IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TRAVIS BUTLER — APPELLANT

VS. — NO. 2009-KA-1219-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The focal point in this appeal from convictions of robbery less than capital and conspiracy is the duration of the concurrent sentences imposed. The trial judge imposed the maximum sentence prescribed by statute for simple robbery - fifteen (15) years - and five years for conspiracy, both to run concurrently as opposed to consecutively.

According to appellant, this sentence was the product of an abuse of judicial discretion because it is based upon illegitimate factors, is disproportionate to the offense of robbery, and constitutes cruel and unusual punishment.

TRAVIS BUTLER, a twenty (20) year old African-American male who was only eighteen (18) years of age at the time of the offenses under scrutiny (R. 62), prosecutes a criminal appeal from the Circuit Court of Tunica County, Mississippi, Albert B. Smith, III, Circuit Judge, presiding.

On April 1, 2009, following a trial by jury, Butler was convicted of robbery less than capital (count I.) and conspiracy (count II.) Butler was thereafter sentenced to serve fifteen (15) years for

robbery and five (5) years for conspiracy with the two sentences to run concurrently as opposed to consecutively.

Two (2) issues are raised on appeal to this Court:

[I.] "Whether or not the [trial judge] abused his broad discretionary power in imposing the maximum sentence of fifteen years."

[II.] "Whether or not the fifteen year sentence constituted cruel and unusual punishment [in violation] of the appellant's constitutional rights."

According to Butler, a young first offender, the trial judge abused his judicial discretion in sentencing Butler to fifteen (15) years for robbery because, *inter alia*, a sentence of this duration was disproportionate considering both the offense and the offender and constituted cruel and unusual punishment as well.

STATEMENT OF FACTS

During the early morning hours of August 24, 2007, Michael Crawford, a surveillance operator at the Sheraton Casino in Tunica, was robbed at gunpoint by a black male he identified at trial as Travis Butler. (R. 15) Crawford had worked the graveyard shift from 10:00 p.m. until 6:00 a.m. (R. 10) He was standing in the parking lot outside his truck conversing with another employee when a red Mercury Sable occupied by two black males pulled up along side Crawford and the other employee and asked for directions to I-69. (R. 10-11)

Mr. Hitt, the other employee, smelled trouble brewing and said to Crawford, "I don't like this. Let's get out of here Something is fixing to take place." (R. 11)

According to Crawford, he was in the process of " . . . getting to my vehicle, [when] one of the black males comes out of the passenger side of the red Mercury Sable and approaches me at gun point. He tells me to give me my - - give him my money. I said, "Yes." For fear of my life, I go

down on my knees. I hand him my wallet. He then in point turns and runs back to the car." (R. 11)

The two black males were apprehended shortly thereafter, and Butler was identified by Crawford as the man who robbed Crawford at gunpoint. (R. 14-15)

Travis Butler testified in his own behalf and admitted at trial he robbed Michael Crawford but denied he used a gun during the robbery. (R. 66) According to Butler, he was under the influence of alcohol and marijuana at the time of the incident. (R. 65)

Michael Crawford, the victim, along with other witnesses, testified Crawford was robbed a gunpoint. (R. 11-12, 15, 18-19, 48)

In sentencing Butler to the maximum sentence of fifteen (15) years for robbery, Judge Smith stated the following: "The Armed Robbery, although he was only convicted of robbery - - is a crime the Court feels strongly about, gun crimes against the person a totally different category. The Court will stay with its original sentence, fifteen years in Count I; five years in Count II, both to run concurrent."

Six (6) witnesses testified for the State during its case-in-chief, including **Michael Crawford,** the victim, who testified that Butler approached him in a casino parking lot and commanded: "Give me your wallet." (R. 12) Crawford surrendered, at gunpoint, his wallet containing "around sixty-eight dollars." According to Crawford, he would have never surrendered his wallet " . . . if he [Butler] didn't have that gun . . ." (R. 12)

During re-examination of Crawford, the following colloquy took place:

BY MR. BLECK:

Q. Defense counsel asked you about a gun. Was there a gun?

A. Yes, sir, there was.

Q. Any question in your mind?

A. No.

Q. Would you have given him your money if he did not have a gun?

A. No, I would not have given him my money. (R. 17)

Malec Gai, an off-duty dealer and an ear and eyewitness to the crime, testified unequivocally he saw a pistol. (R. 18-19)

THE COURT: What did you see?

