, *inter alia,* **Riely v. State,** 562 So.2d 1206, 1209 (Miss. 1990), the Court of Appeals held that a probationer is not always entitled to counsel at a revocation hearing where, as here, the petitioner's case is neither complex nor difficult to understand. Stated differently, there is no automatic right to counsel at hearings for the revocation of probation. **Riely v. State,** *supra,* 562 So.2d 1206, 1209 (Miss. 1990).

Moreover, Agent, much like Jones, " . . . has failed to make an initial showing that there was a disproportionate sentence in this case." Indeed, practically all of Agent's fifteen (15) year sentence was suspended.

In **Jones**, the revocation of Jones's post-release supervision was found to be warranted based upon testimony by his probation officer that Jones tested positive for marijuana on two separate occasions, was caught drinking alcohol, and was in possession of a single rock of cocaine, all in violation of the terms of his post-release supervision.

Same here. The record reflects that Agent tested positive for methamphetamine and marijuana on February 1, 2007, and again on March 12, 2007. (C.P. at 92, 100)

In short, Judge Harrell correctly ruled that Agent received all the due process Agent was due. *See* Miss.Code Ann. §47-7-37 (Rev.2004); **Payton v. State,** 845 So.2d 713 (¶22) (Ct.App.Miss. 2003).

First, he found as a fact and ruled as a matter of law that Agent was not denied due process of law on the ground his probation officer failed to advocate his cause.

Second, he found as a fact that Agent was given a fair opportunity to call his own witnesses or present evidence in mitigation at his revocation hearing.

> THE COURT: * * * So do you have anything you want to offer that it's untrue or incorrect?
>
> THE DEFENDANT: No, sir. Everything is true. (C.P. at 93)

Agent, on no fewer than two occasions, was in direct violation of his post-release supervision. Ms. Penton had no choice but to file with the court an affidavit charging Agent with a violation of his suspended sentence. Any failure by Penton to speak in Agent's behalf as an advocate for his cause did not violate Agent's due process rights.

Judge Harrell's findings of fact are nether clearly erroneous nor manifestly wrong.

"Mississippi law authorizes a trial judge to summarily dismiss a motion for post-conviction relief without the benefit of an evidentiary hearing '[i]f it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief.' " **Buckhalter v. State,** 912 So.2d 159, 160 (¶6) (Ct.App.Miss. 2005).

"If a prisoner is under court imposed probation, that prisoner may be incarcerated if the conditions of probation are not followed." **Johnson v. State,** *supra*, 925 So.2d 86, 92 (Miss. 2006).

The same is true here. As a condition of his suspended sentence and post-release supervision, Agent, during his prolonged period of post-release supervision, was to neither " . . . possess [n]or

consume . . . alcoholic beverages or mood altering drugs . . .".

"A suspension of a sentence does not automatically mean that the defendant will be on probation and under a duty to report to a probation officer. **It simply means that *part of* his entire sentence has been *postponed* pending the defendant's good behavior or such other conditions as the court may see fit to establish." Johnson v. State,** *supra*, 925 So.2d 86, 93 (Miss. 2006), quoting with approval the Justice Mills dissenting opinion in **Carter v. State,** 754 So.2d 1210-11. [emphasis ours.]

ARGUMENT

JUDGE HARRELL'S DECISION DENYING POST-CONVICTION RELIEF WAS NOT CLEARLY ERRONEOUS. RATHER, THE MOTION WAS CORRECTLY DENIED SUMMARILY BECAUSE AGENT'S CLAIMS WERE PLAINLY WITHOUT MERIT.

It was true in **Jones v. State,** *supra,* 976 So.2d 407, 414 (Ct.App.Miss. 2008), and it is equally true here, that " . . . a reading of the record demonstrates a very straightforward case where the probationer violated the terms of his post-release supervision on multiple occasions [and] [t]hus, because the case was not complex, [Agent] had no entitlement to counsel at the revocation hearing."

"A post-conviction claim for relief is properly dismissed without the benefit of an evidentiary hearing where it is manifestly without merit." **Jones v. State,** *supra,* 976 So.2d 407, 412 (Ct.App.Miss. 2008).

"In reviewing a trial court's decision to deny a petition for post conviction relief this Court will not reverse such a denial absent a finding that the trial court's decision was clearly erroneous." **Kirksey v. State,** 728 So.2d 565, 567 (Miss. 1999) citing **State v. Tokman,** 564 So.2d 1339, 1341 (Miss. 1990).

