IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO.: 2009-TS-00321-COA

TAVARES SHOWERS **APPELLANT**

VS.

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed 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 the Court of Appeals may evaluate possible disqualification or recusal:

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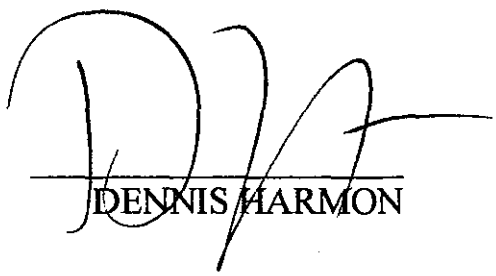

DENNIS HARMON

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STATEMENT OF ISSUES

1. Is a defendant who uses a knife to stop an attacker from choking him entitled to have the jury instructed on the law of self-defense as it applies to disparate size if the deceased attacker is nine inches taller and one-hundred pounds heavier?
2. Whether the trial court improperly limited *voir dire* of the expert, Dr. Steven Hayne, and whether Dr. Hayne is qualified to testify in this case.
3. Where a defendant requests an attorney before speaking to police, is it a violation of *Miranda* rights for the interrogator to withdraw, but leave the video and audio equipment in the walls running to record – as a matter of department policy - while bringing in the defendant's mother and aunt? The discussion among defendant, aunt, and mother was part of the continuous transaction and was taped and introduced at trial.

STATEMENT OF THE CASE

Procedural Statement:

This case was tried by a jury on murder with the lesser included charge of manslaughter. The jury found the defendant not guilty of murder, but guilty of manslaughter. The Court sentenced the defendant to 20 years.

Defendant filed a motion for J.N.O.V or in the alternative a new trial which was overruled.

Defendant appealed.

Factual Statement:

Although there were at least five witnesses old enough to testify (L. Showers, R. at 190), the state only called one, Laketa Showers, and she was not in the room to observe the beginning of the fight that ended in Jeremy Munson's death. (L. Showers, R. at 191) The state did not call any witness who observed the entire fight from beginning to end. At least two people stayed in the room, Tavares Showers' mother and stepfather (L. Showers, R. at 196), but the state called neither.

Tavares Showers, the defendant, asked everyone to leave the room so he could talk to his mother. The witness, Laketa Showers, his sister, went to her mother's room (L. Showers, R. at 205) but Jeremy Munson, the deceased, crossed the room *towards* where Tavares stood at the kitchen entrance. (L. Showers, R. at 205)

Laketa Showers heard glass breaking and went back into the room. "And when I got to the kitchen, I seen Jeremy holding my brother against his neck-against the wall by the neck, and Tavares was cutting Jeremy on his left arm." (L. Showers, R. at 197) She said Jeremy Munson had both hands on Tavares Shower's throat while Showers cut Munson's arm with a steak knife. (L. Showers, R. at 208)

The fight ended when Jeremy Munson let go of Shower's throat. (L. Showers, R. at 200) When Munson let go, Shower's left his home and did not pursue any attack. (L. Showers, R. at 200) Munson stayed and talked a short time while Showers' mother tried to get him to go to the hospital. Then Munson collapsed (L. Showers, R. at 201). He died.

Jeremy Munson was 6'7" tall and 251 pounds at the time of his death. (Hayne, R. at 289) This was about nine inches taller and one-hundred pounds heavier than Tavares Showers. (L. Showers, R. at 204)

The cause of death was a knife strike to the throat. According to Dr. Hayne, the angle of entry is consistent with the scene as described by Laketa Showers:

> Q Now Mr. Showers here is 5'10", about 150, but 5'10", nine inches shorter. Are you with me so far?
> A Yes.
> Q All right. Nine inches shorter, yet you said the wound in the neck was from a downward stroke; is that correct?
> A The angle was downward of the wound track, yes.
> Q Okay. Would you agree with me that that is consistent with Mr. Munson holding Tavares Showers by the throat and Mr. Tavares Showers having to reach over Mr. Munson's left arm to come down and reach him? Is that consistent?
> A It would be consistent. I can't exclude that, Counselor, no.