A. Okay. I was in the truck. When I got out there, I saw them fighting. One of them had a gun. I did saw a gun. I don't know If it was real or fake but I did saw a gun with my own eyes. (R. 21)

After being advised of his right to testify or not to testify, young Butler elected to testify in his own behalf. He admitted the robbery but adamantly claimed no gun was involved. (R. 66-68)

At the close of all the evidence the jury retired to consider its verdict at 3:21 p.m. An hour later, at 4:22 p.m., it returned with the following two verdicts:

"We, the jury, find the defendant guilty of robbery in Count I."

"We, the jury, find the defendant guilty of conspiracy in Count II." (R. 119; C.P. at 133-34)

A poll of the jurors, individually by number, reflected the verdicts were unanimous. (R. 119-20)

Despite the gun testimony from both Crawford and Gai, the jury elected to find Butler guilty of robbery as opposed to armed robbery. (R. 119)

Following consideration of a presentence report, and at the close of a presentence hearing conducted on June 23, 2009, Judge Smith imposed a sentence of fifteen (15) years for the robbery and five (5) years for conspiracy, said sentences to run concurrently. (R. 128-29; C.P. at 139-41)

In sentencing Butler to the maximum term of fifteen (15) years for the robbery, Judge Smith made the following observations:

> THE COURT: All right, Mr. Butler, the crimes against the person are terrible. We've got to stop the violence.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: The Court, in Count I, will sentence you to 15 years in an institution under the direction and control of the Department of Corrections.
>
> * * * * * *
>
> MS. KELLY: Your Honor, since this is his first offense and he doesn't have any criminal history, we would ask that you suspend some of the 15 years.
>
> THE COURT: The Armed Robbery, although he was only convicted of robbery - -
>
> MS. KELLY: Yes, your Honor.
>
> THE COURT: - - is a crime the Court feels strongly about, gun crimes against the person a totally different category. The court will stay with its original sentence. Fifteen years in Count I; five years in Count II, both to run concurrent. (R. 128-29)

Insofar as we can tell, a motion for new trial was neither filed post-trial nor made *ore tenus*. (C.P. at 7-8)

Notice of appeal was filed on July 24, 2009. (C.P. at 145) A corrected Notice of Appeal was filed on July 31, 2009. (C.P. at 148)

On appeal, Butler invites the appellate court to " . . . remand this case back to the trial court for re-sentencing . . ." (Brief of Appellant at 8)

SUMMARY OF THE ARGUMENT

By virtue of Miss.Code Ann. §97-3-75, the permissible punishment for robbery less than capital, i.e., simple robbery, is ". . . imprisonment in the penitentiary for a term not more than fifteen

years."

The fifteen (15) year sentence imposed upon Butler was within the limits prescribed by statute. In accordance with applicable case law, a sentence within the statutory guidelines is not subject to review by an appellate court. **Sykes v. State,** 895 So.2d 191, 194 (Ct.App.Miss. 2005). *See also* **Ford v. State,** 975 So.2d 859, 869 (Miss. 2008) ["It is well established that this Court will not disturb a sentence where it does not exceed the maximum period allowed by statute[,] [h]owever, a sentence that is grossly disproportionate to the crime committed may be reviewed on Eighth Amendment grounds."]

"[A] trial court will not be held in error or held to have abused [its] discretion if the sentence imposed is within the limits fixed by statute." **Clay v. State,** 881 So.2d 354, 358 (Ct.App. Miss. 2004), quoting from **Johnson v. State,** 461 So.2d 1288, 1292 (Miss. 1984).

Stated differently, "[i]t is well settled in this State that the imposition of sentence in a criminal proceeding is within the sole discretion of the trial judge, and that this Court will not reverse a sentence where it is within the limits prescribed by statute." **Sykes v. State,** *supra,* 895 So.2d 191, 194 (Ct.App.Miss. 2005).