However, if questions of law are raised, then the applicable standard of review is *de novo*. **Jackson v. State,** 965 So.2d 686 (Miss. 2007).

In the case at bar, application of neither standard is sufficient to derail the decision of the circuit judge to deny post-conviction relief.

The fact-finding by Judge Harrell was not clearly erroneous.

We agree wholeheartedly with Judge Harrell that Agent " was given every opportunity by this Court to bring forth witnesses and evidence to refute his violation, however[,] none was offered and the Petitioner admitted to testing positive and violating his post-release supervision." (C.P. at 108)

It was not necessary for the "revocator" to prove beyond a reasonable doubt that Agent violated the terms and conditions of his post-release supervision but only that it was "more likely than not" that he did so. **Jones v. State,** *supra*, 976 So.2d 407, 413 (Ct.App.Miss. 2008); **Younger v. State,** 749 So.2d 219 (¶12) (Ct.App.Miss. 1999), citing **Berdin v. State,** 648 So.2d 73, 79 (Miss. 1994), quoting from **Murphy v. Lawhon,** 213 Miss. 513, 517, 57 So.2d 154 (1952), and **Wallace v. State,** 607 So.2d 1184, 1189-90 (Miss. 1992).

Agent admitted at the revocation hearing, and he freely admits in his appellate brief as well, he tested positive for mood altering drugs and thus violated the conditions of his suspended sentence. It matters not one whit that "Kathy Mason" (C.P. at 8, 32), a worker involved with Agent's alcohol and chemical treatment program, may have led him to believe that upon revocation he would be placed in the RID Program.

Judge Harrell correctly observed that any evidence along this line would have merely demonstrated Agent's efforts toward his rehabilitation " . . . which has no bearing on [Agent's] violation." (C.P. at 103)

Miss.Code Ann. § 99-39-11 (Supp. 1999) reads, in its entirety, as follows:

(1) The original motion together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

(2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.

* * * * * *

It does, he did, and he was.

Agent's post-conviction claims were properly denied because they were manifestly without merit.

CONCLUSION

Not every motion for post-conviction relief filed in the trial court must be afforded a full adversarial hearing. **Hebert v. State,** 864 So.2d 1041, 1045 (Ct.App.Miss. 2004). *See also* **Rowland v. Britt,** 867 So.22d 260, 262 (Ct.App.Miss. 2003) ["(T)he trial court is not required to grant an evidentiary hearing on every petition it entertains."]

Agent's motion seeking post-conviction collateral relief in the form of vacation of his sentence and remand for a new revocation hearing was correctly denied as manifestly without merit on the merits.

Appellee respectfully submits this case is devoid of any error. Accordingly, summary dismissal, as manifestly without merit, of Agent's motion for post-conviction collateral relief should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 4912

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

IN THE CIRCUIT COURT OF PEARL RIVER COUNTY, MISSISSIPPI

FILED

DEC 19 2008

VICKIE P. HARIEL, CIRCUIT CLERK
By: D.C.

YANCE AGENT

VS.

CIVIL CAUSE NO: 2008-0843H(PC)

STATE OF MISSISSIPPI

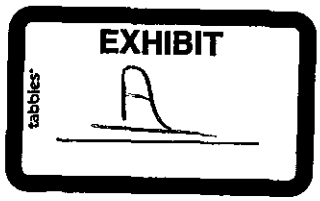
ORDER OF DISMISSAL

BEFORE THIS COURT, comes now Petitioner Yance Agent's *pro se* Motion for Post-Conviction Collateral Relief filed in pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss Code Ann § 99-39-1, *et seq.* In rendering its decision, this Court has reviewed Petitioner's motion together with all files, records, transcripts and correspondence pertaining to this matter. *(See also, Pearl River County Circuit Court Criminal File K2003-799E).* Accordingly, this Court is of the opinion that Petitioner's motion is not well-taken and should be SUMMARILY DISMISSED pursuant to Miss Code Ann § 99-39-11(2), for the following reasons to-wit:

The Petitioner's motion is treated as a motion for post-conviction relief where it was substantially found to comply with the requirements of Miss Code Ann § 99-39-9. In making its findings for this Order of Dismissal, this Court has recognized the well-established practice that where a prisoner is proceeding *pro se* the Court takes that fact into account and, in its discretion, credits not so well pleaded allegations to the end that a prisoner's meritorious complaint may not be lost because they were inartfully drafted. *See Moore v. Ruth*, 556 So. 2d 1059 (Miss. 1990).