(Hayne, R. at 290)

The police found Showers a few hours after the altercation and brought him to the station for interrogation by Officer David Criddle.

Criddle took Showers to an interview room with recording equipment in the walls. (Criddle, R. at 18) Criddle did not tell Showers of the recording equipment. (Criddle, R. at 19-20) Showers declined to talk to Criddle without a lawyer present. (Criddle, R. at 24)

Criddle exited the room but, according to Columbus Police Department policy, left the recording equipment on. (Criddle, R. at 27) This policy applied when Showers mother and aunt came in the room. They did not know they were being taped. (Criddle, R. at 19-20) Again this is part of the policy.

The conversation between Showers, his mother, and aunt went into evidence as well as the interview by Criddle showing his repeated contacts with suggestions to talk after the defendant requested a lawyer. (Criddle, R. at 327-330)

SUMMARY OF ARGUMENT

1. In a murder/manslaughter case, a person who is 5'10 and 150 pounds is entitled to a self-defense jury instruction specific to the use of a weapon where the evidence shows a 6'7", 251 pound man – 9" taller and 100 pounds heavier – pushed the defendant against a wall in the defendant's own home while choking him with both hands and the defendant used a steak knife to fend off the attack.

2. Full *voir dire* of the State's expert pathologist, Dr. Steven Hayne, should be allowed including questioning on matters of fact published in a Mississippi Supreme Court opinion. The answers given before *voir dire* was cut off demonstrated Dr. Hayne's incompetence to testify. He should not have been allowed to give an opinion.

3. A police officer who secretly taped an interview with a defendant may not continue to record video and audio of conversations of the defendant with his mother and aunt after the officer leaves the room because the defendant refused to sign a *Miranda* waiver and requested a lawyer, thereby supposedly ending the interrogation. The continued taping is the functional equivalent of an interrogation in violation of *Miranda.*

ARGUMENT

Denial of Self-Defense Instruction:

The defendant advocated self-defense as his theory of the case. Specifically, he took the position that a much larger man attacked him in his own home. He defended himself with a steak knife which was at hand in the kitchen where much of the fight took place.

The defendant presented enough evidence to the Circuit Court that it granted one general self-defense instruction:

D-1

> The Court instructs the jury that to make a killing justifiable on the grounds of self-defense, the danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to believe that the victim intended to kill the defendant or to do him some great bodily harm, in addition to this, he must have reasonable grounds to believe that there is imminent danger of such act being accomplished. It is for the jury to determine the reasonableness of the grounds upon which the defendant acts. If you, the jury, unanimously find that the defendant acted in self-defense, then it is your sworn duty to return a verdict in favor on the defendant.

(Clerk's papers at p. 80)

As a general statement of the law this is correct.

The defendant also offered D-2 as instruction on the law of self-defense when the defendant is attacked by a larger, stronger individual:

D-2

> If you believe from the evidence that the deceased was a much larger and stronger person than the Defendant, and was capable of inflicting great and serious bodily harm upon the Defendant with his hands, and that the Defendant had reason to believe and did believe as a man or ordinary reason that he was then and there in danger of such harm at the hands of the deceased and used a knife, with which he fatally stabbed the deceased, to protect himself from such harm, then the Defendant was justified, and your verdict shall be "not guilty" even though the deceased may not have been armed.

(Clerk's papers at p. 83)

The Court denied D-2, because it said, "there's no testimony in the record about the defendant thinking the defendant was going to cause him great bodily harm or death. (Court, R. at 382) The Circuit Court does not explain why there was sufficient evidence for D-1 which states, "the danger to the defendant must be actual, present, and urgent, or the defendant must have reasonable grounds to believe that the victim intended to kill the defendant or do him great bodily harm." (Clerks Papers at p. 80) but not for D-2, with similar language. There is only one basis in the record for a self-defense instruction: the disparate size and strength. The facts that support D-1 also support D-2 – use of a weapon against a larger foe.

A smaller defendant is entitled to an instruction stating his theory on the need for a weapon to defend against an attack which he reasonably believes will produce great bodily harm at the hands of a larger individual. *Manuel v. State*, 667 So. 2d, 590, 592 (Miss. 1995). The facts introduced at trial support this instruction.

