IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RODNEY SANDS — APPELLANT

VS. — NO. 2009-KA-1186-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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RODNEY SANDS **APPELLANT**

VS. **NO. 2009-KA-1186-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The grand jury of Jefferson Davis County indicted defendant, Rodney Sands, in a multi-count indictment with Two Counts of Murder and One Count of Aggravated Assault. After a trial by jury, Judge Prentiss Greene Harrell presiding, the jury found defendant guilty of manslaughter on the charges of Murder and guilty as charged in the Aggravated Assault count. (C.p. 140-142). The trial court sentenced defendant to wit:

> Count I - Manslaughter - Twenty Years; Count II - Manslaughter - Twenty Years; Count III - Aggravated Assault - Twenty years. All

sentences are to run consecutive to each other. Additionally a fine, assessment and restitution were imposed. (C.p.149-151).

A motion for new trial was filed, (c.p. 156-161, with exhibits) and after argument of counsel said motion for new trial was denied with findings of fact and conclusions of law. (C.p. 192-193).

The instant appeal was timely noticed and is now before this appellate court.

STATEMENT OF FACTS

Defendant's house, sadly, like others in the community had been burglarized and he heard through word on the street who might have been involved. So, one day he saw a car cruising along the road, he called them over to ask them about their involvement. While defendant Sands had the car and the occupants pulled off in a church driveway, co-defendant Rhodes came by, started an argument and opened fire on the occupants of the Pontiac. Defendant Sands, joined in the fray. Many shots were fired and at some point defendant Sands left the scene.

Two men died from shots fired that day and one man was injured.

About 5 days later, defendant Sands, accompanied by trial counsel turned himself in to law enforcement.

The jury heard the evidence and found defendant Sands guilty of two counts of the lesser offense of manslaughter and one count of aggravated assault.

SUMMARY OF THE ARGUMENT

I.

THERE WAS AMPLE EVIDENCE FOR THE TRIAL COURT TO DENY THE MOTION FOR DIRECTED VERDICT.

There was evidence of every element of the offense and no defense presented.

II.

THE WEIGHT OF THE EVIDENCE SUPPORTS THE JURY VERDICTS.

The evidence was both physical exhibits and testimonial evidence and reasonable inference.

III.

THE EVIDENCE SUPPORTED THE GIVING OF THE AIDING AND ABETTING INSTRUCTION.

There was evidence that defendant Sands was holding or engaging the occupants of the for co-defendant Rhodes.

IV.

THE TRIAL COURT WAS CORRECT IN OVERRULING THE OBJECTION TO WITNESS TESTIMONY OF DEFENDANT'S ILLICIT DRUG USE.

The testimony was in response to cross of defense counsel and was not of such character to deny defendant a fair trial.

V.

THE TRIAL COURT DEALT WITH CLAIMS OF JUROR MISCONDUCT CLEARLY AND ON THE RECORD.

The trial court dealt with the issue, at the time, succinctly and on the record.

VI.
THE INDICTMENT, AS AMENDED, IS LEGALLY SUFFICIENT TO CHARGE AGGRAVATED ASSAULT.

Amending the indictment is permitted and the charge proper.

VII.
DEFENDANT HAD EFFECTIVE ASSISTANCE OF COUNSEL.

None of the alleged deficiencies overcome the presumptive effectiveness of trial counsel.

ARGUMENT

I.

THERE WAS AMPLE EVIDENCE FOR THE TRIAL COURT TO DENY THE MOTION FOR DIRECTED VERDICT.

In this initial allegation of error defendant asserts the trial court erred in denying the motion for directed verdict.

> ¶ 14. Reviewing the evidence in the light most favorable to the State and "giv[ing] the State the benefit of all favorable inferences that may reasonably be drawn from the evidence" we find that fair-minded jurors could have found that Gary, having fired the 9 millimeter pistol, was the one who fired the fatal bullet. Jordan, 936 So.2d at 373(¶ 24). In firing his pistol across a crowded parking lot, the jury found that Gary possessed "the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as the result of the willful creation of an unreasonable risk" required to convict him of manslaughter by culpable negligence. Campbell v. State, 285 So.2d 891, 893 (Miss.1973). We find that there was sufficient evidence to support that conclusion.
>
> *Gary v. State,* 11 So.3d 769, 773 (Miss.App. 2009).