"[T]rial judges may consider all kinds of information when sentencing." **Vaughn v. State,** 964 So.2d 509, 512 (Ct.App.Miss. 2006). The trial judge has broad discretion in the things he/she may consider and is largely unlimited as to the kind of information the court may consider or the source from which it may come. **Davis v. State,** 17 So.3d 1149 (Ct.App.Miss. 2009).

Butler testified he did not have a gun. (R. 66-68) The jury either believed him or simply give him the benefit of a doubt despite direct testimony from Mr. Crawford, the victim, who positively identified Butler as the youth who robbed him at gunpoint. (R. 11-12, 15) According to Crawford, he would have never surrendered his wallet " . . . if he didn't have that gun . . ." (R. 12)

Despite the testimony of Crawford and Gai that a gun was involved in the caption, the jury convicted Butler of robbery as opposed to armed robbery.

We cannot speculate why the jury convicted Butler of robbery as opposed to armed robbery. Sympathy, credibility issues, the fact that no gun was recovered, the fact that Mr. Gai could only place the pistol in the hands of one of the two perpetrators, or simply poor eyesight could conceivably account for the jury's decision to convict Butler of the lesser included offense of simple robbery. The great weight of the testimony indicated the robbery was committed at gunpoint, and the trial judge could certainly take this factor into consideration at sentencing.

ARGUMENT

THE FIFTEEN (15) YEAR SENTENCE FOR ROBBERY IMPOSED TO RUN CONCURRENTLY WITH THE FIVE (5) YEAR SENTENCE FOR CONSPIRACY WAS NEITHER CRUEL NOR UNUSUAL NOR DISPROPORTIONATE OR EXCESSIVE BECAUSE IT WAS WITHIN THE LIMITS PRESCRIBED BY STATUTE.

Butler argues on appeal the trial judge abused his broad judicial discretion in sentencing him to fifteen (15) years because the judge failed to consider the mitigating factors in the record. Specifically, the court never alluded to (1) Butler's youthful age of nineteen (19), Butler's total lack of any kind of criminal record, and (3) Butler's completely remorseful attitude concerning his participation in the crime.

According to young Butler " . . . the record is clear that the only reason for the Court imposing the maximum sentence was due to the fact that he thought that the type of crime for which the appellant committed was terrible." (Brief of Appellant at 7)

Butler also suggests the trial judge, in declining to reconsider Butler's sentence, should not have considered the fact that ". . . gun crimes against the person [are in] a totally different category."

(Brief of Appellant at 2)

We respectfully submit the severity of the crime, i.e., a crime against the person where the victim and others testified a gun was used by the robbers, is a perfectly legitimate factor for sentencing consideration in this case.

The fifteen (15) year sentence imposed by the trial judge was within the limits authorized by statute at the time of sentencing.

Therefore, this issue is controlled, at least in part, by the well established rule " . . . that a trial court will not be held in error or held to have abused [its judicial] discretion if the sentence imposed is within the limits fixed by statute." **Johnson v. State,** 461 So.2d 1288, 1292 (Miss. 1984), and the cases cited therein. *See also* **Wallace v. State,** 607 So.2d 1184, 1188 (Miss. 1992) [A sentence will not be disturbed so long as it doesn't exceed the statutory maximum.]; **Reynolds v. State,** 585 So.2d 753, 756 (Miss. 1991) ["The imposition of a sentence is within the discretion of the trial court, and this Court will not review the sentence, if it is within the limits prescribed by statute.]; **Barnwell v. State,** 567 So.2d 215, 221 (Miss. 1990) [Save for instances where the sentence is "manifestly disproportionate" to the crime committed, extended proportionality analysis is not required by the Eighth Amendment.]; **Hart v. State,** 639 So.2d 1313 (Miss. 1994); **Edwards v. State,** 615 So.2d 590 (Miss. 1993); **Reed v. State,** 536 So.2d 1336 (Miss. 1988).