FACTUAL AND PROCEDURAL BACKGROUND

On September 5, 2006, the petitioner plead guilty to the charge of Statutory Rape in cause number K2003-799E. Subsequently, he was sentenced to fifteen (15) years in the custody of the Mississippi Department of Corrections, with two hundred forty-three (243) days to be served and



the remaining fourteen (14) years and one hundred twenty-two (122) days suspended. However the suspended portion of his sentence was to be served under Post-Release Supervision in accordance with Miss. Code Ann. § 47-7-34. Petitioner was given credit for time served and was immediately released on post-release supervision. Petitioner as a requirement of his Post-Release Supervision successfully completed the A.C.T.S. program. On July 5, 2007, a revocation hearing was conducted before this Court and Petitioner was revoked from Post-Release Supervision for failure to abide by the terms and conditions of his supervision. According to the filed affidavit of Ms. Charlotte Penton, Field Officer with the Mississippi Department of Corrections, Petitioner violated subsection (h) of his terms and conditions of Post-Release Supervision:

> (h) Defendant shall possess or consume no alcoholic beverages or mood altering drugs, and possess no firearm or deadly weapon.

Petitioner tested positive for meth and marijuana on February 1, 2007, and tested positive for meth, marijuana, and amphetamines on March 12, 2007. Petitioner was remanded into the custody of the Mississippi Department of Corrections to serve the remaining fourteen (14) years and one hundred twenty-two (122) days of his sentence and complete the intensive drug and alcohol program.

Petitioner now asserts the following issues in regards to his Post-Release Revocation: 1. Petitioner was denied due process of law by not having a fair revocation hearing by this Court; 2. Petitioner was denied a fair revocation hearing as a result of the Probation Officer's failure to advocate his cause.

DUE PROCESS AT REVOCATION HEARING

Petitioner asserts that he was denied due process of law. He alleges that he was not allowed full discourse under the Due Process Clause concerning his revocation, stating that he

was not given adequate notice and was unable to present evidence or call witnesses. Given proper due process, the Petitioner alleges that he would have presented to this Court mitigating factors that would have advocated alternative forms of punishment.

The Mississippi Supreme Court in *Riely v. State* stated that there are minimum requirements of due process applicable to a final revocation hearing, which are:

> (a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole. *Riely v. State*, 562 So. 2d 1206, 1214 (Miss. 1990), *citing Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and *Morrissey v. Brewer*, 408 U.S. 471 (1972).

Pursuant to Mississippi Code Annotated § 47-7-37, the revocation procedure for post-release supervision is conducted in the same manner as that for a probation revocation.

The Petitioner asserts that he was not given the opportunity to call his own witnesses or present evidence at his revocation hearing. This Court finds the Petitioner's contention to be without merit. On May 22, 2007, Ms. Charlotte Penton, Field Officer with MDOC filed an affidavit alleging the Petitioner's violation of the terms and conditions of his post-release supervision. Subsequently a revocation hearing was conducted by this Court on July 5, 2007, where the Petitioner sworn under oath admitted to testing positive for methamphetamine, marijuana, and amphetamines thereby violating his post-release supervision. It is this Court's opinion that the Petitioner was given ample opportunity to present any evidence he might have had to refute the charges brought before him. This Court asked, "So, Yance, you're denying that the test was done and you tested positive; is that correct?" Petitioner's response, "No, sire. I'm not denying that." *See Official Transcript of Defendant's Revocation Hearing*, page 3, lines 2-6.

The Court continued and asked the Petitioner, "So do you have anything you want to offer that it's untrue or incorrect?" The Petitioner's response was, "No, sir. Everything is true." *See Official Transcript of Defendant's Revocation Hearing*, page 3, lines 17-21. It is evident from the transcript that this Court gave Petitioner the opportunity to present evidence or call witnesses on his own behalf, however, he chose not to do so. Furthermore, the evidence Petitioner would have presented was not to refute the violation of his post-release; it was to show his rehabilitation efforts, which would have had no effect on the outcome of his being revoked off of post-release supervision.

PROBATION OFFICER FAILURE TO ADVOCATE CASE

Mississippi Code Annotated § 47-7-37, Period of probation; arrest, revocation and recommitment for violation of probation or post-release supervision, provides:

> At any time during the period of probation the court, or judge in vacation, may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the probationer to be arrested... Thereupon, or upon an arrest by warrant as herein provided, *the court*, in term time or vacation, *shall cause the probationer to be brought before it and may continue or revoke all or any part of the probation or the suspension of sentence, and may cause the sentence imposed to be executed or may impose any part of the sentence which might have been imposed at the time of conviction. Emphasis Added.*

"If at any time during the period of probation it is determined that the probationer violated any of the specified conditions of his or her probation, the court has the authority to revoke any part or all of the probation or any part or all of the suspended sentence, as if the decision to suspend the sentence and place the defendant on probation had never been made." *Artis v. State*, 643 So. 2d 533 (Miss. 1994).