The crux of defendant Sands argument is, as stated on page 15 of defendant's brief – "Yet, there was no testimony that Rodney fired a shot or even pointed his pistol. There was no physical evidence that Rodney was firing a weapon."

Well, on one page alone, elicited from Jason McNair during cross-examination comes the testimonial evidence, that made it a question for the jury. "I seen him with his gun" and "It was pointed." Tr. 309. On page 310 of the transcript the witness again says he saw defendant Sands with a gun, – but also that he never say him fire

the gun. Even earlier in the transcript on pages 287 & 289 there was testimony of seeing Sands with a gun – a black gun, shooting was going on and there was Sands behind his car with a gun and bullets hitting the car with passengers inside.

It is the position of the State there was ample evidence of defendant's being involved and firing shots. Such is legally sufficient to uphold a manslaughter conviction.

Next counsel argues there was insufficient evidence of "heat of passion" to support a manslaughter conviction. The manslaughter statute is disjunctive so here we have proof of use of a deadly weapon. (See above).

> ¶ 8. Martin's argument centers on two propositions. First, she claims that the State failed to prove that the killing was done in "a cruel or unusual manner" within the meaning of the statute. Miss.Code Ann. § 97-3-35 (Rev.2000). The entire argument on this point consists of a one sentence statement of the proposition. We note that the statute contemplates alternative theories to sustain a manslaughter conviction in that the crime may be charged as a killing in "a cruel or unusual manner" or "by use of a deadly weapon." Miss.Code Ann. § 97-3-35 (Rev.2000). "It is a general rule that where a statute denounces as an offense two or more distinctive acts, things, or transactions enumerated therein in the disjunctive, the whole may be charged conjunctively and the defendant found guilty of either one." Lenoir v. State, 237 Miss. 620, 623, 115 So.2d 731, 732 (1959). We conclude that the use of a knife to stab the victim to death, if found to have been done in the heat of passion without malice and not in necessary self-defense, would be sufficient evidence to convict of manslaughter through the use of a deadly weapon without the necessity of a specific finding that the stabbing was undertaken in a cruel or unusual manner.
>
> *Martin v. State,* 818 So.2d 380, 382 (Miss.App. 2002).

Accordingly, here where we have a deadly weapon there must be evidence of heat of passion. So, again the transcript and the trial court noted shows evidence of a brooding defendant Sands, long 'discussion' – heated demanding money taken from his home, approaching the car armed and confrontational. It is interesting, if the trial court had denied the granting of a manslaughter instruction there would also be sufficient facts to support that decision as well. The evidence could support a murder conviction and most assuredly supports the jury arriving at the conclusion of defendant Sand's guilt in the killings as manslaughters.

Based on the evidence and reasonable inferences there is ample evidence to support the jury's verdicts of guilty. Consequently, no relief should be granted on this allegation of error.

II.
THE WEIGHT OF THE EVIDENCE SUPPORTS THE JURY VERDICTS.

In this claim of error counsel carefully challenges the weight of the evidence alone. Basically claiming one of the witnesses, Jason McNair, is a liar and dishonest. Also, there is a considerable claim that there were no shell casings found where defendant Sands was stopped behind his vehicle. (There was testimony that he had a gun and was pointing it.)

So, interestingly, no one seems to know what kind of gun defendant Sands had. We do know it was...just a gun, – a black gun. A reasonable inference could be it was a revolver, as the expert explained the shell casing never leaves the gun if the weapon is a revolver. Tr. 205-06.

Also, Sands never presented any evidence in his defense. He did, apparently have a short lived claim of alibi, which was quickly dispelled when investigated. So there is not a question of whether the weight of the evidence overcame the defense evidence. There was no defense.

And, as noted above there was evidence of defendant with a gun, pointing it, shots being fired, his anger over being robbed. Appellate counsel would have us believe that co-defendant Rhodes was correct when he said Sands didn't have a gun. But then have us disbelieve witness McNair and essentially make McNair the shooter.