"The imposition of a sentence is within the discretion of the trial court, and [the Supreme Court] will not review the sentence, if it is within the limits prescribed by statute." **Reynolds v. State,** *supra,* 585 So.2d 753, 756 (Miss. 1991), and the cases cited therein. *See also* **Alexander v. State,** 979 So.2d 716 (Ct.App.Miss. 2007), reh denied (Sentencing is within the complete discretion of the trial court and is not subject to appellate review if it is within the limits prescribed by statute.]; **Callins v. State,** 975 So.2d 234 (Ct.App.Miss. 2007) [A sentence is not subject to appellate review

if within the limits prescribed by statute.]; **Sykes v. State,** 895 So.2d 191, 194 (Ct.App.Miss. 2005) ["The sentence prescribed by the trial court was well within the statutory guidelines and is not subject to review by this Court."]

No abuse of judicial discretion has been demonstrated here where the sentence was clearly within statutory guidelines. A reviewing Court has no power to disturb the exercise of that discretion. **Payton v. State,** 897 So.2d 921 (Miss. 2003). Stated differently, "[a] trial court will not be held in error or held to have abused [its] discretion if the sentence imposed is within the limits fixed by statute." **Clay v. State,** *supra*, 881 So.2d 354, 358 (Ct.App. Miss. 2004), quoting from **Johnson v. State,** 461 So.2d 1288, 1292 (Miss. 1984).

The fact that similarly situated defendants may have received less severe punishment, standing alone, " . . . does not prove that the sentences imposed here are grossly disproportionate to the crime committed." **Vaughn v. State,** *supra,* 964 So.2d 509, 511 (¶9) (Ct.App,.Miss. 2006), quoting from **Womack v. State,** 827 So.2d 55, 59 (¶13) (Ct.App.Miss. 2006).

Neither the Supreme Court of Mississippi nor the Mississippi Court of Appeals will engage in a proportionality analysis discussed in **Solem v. Helm**, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), unless a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality. **Ford v. State,** 975 So.2d 859 (Miss. 2008); **Phinizee v. State,** 983 So.2d 322 (Ct.App.Miss. 2007), reh denied, cert denied 981 So.2d 298 (2008). Such simply does not exist here.

A trial court judge is to examine all relevant factors in making a sentencing decision. **Smith v. State,** 973 So.2d 1003 (Ct.App.Miss. 2007), reh denied.

"In imposing sentence, the trial court may take into account larger societal concerns, as long as the sentence is particularized to the defendant." **Reynolds v. State,** *supra,* 585 So.2d at 756.

It was. (R. 129)

Stopping violent crimes committed against the person is, of course, a legitimate societal concern.

The sentence imposed, although a fifteen (15) year maximum, was within the limits prescribed by the statute in existence at the time of sentencing and is not subject to review by a reviewing court.

No abuse of judicial discretion has been demonstrated in Butler's case. A reviewing Court has no power to disturb the exercise of the trial judge's discretion. **Payton v. State,** *supra,* 897 So.2d 921 (Miss. 2003).

Scrutiny of the cases cited by Butler demonstrates his fifteen (15) year sentence was not shockingly disproportionate to the sentence imposed upon others in this State for the same offense.

"Trial judges may consider all kinds of information when sentencing." **Vaughn v. State,** *supra*, 964 So.2d 509, 512 (Ct.App.Miss. 2006). The victim's testimony, as well as the testimony of others, that a gun was used in the robbery was a legitimate sentencing factor for consideration even though the jury only found Butler guilty of robbery.

The following language found in **Waldon v. State,** 749 So.2d 262, 268 (Ct.App.Miss. 1999) is relevant here:

> Procedural bar notwithstanding, we find that this issue does not warrant reversal of Waldon's conviction. In sentencing, the trial court has "broad discretion in the things [it is] able to consider" and "may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information [it] may consider, or the source from which it may come." *Evans v. State,* 547 So.2d 38, 41 (Miss. 1989). * * * * * * There was no evidence suggesting that the judge placed improper emphasis on the fact that Waldon had several indictments pending against him at the time of his sentencing.

> Accordingly, we find no abuse of the circuit court's discretion in determining Waldon's sentence."

Similarly, nothing in the present record indicates Judge Smith improperly relied upon illegitimate factors.

