

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOE HOWARD

APPELLANT

VS.

NO. 2010-CP-0923-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOE HOWARD

APPELLANT

VS.

NO. 2010-CP-0923-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This is an appeal from an order entered on May 7, 2010, by the Circuit Court of Webster County dismissing summarily a "Motion for Post-Conviction DNA Testing" filed *pro se* by Joe Howard, a convicted sex offender. *See* appellee's exhibit A, attached.

This is appellant's eighth motion for post-conviction collateral relief assailing the integrity of guilty pleas entered in Webster County over twelve (12) years ago.

STATEMENT OF FACTS

A long time ago, on June 18, 1998, JOE HOWARD, a Caucasian male (MDOC photograph), entered voluntary pleas of guilty in the Circuit Court of Webster County to three (3) individual indictments charging him with sexual battery. He was accused of engaging in fellatio with two male youths, both minors under the age of fourteen (14). (C.P. at 20-22)

These sordid offenses were committed against, *first*, Ryan Lyda "on or between the 1st and 15th day of November, 1997," and charged in cause number 4402 (C.P. at 20); *second*, against Joseph Conway Manus "on or between the 1st and the 15th day of November, 1997" and charged in cause

number 4403 (C.P. at 21); and *third*, against Joseph Conway Manus, “on or about the 5th day of March, 1998,” charged in cause number 4404. (C.P. at 22)

Howard was thereafter sentenced to serve a term of twenty (20) years in the custody of the MDOC on each individual charge, said sentences to run concurrently as opposed to consecutively. (C.P. at 49)

The heinous facts of this case may perhaps be gleaned from prior proceedings in this case as well as from handwritten letters to Howard penned by the mothers of the two victims. (C.P. at 25-27)

Subsequent to his convictions via guilty pleas, Howard filed a plethora of post-conviction motions, all of which have been denied. In his latest motion, which Howard first filed in the Supreme Court, Howard asked the high Court to order DNA testing. On April 16, 2010, Justice Michael Randolph entered an order dismissing the motion without prejudice to file same in the trial court. *See* appellee’s exhibit B, attached.

In his written order dismissing Howard’s motion for DNA testing without prejudice, Judge Randolph pointed out that the Circuit Court of Webster County had previously denied Howard’s seventh motion for post-conviction relief. *See* appellee’s exhibit B, attached.

In concluding that Howard’s motion was not properly before the Supreme Court, Judge Randolph penned the following language:

[T]he panel is aware that on May 1, 2009, the Circuit Court of Webster County denied Howard’s seventh motion for post-conviction relief in cause number 2009-40-CV-L. The circuit court sanctioned Howard by taking away 180 days of his earned time and by barring Howard “from filing any future post-conviction motions” in that court. Although this order is not to be interpreted as a writ of mandamus to the circuit court, the panel reminds the circuit court that

certain issues may arise in post-conviction matters which meet an exception to the successive writ bar, requiring the circuit's court's attention. Additionally, because of the recent changes to the Mississippi Uniform Post-Conviction Collateral Relief Act which took effect on March 16, 2009, inmates are permitted to file a successive motion for post-conviction relief seeking post-conviction DNA testing.

Howard thereafter, on May 3, 2010, filed his motion for post-conviction DNA testing in the Circuit Court of Webster County. It was filed pursuant to the provisions of Senate Bill 2891 (C.P. at 28-46), a bill introduced but not passed by the Legislature in 2010; rather, 2891 died in the committee on February 2, 2010. *See* appellee's exhibit C, attached.

The bill applicable to DNA testing within the context of post-conviction relief is Senate Bill 2709 passed by the Legislature on March 6, 2009, and signed and approved by the Governor on March 16, 2009. Senate Bill 2709 amended certain provisions of the Mississippi Uniform Post-Conviction Collateral Relief Act and provided for post-conviction DNA testing of "biological evidence" when certain conditions were met. *See* Miss.Code Ann. §§99-39-5, 99-35-7, 99-39-9, 99-39-11, & 99-39-23.

These conditions have not been met here.