The jury heard it all and was instructed on the role of the aider and abettor. Instruction 5 as given, Tr. 507-509. Just being a participant wasn't enough. There was evidence that two men almost independently committed these crimes simultaneously. There were certainly enough weapons and evidence to support two or more guns. There was also evidence, that both defendant's were within a few feet of the car, at the window and could have caused some of the fatal wounds.

> ¶ 6. Testimony was presented that Anderson was seen with a gun. He began to pull the gun out of his pants either immediately after getting knocked to the floor of the In and Out Club or immediately before. At least one witness, Bevie Bingham, saw "fire" coming from the muzzle of the gun. The bullet casings were identified as likely coming from a Glock. A witness identified Anderson's gun as a Glock. While there was also testimony that at least one other person drew a gun inside the club that night, that testimony goes to the weight which the jury gives the various pieces of evidence. Obviously, by returning a verdict of guilty, the jury decided to give that testimony less weight than the testimony supporting the guilt of Anderson. We do not find that evidence of the presence of another gun would cause reasonable doubt and fair minded jurors to find Anderson not guilty.
>
> > There is a similar standard of review when we must review the weight of the evidence. In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. As such, if the verdict is against the overwhelming weight of the evidence, then a new trial is proper

> Baker v. State, 802 So.2d 77, 81(¶ 14) (Miss.2001) (quoting Dudley v. State, 719 So.2d 180, 182(¶ 8) (Miss.1998)). Our finding concerning the weight of the evidence is the same as to the challenge of the sufficiency of the evidence. The jury heard evidence that Anderson was the shooter. They also heard evidence that other persons brandished guns that night. There are many factors that go into the weight a jury gives the testimony it hears during a trial-the appearance of a witness, his or her manner of speech, body language, etc. We are not in a place to judge all of these factors and can only review what is on the record. Looking at the record, we do not find sufficient reason to declare the verdict was against the weight of the evidence. Similarly, there was enough evidence presented for us to *653 say that the verdict was not the result of any bias, prejudice, or passion.
>
> *Anderson v. State,* 856 So.2d 650, 652 -653 (Miss.App. 2003).

Sub judice, as in *Anderson* there was conflicting evidence; – there was evidence of other shooters. There was direct testimony and other answers to very specific questions to the contrary.

All told taking all the evidence and all the death and injury, the jury reached the correct conclusion. No relief should be granted based on this allegation of error.

III.
THE EVIDENCE SUPPORTED THE GIVING OF THE AIDING AND ABETTING INSTRUCTION.

At trial Jason McNair testified that Rodney Sands told the occupants of the car they could just tell their story to co-defendant Rhodes, also known as 'Silk'. Tr. 281-281.

It is the succinct position of the State such is sufficient factual basis to support the giving of an aiding and abetting instruction.

> ¶ 31. In Mississippi, "any person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense is an aider and abettor and is equally guilty with the principal offender." Swinford v. State, 653 So.2d 912, 915 (Miss.1995). Jury instructions may not be given unless there is some evidentiary basis in the record with which to support them. Perry v. State, 637 So.2d 871, 877 (Miss.1994). According to the victim and another eyewitness, Shabazz was alone and pulled the trigger, severely injuring Brown. Shabazz, on the other hand, testified that while he planned the whole incident, he only meant for Noray to shoot the car. Either way, the court did not err in granting instruction S-1M and the language contained therein that Shabazz, acting alone or in concert, committed aggravated assault on Riva Brown. This issue has no merit.
>
> Shabazz v. State 729 So.2d 813, 824 (Miss.App. 1998).

While the State can honestly state it wishes the trial court had not used the word confusing, the instruction is not utterly confusing or hopelessly confusing and when read with the other instructions it correctly and succinctly defines the law regarding aiding and abetting.

> ¶ 18. " 'When considering a challenge to a jury instruction on appeal, we do not review jury instructions in isolation; rather, we read them as a whole to determine if the jury was properly instructed.' " Milano v. State, 790 So.2d 179, 184(¶ 14) (Miss.2001) (quoting Burton ex rel. Bradford v. Barnett, 615 So.2d 580, 583 (Miss.1993)). "[I]f all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." Milano, 790 So.2d at 184(¶ 14). When read together, the instructions in this case set forth an adequate statement of the law on aiding and abetting. Therefore, this issue lacks merit.
>
> *Schankin v. State,* 910 So.2d 1113, 1119 (Miss.App. 2005).