The deceased was 6'7" and 251 pounds. (Hayne, R. at 265) Although defendant does not think Hayne should have been allowed to testify, he did so and on cross-examination admitted this:

> Q Now, Mr. Showers here is 5'10", about 150, but 5'10", nine inches shorter. Are you with me so far?
> A Yes.
> Q All right. Nine inches shorter, yet you said the wound in the neck was from a downward stroke, is that correct?

A The angle was downward of the wound track, yes.

Q Okay. Would you agree with me that that is consistent with Mr. Munson holding Mr. Tavares Showers by the throat and Mr. Tavares Showers having to reach over Mr. Munson's left arm to come down and reach him? Is that consistent?

A It would be consistent. I can't exclude that, Counselor, no.

(Hayne, R. at 290)

An eyewitness's testimony confirmed the 6'7", 251 pound deceased did choke the defendant.

Q And now you have Jeremy holding Tavares in the kitchen by the throat. With both hands or one hand?

A Both.

Q Both hands?

A Yes, sir.

Q How long did you see Jeremy holding on – the best estimate of time – holding onto Tavares's throat? How long?

A I just know he was holding on long enough to get those cuts on his arm.

Q Okay. Tavares is right-handed, right? Correct?

A Yes, sir.

Q Okay. He's right-handed, and the knife is – the steak knife is in Tavares's right hand?

A Yes, sir.

Q Is he jabbing of slashing that left – the left arm of Jeremy?

A I think he was slashing. It was just going up like this.

Q Okay. So he was – all you saw was him attacking the arm—

A Yes, sir.

Q --that was choking him?
A Yes, sir.
Q Was his other – was Tavares's other hand free at all?
A I really didn't pay attention to his other hand.
Q Okay. Did you see Tavares do anything else, other than simply defend himself, trying to get Jeremy away from his throat and out?
A No, sir.

(L. Showers, R. at 208-209)

The eyewitness testimony of choking is confirmed by the expert testimony. (Hayne, R. at 290) A reasonable inference can be drawn that a 5'10", 150 pound man was being choked by a 6'7", 251 pound man and that the defendant could "reasonably believe the victim intended to kill him or do great bodily harm."

Without waiving the right to remain silent, evidence of a need for self-defense does not get any better than this. Moreover, the reasonable man standard, as instructed is an objective one. A reasonable man being choked in this situation may believe he is in danger of great bodily harm or death.

Notice also, the defendant began by slashing the arms which were choking him, not a killing strike. (L. Showers, R. at 208-209) The state's expert agrees he saw wounds on the deceased's left arm possibly consistent with the defendant fending off the deceased. (Hayne, R. at 251)

With this evidence in hand, the defendant offered D-2 based on the approved Pattern Instruction 2:13 which in turn cites to *Robinson v. State*, 858 So. 2d 887

(Miss. Ct. App., 2003) The Circuit Court refused this instruction because it said, "there's no testimony in the record about this defendant thinking that the defendant (verbatim) was going to cause him great bodily harm or death". (Court, R. at 382) How being pushed up against the wall while being choked by a man 9" taller and 100 pounds heavier is anything other than a situation producing fear of harm or death is not explained. With the evidence adduced, the defendant did present enough evidence to show fear of harm or death by being choked by a 6'7", 251 pound man.

This denial worked to the advantage of the state because it prevented instructions to the jury on the law as it applied to the defendant's theory of the case.

The Supreme Court had found, as noted above in *Manuel v. State*, *supra*, a defendant is entitled to an instruction which explains the law controlling a smaller person's use of a weapon to defend himself.

To be fair, under some circumstances, the court may tailor instructions, and refuse an instruction dealing with self-defense if it is redundant and not supported by the evidence in the case. That is not the situation factually or legally here. The Circuit Court refused the instruction on lack of evidence which is plain error. In a homicide case, a defendant is entitled to have the jury instructed on the law of his theory if there is evidence to support the theory.