Petitioner alleges he was led to believe by Kathy, a worker at the A.C.T.S. Program, that his probation officer had spoken to this Court and that upon his revocation he would be placed in the RID Program. Petitioner has provided evidence in the form of a letter written to him from

Kathy, however, this is hearsay evidence and Petitioner has provided nothing further to corroborate the allegation. Petitioner asserts that his probation officer did not have his best interests at hand and as a result of her failure to advocate his cause, the Petitioner was unable to put on his own defense and was sentenced to serve the remainder of his fifteen (15) year sentence.

As stated *supra*, the evidence Petitioner would have presented was not to refute the violation of his post-release; it was to show his rehabilitation efforts, which has no bearing on the Petitioner's violation. Petitioner admitted to testing positive for methamphetamine, marijuana and amphetamines on two occasions. Pursuant to the Order of Conviction and Sentence issued by this Court on September 4, 2006, "The suspension of any portion of said sentence, whether under Post-Release Supervision, probation or otherwise, shall be subject to the following conditions:

Defendant shall:

> (H) Possess or consume no alcoholic beverages or mood altering drugs, and possess no firearm or other deadly weapon.

Petitioner was in direct violation of his post-release supervision. Therefore, this Court had sole discretion to revoke all or a portion of his original sentence.

This Court is of the opinion that Petitioner was not denied due process of law. The Petitioner was in direct violation of his post-release supervision. He was given every opportunity by this Court to bring forth witnesses and evidence to refute his violation, however none was offered and the Petitioner admitted to testing positive and violating his post-release supervision. Therefore, it is this Court's opinion that the Petitioner's claims should be denied and dismissed.

IT IS THEREFORE ORDERED AND ADJUDGED, that Petitioner Yance Agent's Motion for Post-Conviction Collateral Relief should be SUMMARILY DISMISSED pursuant to Miss Code Ann § 99-39-11(2), for the reasons discussed herein. It is further,

ORDERED AND ADJUDGED, that the Circuit Clerk of Pearl River County, Mississippi, be and is hereby directed to notify the Petitioner, by mail, by forwarding a certified true copy of this order to him at the following address: Mr. Yance Agent, MDOC #125439, P.O. Box 1419, Leakesville, Mississippi 39451.

SO ORDERED AND ADJUDGED this the 10 day of December, 2008.

CIRCUIT JUDGE

CERTIFICATE OF SERVICE

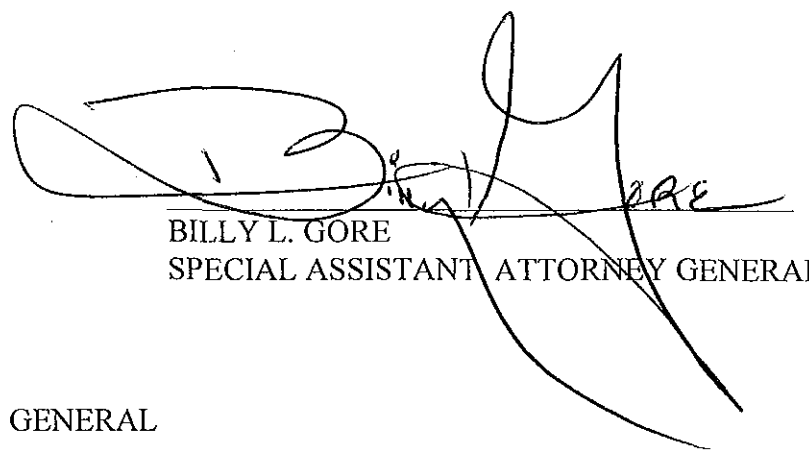
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

Honorable Prentiss Greene Harrell
Circuit Judge, District 15
P. O. Box 488
Purvis, MS 39475

Honorable Hal Kittrell
District Attorney, District 15
500 Courthouse Square, Suite 3
Columbia, MS 39429

Yance Agent, #1234439, Pro Se
MDOC
S.M. C. I., A-1
P.O. Box 1419
Leakesville, MS 39451

This the 18th day of June, 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