In conclusion, there was a factual basis in the testimony and by inference the time line of facts and actions of the defendants to support the granting of the State's aiding and abetting instruction. While the judge probably found the facts and the argument presented a bit confusing, the instruction as presented and when read with the other correctly stated the law.

No relief should be given based on this allegation of error.

IV.
THE TRIAL COURT WAS CORRECT IN OVERRULING THE OBJECTION TO WITNESS TESTIMONY OF DEFENDANT'S ILLICIT DRUG USE.

Defendant Sands makes the same argument, being similarly situated regarding the comment about illicit drub use.

During redirect the State asked about the witness smoking marijuana with both defendant's... the witness said he had. Defense objected. Tr. 347-48. The judge overruled the objection, probably because it was defense counsel, during his cross-examination of this witness, had specifically gone in to his illicit drug use and with whom he used. Tr. 303-304. This was defense strategy to impeach the witness testimony and to attack the credibility based upon impaired perception.

Then on re-direct the State pointed out that the witness had also smoked with both the defendant's. This was to show that everyone was friends, knew each other. There was also evidence they had been at a barbecue earlier in the week. Tr. 457.

After that mention on page 347-348, there was another brief mention in closing at page 540, that the witness also smoked with the defendants.

Also again, during closing, defense mentioned the witness' use of marijuana, Tr.541, 560. And, actually the testimony bolstered the contention of defendant that he knew these guys, they were just having a discussion, they were all friends and knew each other.

It is the contention of the State that the mention of illicit drug use was not to impeach the defendant's but to show familiarity with all the players on that day.

> ¶ 20. The State's questions regarding Enlow's use of or involvement with drugs is a different matter. We can discern no reason why this line of questioning should have been pursued. At the same time we do not believe, given the strong case against Enlow, that the questions asked him by the State regarding his use of or involvement with drugs caused him to be denied a fair trial. Nor do we believe that the results would have been different in the absence of the questions. After all, Enlow denied categorically the questions asked, and the State did not offer any evidence rebutting Enlow denials. Consequently, we find no merit in this claimed error.
>
> *Enlow v. State,* 878 So.2d 1111, 1116 -1117 (Miss.App. 2004).

While it is the contention of the State it was not error, arguendo, even if this court holds such limited testimonial evidence to be error it would be harmless under the rationale expressed in *Enlow*. This defendant was not denied a fundamentally fair trial.

No relief should be granted on this allegation of error.

V.

THE TRIAL COURT DEALT WITH CLAIMS OF JUROR MISCONDUCT CLEARLY AND ON THE RECORD.

It is worth noting that the trial court was made aware early on in the trial process of claims of juror misconduct and made note of same in order denying the motion for new trial. (Tr. 190-91).

Also the State searched the transcript and can only find Jackie Coleman's name mentioned twice (tr. 72 & 354, et seq) – and it was not discussing her relation, if any, to the Mother of one of the victim's. There is just nothing in the record to support this argument on appeal.

The trial court as noted in his order, and as supported by the record (i.e., Tr. 354) dealt with each and every claim during trial of juror misconduct.

> ¶ 71. The standard of review for juror misconduct arising from a failure to respond to questions during voir dire is as follows: Where a prospective juror fails to respond to a question by defense counsel on voir dire, the court should determine whether the question was: (1) relevant to the voir dire examination, (2) whether it was unambiguous, and (3) whether the juror had substantial knowledge of the information sought to be elicited. If all answers to the above questions are affirmative, then the court determines if prejudice to the defendant in selecting the jury can be inferred from the juror's failure to respond. Barker v. State, 463 So.2d 1080, 1083 (Miss.1985) (citing Odom v. State, 355 So.2d 1381 (Miss.1978)). This test, although frequently applied in criminal trials, is equally applicable to allegations of juror misconduct in civil suits. See T.K. Stanley, Inc. v. Cason, 614 So.2d 942, 948 (Miss.1992). Moreover, the Odom test has been expanded to include a fourth prong requiring that "prejudice ... in selecting the jury could reasonably be inferred from the juror's failure to respond." Payton

v. State, 897 So.2d 921, 954 (¶ 131) (Miss.2003) (citing Chase v. State, 645 So.2d 829, 847 (Miss.1994)). "There is no 'unbending rule for every situation that might arise' on the voir dire of prospective jurors," so each case must be decided on the facts of that case. Mariner Health Care, Inc. v. Estate of Edwards, 964 So.2d 1138, 1147 (¶ 19) (Miss.2007).