We note the two (2) sentences were imposed to run concurrently, as opposed to consecutively. It could have been worse.

Judge Smith, in imposing the fifteen (15) year sentence, appeared to rely largely on the fact that Butler's crime was a violent crime against the person as opposed to a nonviolent property crime. (R. 128) He opined:

> All right, Mr. Butler, the crimes against the person are terrible. We've got to stop the violence.
>
> * * * * * *
>
> The Court, in count I, will sentence you to 15 years in an institution under the direction and control of [the] Department of Corrections. (R. 128)

These were perfectly legitimate sentencing factors personalized to this defendant.

A trial judge is to consider all relevant factors when making a sentencing decision. Where, as here the sentence imposed is within the range permitted by statute, this Court generally has no power to disturb the trial court's exercise of judicial discretion. **Payton v. State,** *supra,* 897 So.2d 921 (Miss. 2003). *See also* **Johnson v. State,** 908 So.2d 900 (Ct.App.Miss. 2005) [Although defendant argued he was a first-time offender, sentences within statutory guidelines were not excessive.] The sentence(s) imposed in the case at bar were within the limits prescribed by statute for the offenses committed. The sentences were imposed to run concurrently, as opposed to consecutively. Butler's sentence was not excessive, and despite his clean record, was neither cruel nor unusual. **Cook v. State,** 728 So.2d 117 (Ct.App.Miss. 1998) [Imposition of thirty (30) year

sentence for sale of cocaine was not unconstitutionally disproportionate despite defendant's previous clean criminal record and the modest amount of cocaine involved]. *See also* **Stromas v. State,** 618 So.2d 116 (Miss. 1993); **Boyd v. State,** 767 So.2d 1032 (Ct.App.Miss. 2000).

Butler received fifteen (15) years, clearly within the maximum authorized by statute. *See* **Griffin v. State,** 492 So.2d 587 (Miss. 1986) [Defendant indicted for armed robbery found guilty of robbery and sentenced to fifteen (15) years.]; **Booker v. State,** 840 So.2d 801 (Ct.App.Miss. 2003) [Appellant convicted of armed robbery not entitled to receive a sentence proportionate to that imposed upon an accomplice.]

We respectfully submit the sentence imposed in the case at bar is not subject to appellate review. **Boggan v. State,** 894 So.2d 581 (Ct.App.Miss. 2004), cert. denied 896 So.2d 373 [Where, as here, sentence is within the limits prescribed by statute, sentence is not subject to appellate review.]

Obviously, Butler did not receive the harshest penalty allowable which would have been having the two sentences run consecutively as opposed to concurrently.

In **Hopson v. State,** 625 So.2d 395, 404 (Miss. 1993), this Court, citing **Harmelin v. Michigan,** 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), observed that the Supreme Court of the United States questioned the proportionality analysis created by **Solem v. Helm,** 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Nevertheless, this Court concluded: "[E]ven though **Harmelin** questions the proportionality analysis, there is language in the case to indicate that a 'gross proportionality' analysis is still in order." 625 So.2d at 404.

In **Ford v. State,** *supra*, 975 So.2d 859, 869 (Miss. 2008), we find the following language dispositive of the issue presented here:

> It is well established that this Court will not disturb a sentence

> where it does not exceed the maximum period allowed by statute. *Williams v. State,* 794 So.2d 181, 188 (Miss. 2001) (citing *White v. State,* 742 So.2d 1126, 1135 (Miss. 1999). However, a sentence that is grossly disproportionate to the crime committed may be reviewed on Eighth Amendment grounds. *Id.* Unless a "threshold comparison of the crime committed to the sentence imposed leads to an inference of 'gross disproportionality,' " the Court will not engage in the analysis set forth in *Solem v. Helm,* 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). *White,* 742 So.2d at 1135 (citing *Hoops v. State,* 681 So.2d 521, 538 (Miss. 1996)).