In *Robinson v. State, supra* , we have exactly the same situation as we have in the case at bar:

> This is the language of the denied instruction, D-6:
>
> If you believe from the evidence that the deceased was a much larger and stronger man than the Defendant, and was capable of inflicting great and serious bodily harm upon the Defendant with his hands, and that the Defendant had reason to believe and did believe as a man of ordinary reason that he was then and there in danger of such harm at the hands of the deceased and used a knife, with which he fatally stabbed the deceased, to protect himself from such harm, then the Defendant was justified, and your verdict shall be "not guilty" even though the deceased may not have been armed.
>
> The instruction was denied as being "repetitious of some other instructions" already given.
>
> In cases of homicide, failure by the trial court to grant an instruction which presents the defendant's theories of justification, defense or excuse is reversible error so long as there is some evidence to support the theory. *Hester v. State*, 602 So. 2d 869, 872 (Miss. 1992).

(*Id.*, at 896)

Showers has provided "some evidence" and more in the form of eyewitness and expert testimony. *Manuel v. State, supra,* at 593. He is entitled to an instruction on his specific theory. As the *Manuel* Court found, a defendant is entitled to a specific instruction even if the evidence is meager, or unlikely. Proof of the defendant being choked by a 6'7", 251 pound man exceeds that low standard.

In *Robinson*, the trial court did give a general self-defense instruction which the Appeals Court held insufficient:

> Though the jury was told to consider Robinson's actions in light of the manner in which the "circumstances reasonably appeared to the defendant on that occasion," this does not explicitly raise the issue of the right in some situations to use a deadly weapon to ward off an attack with fists.

(*Id.*, at 898)

The *Robinson* Court analyzing *Manuel* found an abstract instruction as granted by the circuit court is not sufficient to explain the law well enough for a jury to consider the issue of a smaller person using a weapon to defend himself against a larger person:

> In an abstract way, the instructions call on jurors to consider the reasonableness of the grounds on which the defendant may have been fearful of serious injury. In neither case was a specific instruction in which the facts of the disparate size and the right in some circumstances to use a deadly weapon in response to mere fists explained to the jury. Those instructions were not sufficient in *Manuel* to prevent reversal.

(*Id.*, at 899)

This jury, even without full self-defense instructions, found the defendant not guilty of murder. They did find him guilty of a heat of passion crime manslaughter. That is, they found the situation prompted him to use a knife to kill the victim.

The defense maintains the situation prompted the use of a knife in a self-defense. The Circuit Court refused the instruction of the specific theory of self-defense but did grant a general theory. This tells us the defense did present sufficient evidence to go to the jury on self-defense.

The only basis for self-defense based on the evidence is disparate size and strength, so if one self-defense instruction is justified, then both are. A 5'10", 150 pound man attacked a 6'7", 251 pound man can legally use a knife to defend himself when choked if the other requirements of the law are met. This is certainly an issue for the jury to consider under proper instructions.

The failure to give a self-defense instruction defining the law on defendant's theory in a homicide case is clear reversible error.

Stephen Hayne is Not Qualified to Testify:

This section challenging Dr. Stephen Hayne's qualifications will be unusual because the Circuit Court's position became a bit different by questioning counsel's (Dennis Harmon) honesty to the tribunal when he cited the Circuit Court to *Edmonds v. State*, 955 So. 2d 787 (Miss. 2007) (R. at 30)

Edmonds is the closest case in Mississippi law to the case at bar. In it, the Supreme Court reversed a conviction in this Lowndes County Court where Dr. Haynes testified in a murder trial involving a teenage defendant. A concurring opinion dwelled on Dr. Haynes qualifications or lack there of.

Counsel asks this Court to please examine the voir dire of Dr. Hayne in the record at pages 254 - 263 and the proffer and exchange with the Court of pages 293 – 301, as well as the record at pages 303 – 305 where the Court returned to the issue again with its own research. Counsel believes that *Edmonds* and the record show voir dire to be improperly limited. The Court cited to two cases, *Treasure Bay v. Ricard* and *Ruffin v. State* (Court, R. at 301) which the Court took to be approval of Dr. Hayne and answered the questions raised in the *Edmonds'* concurring opinion by Justice Diaz.