Howard suggested in his motion filed on May 3, 2010, and he claims here and now on September 17, 2010, (1) he was actually innocent of the crimes for which he plead guilty; (2) there exists "specifically identified" biological evidence not previously tested secured in relation to the investigation and prosecution attendant to his convictions via guilty pleas, and (3) the testing will demonstrate to a reasonable probability Howard would not have been convicted. (C.P. at 3-4) The relief requested by Howard in his motion was an evidentiary hearing. (C.P. at 11)

In summarily denying Howard's motion, the circuit Judge noted specifically that Senate Bill

2891 - the bill that never passed - required the motion to be filed in the Supreme Court and, by its plain language, was not to take effect until July 1, 2010. Accordingly, Judge Loper dismissed Howard's motion summarily on the grounds it was several months premature, and the circuit court lacked jurisdiction.

We respectfully submit the circuit judge, under these circumstances, did not abuse his judicial discretion in denying the requested post-conviction relief.

SUMMARY OF THE ARGUMENT

Post-conviction DNA relief was properly denied for several cogent reasons.

First, Howard sought to challenge three (3) individual convictions with one motion/petition in contravention of the "one judgment at a time" rule found in Miss. Code Ann. §99-39-9(2).

Second, Howard is both time barred and successive writ barred because none of the exceptions are applicable to his case. "The burden of proving that no procedural bar exists falls squarely on the petitioner." **Crawford v. State**, 867 So.2d 196, 202 (Miss. 2003).

Third, the first page of Howard's motion for post-conviction DNA testing states, *inter alia*, that his motion is filed pursuant to Miss.Code. Ann. §§99-49-101. This section of the Code does not exist because Senate Bill 2891 died in committee.

Judge Loper found as a fact and concluded as a matter of law that Howard's motion was premature and filed in the wrong court. Senate Bill 2891, upon which Howard relies for relief, did not become law. Accordingly, the findings made by the circuit judge which were based upon his examination of 2891 were neither manifestly wrong nor clearly erroneous.

Fourth, and most significantly, Howard has failed to identify in his motion with the specificity required any biological evidence that could be tested for DNA.

There may in the future be cases where post-conviction DNA testing of biological evidence

is both prudent and expedient, but the case at bar is clearly not one of them.

“The burden is upon [Howard] to prove by a preponderance of the evidence that he is entitled to the requested post-conviction relief.” **Bilbo v. State**, 881 So.2d 966, 968 (¶3) (Ct.App.Miss. 2004) citing Miss.Code Ann. §99-39-23(7) (Rev.2000).

When reviewing the trial court’s decision to deny a petition for post-conviction relief, an appellate court will not disturb the trial court’s factual findings unless they are found to be clearly erroneous. **Brown v. State**, 731 So.2d 595, 598 (¶6) (Miss. 1999).

“A trial judge’s finding will not be reversed unless manifestly wrong.” **Hersick v. State**, 904 So.2d 116, 125 (Miss. 2004).

“However, where questions of law are raised the applicable standard of review is *de novo*,” i.e., afresh or anew. *Id.*

It is enough to say that any *de novo* review of the conclusions of law reached by Judge Loper should result in a finding that the trial court did not abuse its judicial discretion in finding that Howard’s claims were devoid of merit.

ARGUMENT

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN DENYING POST- CONVICTION RELIEF.

Howard, citing and relying upon the provisions of Senate Bill 2891, claims that although he plead guilty to sexual battery, he is actually innocent, and DNA testing would demonstrate by reasonable probability that Howard would not have been convicted.

The circuit judge did not abuse his judicial discretion in summarily denying relief because Senate Bill 2891, relied upon by Howard, never became law. Rather, the bill that was passed by the Mississippi Legislature in 2009 and signed by the governor was Senate Bill 2709 - An Act to

Improve the Preservation and Accessibility of Biological Evidence, which directly and significantly amended the Mississippi Uniform Post-Conviction Collateral Relief Act so as to provide for post-conviction DNA testing when certain conditions were met. *See* Miss.Code Ann. §§99-39-5, 99-35-7, 99-39-9, 99-39-11, & 99-39-23.

Judge Loper found as a fact and concluded as a matter of law that he did not have jurisdiction under Senate Bill 2891 which required that Howard file his pleading in the Supreme Court. Judge Loper also found as a fact and concluded as a matter of law that Howard's motion was premature because the provisions of Senate Bill 2891 would not become effective until "from and after July 1, 2010." How could these findings possibly be clearly erroneous or manifestly wrong under the circumstances?

[1] The One Judgment Rule.

Howard seeks to challenge in one motion all three of his convictions via guilty pleas. Two of the offenses were committed on or between 1 and 15 November 1997 while the third was committed on March 5, 1998.