Goodyear Tire & Rubber Co. v. Kirby, 2009 WL 1058654, 18 (Miss.App. 2009).

Also a slightly different standard where here, we also have a claim of improper contact with jurors.

¶ 8. Gladney v. Clarksdale Beverage Company, Inc., 625 So.2d 407 (Miss.1993), attempts to clarify the procedure of handling alleged improper jury contact or misconduct. As to the standard of proving jury misconduct, the Gladney court states the following:

> Once an allegation of juror misconduct arises, then the next step is to consider whether an investigation is warranted. In order for the duty to investigate to arise, the party contending there is misconduct must make an adequate showing to overcome the presumption in this state of jury impartiality. Juror polling shall only be permitted by an attorney, outside the supervision of the court, upon written request. At the very minimum, it must be shown that there is sufficient evidence to conclude that good cause exists to believe that there was in fact an improper outside influence or extraneous prejudicial information. Although a minimal standard of a good cause showing of specific instances of misconduct is acceptable, the preferable showing should clearly substantiate that a specific, non-speculative impropriety has occurred. The sufficiency of such evidence shall be determined by the trial court if a post-trial hearing is indeed warranted under these standards. Gladney, 625 So.2d at 418.

Boyles v. State, 778 So.2d 144, 147 (Miss.App. 2000).

The trial judge specifically noted in his order denying the motion for new trial that he had dealt with issues on an on-going basis during trial. Moreover, there is an on the record voir dire of jurors. Tr. 348-358. There appears to be only a bald, unsupported allegation of a juror being related to the Mother of one of the victim's. Nothing as to the degree of relation or anything. Clearly the trial court did not feel, based upon his experience at and during trial that such assertions rose to the level requiring an investigation.

> ¶ 34. . . . The standard of review for the trial court's denial of a motion for a new trial is an abuse of discretion. This Court will disturb a verdict only "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice ."...

Liddell v. State, 2010 WL 1444540 (Miss.App. 2010).

There being no error in the trial court's order denying the motion for new trial and no new argument on appeal, this is not error and no relief should be granted.

VI.
THE INDICTMENT, AS AMENDED, IS LEGALLY SUFFICIENT TO CHARGE AGGRAVATED ASSAULT.

Next, defendant challenges, specifically, the validity of Count III of the indictment was fatally flawed.

At the reading of the indictment the prosecution sought to amend ore tenus the indictment to correctly follow the statutory language "... against the peace and dignity of the State of Mississippi." (Tr.3-5). The trial court allowed the amendment during the reading of the indictment (to which both defendant's pled not guilty) – and as noted in both brief – the trial court apparently did not memorialize his allowing the amendment to the indictment with a written and filed order.

It is worth mentioning that pre-trial when the State sought to amend the indictment counsel for defendant Sands opined that it could be amended. (Tr.5) Defense counsel for defendant Rhodes did not object to the amendment of the indictment to include the statutory language (Tr. 3-5).

The position of the State is that even without a written order, the ruling of the court was correct.

> ¶ 19. The question of whether an indictment is fatally defective is an issue of law and deserves a relatively broad standard of review. Hawthorne v. State, 751 So.2d 1090, 1092(¶ 8) (Miss.Ct.App.1999). Although Moses correctly asserts that the Mississippi Constitution requires that all indictments conclude with the words "against the peace and dignity of the State," **we note that our supreme court has held**

> **that the failure of an indictment to conclude with these words is a formal defect that is curable by amendment.** Brandau, 662 So.2d at 1054. As a result, we find that the trial judge properly allowed the State to amend the indictment. Therefore, this issue is without merit.
>
> *Moses v. State,* 885 So.2d 730, 735 -736 (Miss.App. 2004)(emphasis added).

There was no error in the trial court allowing the amendment of the indictment. Defendant can not show, nor does he now claim, any prejudice to his case by the amendment.

No relief should be granted on this allegation of trial court error.