If *Ruffin v. State* is the case found at 992 So. 2d 1161 (Miss., 2008), then Hayne is only mentioned in footnote. Apparently, no one challenged him in that case.

Treasure Bay v. Ricard, 967 So. 2d, 1235 (Miss., 2007) is a wrongful death civil case, not a criminal homicide. The issue was if Hayne could rely on a witness statement in his affidavit filed in opposition to summary judgment. No one in the record challenged Hayne's qualifications or methodology.

Neither case answered questions raised in *Edmonds*.

Rather than respond to arguments advanced by the Circuit Court that counsel tried to avoid, counsel requests this Court to review the transcript pages and *Edmonds* and find:

1) Dr. Stephen Hayne is unqualified to testify as a forensic pathologist in this homicide case or other homicide cases in Mississippi courts, or

2) If he is to testify, then defendant requests a finding that the court below improperly limited voir dire of the expert and that reversal and remand is justified for a full voir dire with instructions.

Secret Videotaping Contrary to Miranda Rights:

On the evening of the altercation, the police brought Tavares Showers in to an interrogation room and began questioning. The tape began running at this time. After Tavares Showers refused to give a statement, the police brought his mother and aunt in to the room where they were keeping Tavares and secretly taped the conversations. (Criddle, R. at 322 - 324) The state, over several objections introduced the 37 minute DVD of this conversation.

> Q And this room where you interviewed this- -You know, Tavares, this occurred at the Columbus Police Department, right?
> A Correct
> Q And this was a fairly small room?
> A It's probably, say, a 12 by 12, 14 by 14, something like that.
> Q At any time did you ever tell Tavares that he was going to be tape recorded?
> A No, sir.
> Q Are there any signs within the room that says that anything said in there was going to be taped- -
> A No, sir.
> Q - - or recorded? Was there any sign outside the room that said that they would be recorded?
> A No, sir.

Q And in fact, I believe you read him his Miranda rights on the tape. I don't believe he ever signed any forms, did he?
A No, sir.
Q And I noticed a number of times - - once again, the tape speaks for itself - - that he requested an attorney; is that correct?
A Correct.
Q And in fact, after he said he wanted a lawyer and then subsequently you come back in and y'all talked and he started giving a statement to you, he said that he wanted to write it down, and I think you used term there somewhere that you would write down his statement; is that correct?
A I said if he wanted to give me a written statement, that would be fine.
Q And that would kind of give you the impression that Tavares didn't know that he was being recorded?

(Criddle, R. at 19-20)

Nor was anyone told of the taping later.

Q Okay. Now, did you ever tell Mr. Showers- - if I call him Tavares, it'll be easier for me to say Tavares. Did you ever tell Tavares that he was being recorded by camera?
A No, sir.
Q Did you ever tell either of these two women that came after the fact, one being his mother and one being his aunt, that they were going to be recorded while they were in this room?
A No, sir.

(Criddle, R. at 19)

The state's witness admitted the defendant refused to sign a *Miranda* waiver or give a statement and repeatedly requested a lawyer.(Criddle, R. at 19-20) Nevertheless, the state continued to gather statements secretly by introducing

relatives into the room and collecting conversations and statements from Showers in one continual transaction with the video always turning. This is the functional equivalent of an interrogation.

In *Pannell v. State*, 7 So. 3d 277 (Miss. Ct. App., 2008), this Court of Appeals discussed the issue of functional equivalence.

> However, the term "interrogation" has not been limited to encompass only express questioning by the police. In fact, the Mississippi Supreme Court has applied a broad interpretation to the term "interrogation" to include not only questioning, but rather "questioning and its functional equivalent. *"Culp v. State, 933 So. 2d 264, 273(P19) (Miss. 2005) (citing Pierre v. State, 607 So. 2d 43, 52 (Miss. 1992)).* In the landmark decision of *Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d, 297 (1980),* the United States Supreme Court defined "functional equivalent" to mean "words or actions . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis, 446 U.S. at 301.* In broadening it definition of "interrogation," the Supreme Court in *Innis* noted that its concern in *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2 694 (1966)* was that "the interrogation environment" created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Innis, 446 U.S. at 299.*

