IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL K. JOHNSON — APPELLANT

VS. — NO. 2009-KA-0048

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL K. JOHNSON **APPELLANT**

vs. **CAUSE No. 2009-KA-00048**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Coahoma County, Mississippi in which the Appellant was convicted and sentenced for his felonies of **ATTEMPTED AGGRAVATED ASSAULT** and **POSSESSION OF A FIREARM BY A FELON**.

STATEMENT OF FACTS

The facts of the case at bar are straightforward. The victim in this case, one Russell Sanders, and the Appellant were employed as welders by an entity known to the record as "KBH." On 20 March 2008, while at their work at KBH, the Appellant made a complaint about another employee to Sanders. Sanders, however, was not interested in whatever fault the

Appellant found with that employee. The Appellant "went to being verbal" with Sanders; Sanders walked off, head toward a water fountain, the Appellant following.

As Sanders was drinking water, the Appellant came closer to him. Sanders stood up so as not to have his back to the Appellant. The Appellant "flinched toward" Sanders; Sanders grabbed the Appellant. When Sanders grabbed the Appellant, the Appellant dropped a screwdriver. The Appellant mumbled something, picked up his screwdriver, and went off. Sanders thought the incident was over. The Appellant then left the building.

At the conclusion of the workday, Sanders and two others left the building and got into a car, Sanders driving. The Appellant reappeared. At first, due to the fact that there was another car between the Appellant and Sander's car, Sanders could only see the Appellant's head. Sanders thought the Appellant wanted to resume whatever he had been quarreling about. When the car between Sanders and the Appellant moved, Sanders could see that the Appellant had a gun. Sanders also noticed that the Appellant's face did not look right. In fact, it seemed that the Appellant was quite angry. After another car passed between Sanders and the Appellant, the Appellant raised his gun and fired it. The Appellant then went off toward a railroad track.

The Appellant's bullet struck the door frame on the driver's side and shattered the window. (R. Vol. 2, pp. 34 - 43).

The bullet was found in the door seal. An expended nine millimeter shell was found some seven or eight feet from the victim's vehicle. (R. Vol. 2, pp. 44 - 51).

The other two men who were in the victim's car when the Appellant shot at the victim testified, and their testimony corroborated the victim's testimony. (R. Vol. 2, pp. 52 - 54; 59 - 63; 64 - 69).

Counsel for the defense and for the State stipulated that the Appellant had been

previously convicted of the felony of aggravated assault. (R. Vol. 2, pp. 55 - 58; 88).

The recovered bullet and shell casing were introduced into evidence, as well as photographs of the victim's car. R. Vol. 2, pp. 69 - 80; 85).

STATEMENT OF ISSUES

1. WAS SO MUCH OF THE INDICTMENT THAT ALLEGED THE APPELLANT'S HABITUAL OFFENDER STATUS DEFECTIVE FOR HAVING ALLEGEDLY FAILED TO ALLEGE THE DATES OF SENTENCING WITH RESPECT TO THE PRIOR OFFENSES?

2. WAS COUNSEL FOR THE DEFENSE INEFFECTIVE IN HIS REPRESENTATION OF THE APPELLANT?

3. DID THE TRIAL COURT ERR IN OVERRULING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT?

4. WAS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

5. WAS SO MUCH OF THE INDICTMENT THAT ALLEGED HABITUAL OFFENDER STATUS DEFECTIVE FOR HAVING SUPPOSEDLY ALLEGED MORE THAN ONE HABITUAL OFFENDER STATUTE?

6. WERE CUMULATIVE ERRORS COMMITTED SUCH THAT THE APPELLANT WAS DENIED A FAIR TRIAL?

SUMMARY OF ARGUMENT

1. THAT THE PORTION OF THE INDICTMENT WHICH ALLEGED HABITUAL OFFENDER STATUS WAS NOT DEFECTIVE[1]

2. THAT THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

3. THAT THE VERDICT WAS SUPPORTED BY THE EVIDENCE; THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

4. THAT THERE IS NO CUMULATIVE ERROR IN THE CASE AT BAR

---

[1] We will respond to the allegations of the Appellant's First and Fifth Assignments of Error in this response.