We eschew Butler's invitation for a proportionality analysis because the sentence, under the facts presented here, does not lead to an inference of "gross disproportionality". Stated differently, the sentence was not grossly or manifestly disproportionate to the crime committed. *See e.g.,* **Ashley v. State,** 538 So.2d 1181 (Miss. 1989) [Life imprisonment under recidivist statute for in-store consumption of two cans of sardines and breaking into house to pay for them was unduly harsh and warranted re-sentencing]; **Presley v. State,** 474 So.2d 612, 621 (Miss. 1985) ["(F)orty (40) years without parole for what in essence is a petty criminal's stealing a steak."] This type of "undue harshness" does not exist here.

The concurrent sentences imposed in the case at bar were neither cruel nor unusual nor manifestly disproportionate to the crimes of robbery and conspiracy. Although Butler was a first-time offender, the trial judge expressed his concern about violent crimes against the person which he described as "terrible." (R. 128) Accordingly, the imposition of a fifteen (15) year and a five (5) year concurrent sentences, under the circumstances, was neither "grossly" nor "manifestly" disproportionate nor shockingly excessive.

The cases cited by Butler do not help his cause.

In **White v. State,** 742 So.2d 1126 (Miss. 1999), White, a first-time offender, got sixty (60) years for selling a small amount of cocaine. Unlike the case at bar, there was nothing in the record

justifying the maximum sentence.

In **Clowers v. State,** 522 So.2d 762 (Miss.1988), Clowers was convicted of uttering a forgery as a habitual offender and sentenced to fifteen (15) years without the benefit of probation or parole. The Supreme Court held that despite Mississippi's habitual offender statute requiring a defendant to be sentenced to the maximum of fifteen (15) years, the trial judge still had the authority to review the habitual sentence in light of the constitutional principles of proportionality. The Court opined: "What we hold today - and all we hold - is that the trial court did not commit reversible error in reducing what it found to be a disproportionate sentence under the facts of this case." 522 So.2d at 765.

In **Waddell v. State,** 999 So.2d 375, 378 (Ct.App.Miss. 2008), cited and relied upon by Butler, the following language contained in the passage quoted by Butler appears to be dispositive of Butler's gross proportionality complaint: "As the sentence was within the statutorily prescribed limits, we cannot find any inference of gross disproportionality in Waddell's sentence. This issue is without merit."

We perceive no reversible error involving the imposition and length of Butler's sentence in the case at bar. It was neither cruel nor unusual. Under the circumstances and considering all factors, fifteen (15) years fails to shock our conscience.

CONCLUSION

The trial judge considered legitimate factors in imposing the maximum sentence allowed by statute.

A sentence within the limits of the applicable statute will generally not be reviewed where, as here, it is within the limits prescribed by statute.

Finally, it is clear to us Judge Smith imposed a sentence of fifteen (15) years because he

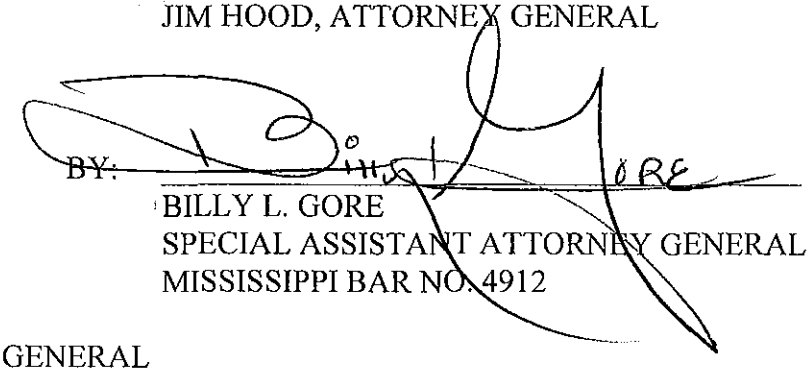
considered " . . . the crimes against the person are terrible" and "[w]e've got to stop the violence." (R. 128) The victim and several other ear and eyewitnesses testified a gun was used in the robbery.

These are legitimate sentencing factors.

Appellee respectfully submits no reversible error took place during the trial of this cause. Accordingly, both of Butler 's convictions following trial by jury, as well as the two concurrent sentences - 15 years and 5 years - imposed in their wake, should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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