Miss. Code Ann. §99-39-9(2) reads, in its entirety, as follows:

(2) A motion shall be limited to the assertion of a claim for relief against one (1) judgment only. If a petitioner desires to attack the validity of other judgments under which he is in custody, he shall do so by separate motions.

Howard's motion was properly denied for this reason, if for no other.

[2] No Specific Biological Evidence Identified or Requested.

Howard states in paragraph IV of his motion filed in the trial court that "[t]here exists specifically identified biological evidence secured in relation to his investigation and prosecution. . ." (C.P. at 4)

If this is true, what and where is it?

Mere speculation and conclusory allegations will not justify the relief requested.

Howard has failed to identify any biological evidence available for DNA testing. The State's response in 1998 to Howard's request for discovery reflects there were *no* crime laboratory reports or tests, *no* physical evidence, and *no* exculpatory evidence. (C.P. at 23-24; appellee's exhibit D, attached) Howard has filed no affidavit asserting otherwise.

Moreover, paragraph VIII of Howard's motion suggests there is "no existing evidence." (C.P. at 4) On page 9 of his motion Howard states that "no sexual assault kit test was done on me or the victims [sic]." (C.P. at 9)

Howard has not identified any biological evidence newly discovered.

[3] Time Bar and Successive Writ Bar.

"The burden of proving that no procedural bar exists falls squarely on the petitioner."

Crawford v. State, *supra*, 867 So.2d 196, 202 (Miss. 2003).

Howard's factual scenario in both his motion for post-conviction DNA testing and his brief on appeal fails to satisfy any of the exceptions found in the amended post-conviction relief act, including the biological evidence exception found in Miss.Code Ann. §99-39-5(2)(a)(ii). (Supp. 2009)

Howard's motion is time barred by virtue of Miss.Code Ann. §99-39-5(2) and successive writ barred by virtue of Miss.Code Ann. §99-39-23(6).

The truth of the matter is that Howard has failed to identify with the specificity required any biological evidence that is available for DNA testing. Merely asserting a claim that biological evidence exists without some basis for the truth of the claim is not sufficient to overcome the time or successive writ bars.

[4] No Retroactive Application.

The last paragraph of Senate Bill 2709 states that the act shall be in force from and after its passage. Passage was accomplished on March 16, 2009, as recognized by Judge Randolph in State's exhibit B. We respectfully submit it is not manifestly obvious that the amended provisions are to be applied retroactively. See **City of Starkville v. 4-County Elec. Power Ass'n**, 909 So.2d 1094, 1109 (Miss. 2005) ["A statute will not be given retroactive effect unless it is manifest from the language that the Legislature intended it to so operate."]

Prospective only application is entirely consistent with the decision of the United States Supreme Court in **District Attorney's Office for Third Judicial Dist. V. Osborne**, 174 L.Ed.2d 38 (June 18, 2009), which held there is no substantive constitutional right to have DNA testing for convictions that are final.

Howard entered his guilty pleas nearly twelve (12) years ago. Retroactive application would simply open the floodgates to prisoners whose convictions are final and who have nothing to lose. Howard, by the Supreme Court's own arithmetic, is working on his eighth motion for post-conviction relief.

"The burden is upon [Howard] to prove by a preponderance of the evidence that he is entitled to the requested post-conviction relief." **Bilbo v. State**, *supra*, 881 So.2d 966, 968 (¶3) (Ct. App.Miss. 2004) citing Miss.Code Ann. §99-39-23(7) (Rev.2000).

We respectfully submit the trial judge did not abuse his judicial discretion in finding that Joe Howard has failed to do so here.

CONCLUSION

Petitioner entered guilty pleas over twelve (12) years ago. He confessed his guilt then and there to a judge as well as to members of the victim's family. (C.P. at 25-27) Here and now he

suggests there is biological evidence out there somewhere which, if tested for DNA, would demonstrate by reasonable probability he would not have entered his guilty pleas.

Howard has not filed any affidavits attesting to the existence of biological evidence or pointed to any biological evidence in existence that could be tested. Mere assertions such as those made here (C.P. at 4-5) are insufficient to overcome the procedural bars applicable to Howard.

When reviewing the trial court's decision to deny a petition for post-conviction relief, an appellate court will not disturb the trial court's factual findings unless they are found to be clearly erroneous. **Brown v. State**, 731 So.2d 595, 598 (¶6) (Miss. 1999).