ARGUMENT

1. THAT THE PORTION OF THE INDICTMENT WHICH ALLEGED HABITUAL OFFENDER STATUS WAS NOT DEFECTIVE[2]

In the First Assignment of Error, the Appellant claims that the habitual offender portion of the indictment exhibited against him was defective because that portion failed to allege the dates of the sentenced imposed on the previous convictions. This claim was not raised in the trial court either with respect to the indictment or with respect to the sufficiency of the State's evidence during the sentencing hearing. It may not be considered here. *Franklin v. State*, 766 So.2d 16 Miss. Ct. App. 2000). The Appellant bases his argument upon a former version of the rule now governing pleading and procedure in habitual offender cases.

Assuming for argument that the issue was properly preserved, there is no merit in it.

The habitual offender portion of the indictment alleged the courts of conviction, the cause numbers involved, the dates of conviction, the specific felonies of which the Appellant was convicted, the dates of the "incidents," and the length of the terms of imprisonment imposed for each. It did not allege the dates that the sentences were imposed. (R. Vol. 1, pg. 4).

Under URCCC 11.03(1), an indictment, with respect to a charge of habitual offender status, must allege with particularity the nature or description of the offense constituting the previous convictions, the State or federal jurisdiction in which the prior convictions were had, and the date of judgment. There is no requirement that the dates of sentencing, if different from the dates of judgment, be alleged.

The indictment in the case at bar was completely in compliance with Rule 11.03(1); if

---

[2] We will respond to the allegations of the Appellant's First and Fifth Assignments of Error in this response.

anything, it alleged more than was required. Even if there were some requirement that the date of sentencing be alleged, the lack of such an allegation here would not be fatal. What the State did allege was more than sufficient to give the Appellant fair notice, and to permit the Appellant to present such defenses as he might have had. *Franklin, supra.* While the Appellant cites *Ard v. State*, 403 So.2d 875 (Miss. 1981), the indictment in the case at bar alleged everything – and more – that was not alleged in *Ard.*

The Appellant, at page seven, footnote one of his brief, claims that there was a re-sentencing in one of his prior convictions. That claim is not supported by the record and is to be ignored. *Mason v. State*, 440 So.2d 314 (Miss. 1983). In any event, through counsel he expressly stated that he had no objections to the documents introduced by the State during the sentencing hearing to establish his status as an habitual offender. (R. Vol. 2, pp. 122 - 123). He may not be heard now to claim some defect in the conviction or in the indictment for reason of any such alleged re-sentencing. There is no claim that any such re-sentencing affected the usefulness of the conviction to support sentencing as an habitual offender.

In the Fifth Assignment of Error, the Appellant asserts that the indictment with respect to the habitual offender portion thereof was vague and ambiguous since both Miss. Code Ann. Section 99-19-81 and 99-19-83 were mentioned. The Appellant then asserts that he should have been sentenced under Section 99-19-81 because there was substantial doubt as to which statute applied.

There was no objection on this ground in the trial court; it may not be raised here. *Franklin, supra.*

Assuming the Fifth Assignment of Error is before the Court, there is no merit in it.

The indictment, as relevant here, alleged as follows: ". . . upon conviction the said

defendant is hereby charged under MCA Section 99-19-83 to be sentenced to life imprisonment or alternatively, if the proof not support sentencing under Section 99-19-83, under MCA Section 99-19-81. . . ." (R. Vol. 1, pg. 4). From this language, nothing could be clearer than that the State charged the Appellant under Section 99-19-83 and sought sentencing under Section 99-19-81 only if the proof was insufficient to support sentencing under Section 99-19-83.[3] Quite plainly, there was no ambiguity present.