VII.
DEFENDANT HAD EFFECTIVE ASSISTANCE OF COUNSEL.

In this allegation of error appellate counsel claims three specific instances of ineffective assistance of trial counsel.

First counsel asserts that trial counsel should have objected with more specificity when testimony was elicited that defendant engaged in illicit drug use.

> ¶ 16. . . . The State responds that, when looking at the admission or objection of evidence as a matter of trial strategy, "[t]he failure to object to its admission does not rise to the level of prejudice required under Strickland." Carle v. State, 864 So.2d 993, 997(¶ 14) (Miss.Ct.App.2004).

Miller v. State, 914 So.2d 800, 805 (Miss.App. 2005).

Again, as presented factually above, during redirect the State asked about the witness smoking marijuana with both defendant's... the witness said he had. Defense objected. Tr. 347-48. The judge overruled the objection, probably because it was defense counsel, during his cross-examination of this witness had specifically gone in to his illicit drug use and with whom he used. Tr. 303-304.

This was trial strategy and not ineffective assistance... trial counsel argued marijuana use by witnesses during his closing. Tr. 541, 560. This is not ineffective assistance. *Miller, supra.* Appellate counsel does assert trial counsel should have requested a limiting instruction be given to the jury regarding this testimony.

¶ 32. We are also mindful that counsel's decision whether to request a

> limiting instruction regarding a part of the evidence against the accused may also be a part of trial strategy. Our supreme court has pointed out that a limiting instruction "can actually focus the jury's attention on sensitive information" Sipp v. State, 936 So.2d 326, 331(¶ 9) (Miss.2006) (citing Brown, 890 So.2d at 913(¶ 35)). **We have held that a lawyer's failure to request such a limiting instruction as a tactical decision does not amount to ineffective assistance**. Hill v. State, 749 So.2d 1143, 1151(¶ 20) (Miss.Ct.App.1999). Moss' arguments did not meet the first prong of the Strickland test, as his counsel's performance was not deficient. Therefore, we decline further review of the issue.
>
> *Moss v. State,* 977 So.2d 1201, 1214 (Miss.App. 2007)(emphasis added).

Next defendant Sands asserts his counsel was ineffective for not more fully following up on the alleged 'juror misconduct.' Third and lastly, it is claimed trial counsel was ineffective for failing to subpoena witnesses to testify at the hearing on the motion for new trial.

> ¶ 8. . . . [defendant] claimed at a new trial motion hearing that trial counsel refused his request to have a witness named Ike Barnes subpoenaed for trial as being a witness who could, in some way, substantiate this defense. There was no showing at the hearing as to what specific evidence Barnes could give relevant to the defense. An allegation of ineffective assistance of counsel based on the failure to properly prepare must state how any additional investigation, such as interviewing witnesses or investigating facts, would have significantly aided the defense during the course of the trial. Brown v. State, 798 So.2d 481, 495 (¶ 17) (Miss.2001).
>
> *Sharkey v. State,* 856 So.2d 545, 547 (Miss.App. 2003).

Even now, on appeal, there is no showing of what those witnesses would have provided. This was not ineffective assistance.

Counsel for defendant stipulates the record is adequate for determination of these claims of ineffective assistance. The State would accept this stipulation and submit these for this Court's decision.

Looking to the argument presented, not only are there no claims of deficient performance, there is no assertion or allegation of prejudice

Accordingly, having failed on both prongs of *Strickland* no relief should be granted on this claim of error.

CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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:

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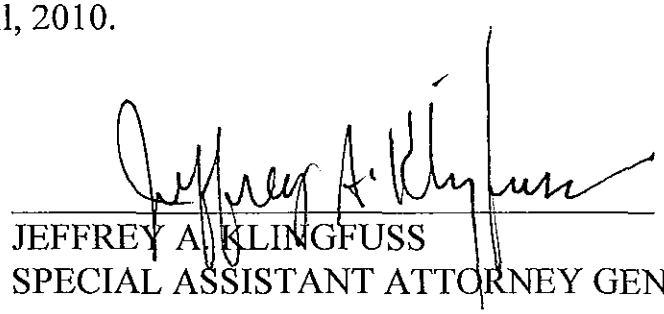
This the 21st day of April, 2010.



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