(*Id,. at 282-283*)

The Pannell Court found:

> The test does not examine the subjective intent of the police, but rather, whether the officer 'should have known his actions were reasonably likely to elicit an

> incriminatory response.' *Id. (quoting Snow v. State 800, So. 2d, 472, 497 (P91) (Miss. 2001))*

(Id,. at 284)

The question then becomes whether Officer Criddle should have known he was reasonably likely to get some incriminatory response if he left the room and brought the scared teenager's mother and aunt in to the room while he recorded the conversation in sight and sound. The answer is obviously yes – that is the only reason to tape the exchange. If Criddle thought Showers was a danger to himself or others, there are alternative ways to observe in the moment. None were done. This is a secret taping of a suspect to get information.

In fact, this is the policy of the Columbus Police Department.

> Q Now, why did y'all continue taping after you got through with your part of the interview?
> A We - - excuse me - - we run a - - we tape the whole time that someone's in the room. They don't have any expectation of privacy, so we just record.
> Q They don't have any expectation of privacy?
> A No, I wouldn't think so, at a police department, no.
> Q Has anyone told you that, or is that just your opinion?
> A It's policy at the Columbus Police Department, when you put a subject in a room and you start videoing it, you video it until the person is taken out and transported to the county.
> Q And is also part of that policy that you do not inform the individual or any people coming in to talk to him that they are being recorded?
> A I have been told by the - - my last lieutenant, when I was - - during this case that you do not tell anybody it's being videoed, so that's the way it's been.

(Criddle, R. at 27)

The taping is not an error by one officer, it is the stated policy of the Columbus Police Department to gather evidence by sleight of hand. It is the department policy to collect incriminating responses secretly in disregard for *Miranda.*

The police justify this in saying there is no expectation of privacy. (Criddle, R. at 27) That does not trump *Miranda* or any Fifth or Sixth amendment rights. This is a clear design to elicit incriminating evidence as a matter of policy, even if someone had ended interrogation by demanding an attorney.

The standard in *Miranda* to accept a statement is "a knowing, voluntary and intelligent waiver." Nothing of the sort can happen if the taping is secret. If the taping is unknown, the waiver cannot be knowing. If the taping is unknown, the waiver cannot be voluntary - - it is imposed by the police. If the taping is unknown, the waiver cannot be intelligent because there is no thought process at all. This policy or secret taping makes a mockery of *Miranda.*

Even videotaping out in the open without a *Miranda* waiver is not allowed. *Taylor v. State, 406 So. 2d 811 (Miss. 1981)* In *Taylor*, an inmate, without Miranda warnings, was interviewed by the local TV station, the president of the local NAACP, the county attorney and the district attorney. This video tape was later introduced at trial *(Id., at 812)* The Supreme Court reversed. *Taylor* at least knew

he was being interviewed while in custody, Showers did not have even that protection.

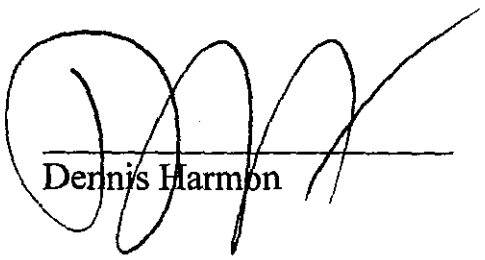
The officer's continuous communication to suggest the defendant could change his mind also violates *Pannell,* as a functional equivalent of an interrogation.

The entire DVD recording should be suppressed and a new trial granted.

CONCLUSION

The defendant requests reversal and remand with instructions for the next trial on each issue advanced.

Respectfully submitted, this the 21st day of December, 2009.



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CERTIFICATE OF SERVICE

This is to certify that I, the undersigned, have this day served, via hand delivery, a true and correct copy of the foregoing **Appellant's Brief** to:

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P.O. Box 1044
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and

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and

Honorable James T. Kitchens, Jr.
Circuit Court Judge, Lowndes County
P.O. Box 1387
Columbus, MS 39703

SO CERTIFIED, this the 21st day of December 2009.

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