Still, the Appellant claims that the State "confessed" that either statute could apply. The plain language of the indictment gives the lie to that claim. The State simply alleged that it would seek sentencing under 99-19-81 should for some reason its evidence failed to demonstrate that at least one of the Appellant's prior convictions was a crime of violence. Section 99-19-81 would "apply" if and only in that event.

The Appellant cites *Beckham v. State*, 556 So.2d 342 (Miss. 1990), for the proposition that, where facts that constitute a criminal offense may fall under two or more statutes, and the indictment is ambiguous as to which statute is to be applied, the statute with the lesser penalty will be applied. But, as we have said, there was no ambiguity here. Beyond this, the rule involved in *Beckham* and in *Clubb v. State*, 672 So.2d 1201 (Miss. 1996) applies to cases in which two statutes defining two different crimes and imposing different punishments are potentially involved, the indictment failing to indicate which one the State chose to prosecute. The statutes involved here do not define the substance of felonies.

---

[3] The differences between these sections are that under Section 99-19-83 one of the underlying felonies must be shown to have been a crime of violence. The sentence imposable is life imprisonment without the possibility of parole or early release. Under Section 99-19-81, there is no requirement that one of the felonies constitute a crime of violence, and the imposable sentence is the maximum term of imprisonment on the principal charge without the possibility of parole or early release.

The Appellant then suggests that the State somehow waived the charge of habitual offender status by the way it drafted the indictment. This surely is a fine example of magical thinking. The State waived no such thing. The indictment was not ambiguous.

In another footnote, this one at page 36 of the Appellant's brief, the Appellant asserts that the State's approach would have allowed the State more than one opportunity to establish his status as an habitual offender. This is clearly untrue. The State proved two prior convictions in accordance with the statutes. Had the trial court found that neither conviction had been a crime of violence, then the court would have sentenced the Appellant under Section 99-19-81. This would not have required a second sentencing hearing.

The First and Fifth Assignments of Error are without merit

2. THAT THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

The Appellant alleges a number of said - to - be instances of ineffective assistance of counsel. In considering these claims, we bear in mind the familiar standard by which such claims are measured. *Strickland v. Washington*, 466 U.S. 668 (1984).

It is first said that the Appellant's attorney failed to object to the lack of a jury during the sentencing hearing. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) has no application to sentence enhancements based upon the fact of prior convictions. *McNickles v. State*, 979 So.2d 693 (Miss. Ct. App. 2007). Thus, the Appellant's attorney was not ineffective because he failed to raise a futile objection. *Casas v. State*, 735 So.2d 1053 (Miss. Ct. App. 1999).

The next complaint is that the Appellant was not satisfied with his attorney and did not want that attorney to represent him. It is claimed that the attorney lied to the Appellant, that the attorney would not let the Appellant review the State's discovery responses, and that the

Appellant filed a complaint against the attorney with the Mississippi Bar. It is also claimed that the attorney was angry with the Appellant because the Appellant did not want to enter a guilty plea. The Court is told that "[t[he record is clear on these issues." (Brief for the Appellant, at 16).

What the record actually shows is something rather different. When the trial court enquired of the parties as to whether they were ready for trial, the defense attorney told the court that he had been appointed to defend the Appellant some weeks prior to trial, that the defense attorney had attempted to meet with the Appellant at a conference room at the county jail, at which time the Appellant began screaming and cursing at him, and that the attorney had not gone back to speak with the Appellant because he was unwilling to put up with such abuse. However, the defense attorney told the court that he was prepared and ready for trial.

At that point the Appellant piped up and told the court that his attorney and he were not prepared for trial. He denied having cursed the attorney. He further stated that he had a letter from the State Bar in his pocket in which the Bar supposedly instructed the attorney to contact him immediately. The Appellant claimed that the attorney had not contacted him in over seven months. He further stated that the attorney had not let him see who signed an affidavit against him. The Appellant claimed that it was the attorney who cursed him, supposedly because the Appellant would not "cop out."

In reply to a question by the trial court, the defense attorney told the court that there would be no witnesses for the defense. When the Appellant again told the court that the attorney had not contacted him, the lawyer stated that he had not attempted to re-contact the Appellant on account of the Appellant's behavior. The Appellant retorted that "that's not due process of the law" and "every man got a right to know who has signed papers on him so he can study his case

for his self." The Appellant was of the view that the attorney was not going to study the case.

The trial court pointed out that the cause against the Appellant was instituted by a grand jury, a fact the Appellant admitted. The court then asked the Appellant if he had any witnesses, and the colloquy then veered into a discussion about who controlled the telephone at the county jail and something known to the record as "Evercom minutes."

The Appellant alleged that he had two witnesses he wished to call to aid the defense. When asked by the trial court who those witnesses were, the Appellant began mumbling, and then stated that that information was between his lawyer and himself. The Appellant finally mentioned an Officer Sledge, stating that he wanted him as a witness because Sledge arrested him. The State informed the trial court that Sledge was present and would be a witness for the State. When the court asked the Appellant for the name of the other witness, the Appellant began mumbling again. The court then told the prosecutor to make Sledge available to the defense attorney for an interview.

The trial court, exhibiting much patience, we should say, then enquired of the Appellant who his other witness would be. The Appellant responded that he had not had a chance to prepare. The Appellant then meandered into a discussion about some other case he had been involved in and how he had to win an appeal of it by himself. He concluded his remarks with a statement to the effect that the trial court was oppressing him with its power. The trial court responded to that it did not recall having received any complaints from the Appellant. The court did not get a sensible response to that question.

When the trial court asked the Appellant how he had been prejudiced, the Appellant said that he did not get on with his attorney and that the attorney lied about his having cursed the attorney. The Appellant then stated that he wanted someone else to represent him. The

Appellant then said he needed time because he did not think his attorney would help him. After a bit more of this sort of thing between the court and the Appellant, the court stated that the Appellant had time to prepare, that it understood that the Appellant had a personality conflict with the attorney, but that nothing had been shown to indicate that trial should be delayed. (R. Vol. 2, pp. 3 - 13).

Nonetheless, the trial court effectively continued the case for two days so that the attorney and the Appellant could confer. The Appellant was specifically instructed to inform his attorney of such witnesses as he wished to testify on his behalf. When the Appellant asked whether he could see "the report [the attorney] got on the case," the court indicated that the attorney would show the Appellant everything he received from the State in discovery. The Appellant then stated three times that he would be ready for trial on the day set by the court. (R. Vol. 2, pp. 14 - 15). When that day came, both sides announced ready for trial, without objection from the Appellant. (R. Vol. 2, pg. 17).

None of this demonstrates ineffective assistance of counsel. While the Appellant claims in his brief that the attorney was angry with him because he would not plead guilty to the offenses charged against him and so on, this is merely the Appellant's say - so. In any event, there is nothing in this record to show that whatever pre - trial problem the Appellant had with his attorney compromised the defense. The facts of the case were straightforward.

At the conclusion of the discussion, the Appellant stated three times that he would be ready for trial. Since he did not state that he was not ready for trial when trial occurred, this contretemps between himself and the attorney prior to trial is of no significance. Whatever it is that the Appellant wanted to see was apparently shown to him, to satisfaction.

Finally, we note that the Appellant's complaint about his attorney and request for another

attorney was made on the day the case was originally set for trial. The Appellant, while he claimed that he had complained to the State Bar, did not complain in a timely fashion to the trial court. The court committed no error in denying the request for substitute counsel. *Sturkey v. State*, 946 So.2d 790 (Miss. Ct. App. 2006).

There is then some vague complaint concerning the Appellant's sentences, said by him to be excessive. He also alleges, very vaguely, that there was a violation of the proscriptions against double jeopardy. We have no idea what the Appellant means by this. It is sufficient to say that the sentences imposed were authorized by law and were, in fact, the only sentences that could be imposed. No attempt has been made by the Appellant to mount disproportionality claim with respect to the sentences. While it is unclear what the Appellant means to say by claim a violation of the jeopardy clauses, it is sufficient to note that the elements of the two felonies the Appellant committed were different.

The Appellant then says his attorney failed to attack the indictment on the grounds raised in the first assignment of error. Those claims have been addressed above, and it is sufficient here to say only that any such attack was doomed to failure. As for the claim that there was a re-sentencing involved as to one of the felonies, that claim is not supported by the record and, in any event, the Appellant wholly fails to explain how any such re-sentencing, if indeed one was had, in any way affected the usefulness of that felony as a predicate felony.

The Appellant then natters on about jeopardy considerations with respect to re-sentencing as an habitual offender should this Court vacate the sentences now in place. Even were the Court to vacate those sentences, and there is no ground for it to do so, jeopardy issues would not be ripe for consideration until such time as the Appellant was re-sentenced by the trial court.

There is nothing apparent in the record to demonstrate a deficient performance by counsel

and resulting prejudice to the Appellant. A review of the record shows that counsel was familiar with the case, was prepared, and, while he had very little to work with, did as well as any attorney might have done with these facts.

The Second Assignment of Error is without merit.

3. THAT THE VERDICT WAS SUPPORTED BY THE EVIDENCE; THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE[4]

Sufficiency of the evidence

In considering the Appellant's Third and Fourth Assignments of Error, we bear in mind the respective standards of review applicable to them. *May v. State*, 460 So.2d 778 (Miss. 1984).

The essential facts of the case at bar are simple. The Appellant became angry with a fellow employee. The Appellant left their place of employment and got a gun, and when that fellow employee was in his car, about to leave the premises, the Appellant fired at him. There were three witnesses to what the Appellant did. The Appellant was seen with the gun as he fired it.

The Appellant, though, claims that the proof did not show aggravated assault but, rather, shooting into a motor vehicle, presumably under Miss. Code Ann. Section 97-25-47 (Rev. 2006). However, this claim was not raised in the trial court in the motion for a directed verdict. (R. Vol. 2, pp. 88 - 89). Nor did the Appellant request an instruction on shooting into a motor vehicle. The issue is not before this Court. *Moore v. State*, 958 So.2d 824 (Miss. Ct. App. 2007)(Motions for directed verdict must be specific and not general in nature); *Staten v. State*, 989 So.2d 938 (Miss. Ct. App. 2008)(Error cannot be predicated on a trial court's failure to grant

---

[4] We will respond to the Appellant's Third and Fourth Assignments of Error in this response.

an instruction where the instruction was never sought).

Assuming the issue is before the Court, there is no merit in it. The testimony in support of the verdict, taken as true together with all reasonable inferences therefrom, was that the Appellant was quite angry with the victim just prior to firing the gun. There was also testimony that the Appellant appeared to be quite angry at the moment he fired the shot. The bullet struck the driver's door, shattering the glass and coming to rest in the door frame. The evidence was certainly sufficient to permit a reasonable juror to find that the Appellant, in shooting at the driver's side of the car, was attempting to cause bodily injury to the victim, thus attempting to commit aggravated assault. *Howard v. State*, 755 So.2d 1188 (Miss Ct. App. 1999). That the Appellant fired the gun at the victim and was in possession of the gun and was a convicted felon are not facts in dispute.

Whether the Appellant could have been indicted for shooting into a motor vehicle is neither here nor there. While the facts might have supported a conviction on shooting into a motor vehicle, the facts also supported aggravated assault. The facts might well have supported attempted murder as well. It was, though, the State's option as to which crime to charge. *Cumbest v. State*, 456 So.2d 209, 222 - 223 (Miss. 1984).

The Appellant appears to assert that the State did not prove that he intended to attempt aggravated assault. Intent is seldom provable by direct evidence. It is more often inferred from what one does and the surrounding circumstances. *Shanklin v. State*, 290 So.2d 625, 627 (Miss. 1974). Here, the circumstances clearly demonstrate the Appellant's intention.

The Appellant then says he was not guilty beyond a reasonable doubt and the exclusion of every reasonable hypothesis consistent with innocence. That statement of the State's burden of proof is relevant in circumstantial evidence cases. This case, it need hardly be said, is not a

circumstantial evidence case. *Brown v. State*, 970 So.2d 1300 (Miss. Ct. App. 2007). There were eyewitnesses to the Appellant's act.

Motion for a new trial

The Appellant asserts again, in his argument in support of the Fourth Assignment of Error, that the State failed to prove him guilty beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence. The short answer is that this statement of the State's burden of proof is not applicable in the case at bar, as we have said.

The Appellant then says that "there was (*sic*) too many probabilities left unresolved by the prosecution in this case. Most critical is the fact that [the Appellant] was charged under an incorrect statute. Attempted aggravated assault was not a viable charge under the law."

Well, the Appellant does not trouble himself to explain what probabilities were left unresolved, a thing that is not surprising since he was seen to fire a shot at the victim. The Appellant was not charged under an "incorrect" statute, as we have said above, and attempted aggravated assault was certainly a "viable charge."

This Court will not find abuse of the trial court's discretion in denying relief on a motion for a new trial short of a conclusion that the verdict constitutes an unconscionable injustice. The verdicts in the case at bar could hardly be considered unconscionable much less unjust. The Appellant got a gun and shot at the victim. The Appellant had been convicted of a felony. The facts are that simple. There is no evidence in opposition to the verdict. The trial court did not abuse its discretion in denying relief on the motion for a new trial.

The Third and Fourth Assignments of Error are without merit.

4. THAT THERE IS NO CUMULATIVE ERROR IN THE CASE AT BAR

In the Appellant's final Assignment of Error, he asserts that there was cumulative error. He asserts that his trial was not fair and impartial, this being so, according to him, because of what he describes as a defective indictment. In support of his position, he cites a number of instances of rhetorical flourishes from the Mississippi Supreme Court's jurisprudence. However, since this claim was not raised in the trial court, it may not be raised here. *Gipson v. State*, 731 So.2d 1087, 1098 (Miss. Ct. App. 1998).

Assuming for argument that the Sixth Assignment of Error is properly before the Court, there is no merit in it.

As we have demonstrated above, the indictment was not defective. Furthermore, none of the foregoing assignments of error have merit. Because there was no error in the particular assignments of error, there can be no cumulative error. Where there is no reversible error in any part, there is no reversible error in the whole. *Gipson, supra.*

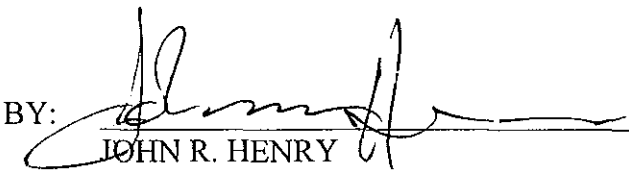
The Sixth Assignment of Error is without merit.

CONCLUSION

The Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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

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

CERTIFICATE OF SERVICE

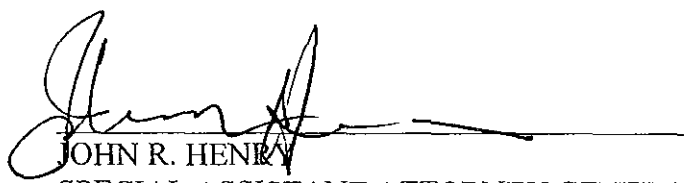
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Charles E. Webster
Circuit Court Judge
P. O. Drawer 998
Clarksdale, MS 38614

Honorable Laurence Y. Mellen
District Attorney
115 First Street, Suite 130
Clarksdale, MS 38614

Michael K. Johnson, #41273
Delta Correctional Facility (D.C.F.)
3800 County Road 540
Greenwood, MS 38930

This the 24th day of August, 2009.



JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL

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