"This Court reviews the denial of post-conviction relief under an abuse of discretion standard." **Phillips v. State**, 856 So.2d 568, 570 (Ct.App.Miss. 2003).

Appellee respectfully submits this case is devoid of any claims worthy of an evidentiary hearing. The circuit judge was neither clearly erroneous nor manifestly wrong and did not abuse his judicial discretion in summarily denying Howard's eighth (8th) motion for post-conviction collateral relief.

Accordingly, the judgment entered in the lower court denying Joe Howard's motion for post-conviction DNA testing (C.P. at 2-15) should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:


BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220

IN THE CIRCUIT COURT OF WEBSTER COUNTY, MISSISSIPPI

JOE HOWARD

VS.

CAUSE NUMBER 2010-39-CV-L

STATE OF MISSISSIPPI

**ORDER DISMISSING MOTION FOR POST-CONVICTION
DNA TESTING**

This court presently has before it a Motion for Post-Conviction DNA Testing that was filed by the Petitioner, Joe Howard, on May 3, 2010. For the reasons herein stated, this court finds that the motion should be dismissed.

On June 18, 1998, Joe Howard pled guilty to the crime of Sexual Battery in Webster County Circuit Court Cause Number 4402. He was sentenced to serve a term of twenty (20) years in the custody of the Mississippi Department of Corrections. On that same date, in Webster County Cause Numbers 4403 and 4404, Howard pleaded guilty to the crime of Sexual Battery and was sentenced to serve a term of twenty (20) years in the custody of the Mississippi Department of Corrections. The sentences imposed in Cause Numbers 4403 and 4404 were ordered to run concurrently with the sentence imposed in Cause Number 4402. Subsequent to his convictions, Howard has filed numerous post-conviction motions in this court. In his latest motion, Howard seeks to have this court order DNA testing pursuant to Senate Bill 2891 that was recently enacted by the Mississippi legislature.

Article 3, Section 2 of Senate Bill 2891 states that the purpose of the bill is "to provide an

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WEBSTER COUNTY
MAY 10 2010
DEBORAH HOOD NEAL
CIRCUIT COURT CLERK
DOR

EXHIBIT

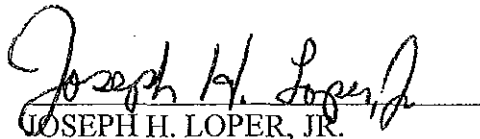
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exclusive and uniform mechanism for a prisoner who has been convicted of a serious crime, whose judgment of conviction and sentence has been affirmed on appeal, who is in custody; and who makes a claim of actual innocence to move the Supreme Court of this state for permission to seek DNA testing of biological evidence that has been retained in his case.” Article 3, Section 3 of Senate Bill 2891 requires motions for post-conviction DNA testing to be filed with the Mississippi Supreme Court. Article 3, Section 17 states that the effective date of Senate Bill 2891, is July 1, 2010.

This court finds that Howard was premature in filing his motion, since the law under which he seeks DNA testing does not take effect until July 1, 2010. Additionally, this court finds that Howard is seeking relief from the wrong court, since the legislation clearly states that a motion for post-conviction DNA testing shall be filed in the Mississippi Supreme Court. For these reasons, this court finds that Howard’s motion should be dismissed.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion for Post-Conviction DNA Testing, that was filed by the Petitioner, Joe Howard, on May 3, 2010, is **DISMISSED** as premature and for lack of jurisdiction.

SO ORDERED, this the 7th day of May, 2010.


JOSEPH H. LOPER, JR.
CIRCUIT COURT JUDGE

Serial: 161705

IN THE SUPREME COURT OF MISSISSIPPI

No. 2008-M-00621

FILED

APR 16 2010

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

JOE HOWARD

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

ORDER

This matter came before the panel of Graves, P.J., Randolph and Chandler, JJ., on the Motion for Post-Conviction DNA Testing filed pro se by Joe Howard. Howard's motion is not properly before this Court. Miss. Code Ann. § 99-39-7. Accordingly, the panel finds that the motion should be dismissed without prejudice to Howard's right to file it in the trial court.

Further, the panel is aware that on May 1, 2009, the Circuit Court of Webster County denied Howard's seventh motion for post-conviction relief in cause number 2008-40-CV-L. The circuit court sanctioned Howard by taking away 180 days of his earned time and by barring Howard "from filing any future post-conviction motions" in that court. Although this order is not to be interpreted as a writ of mandamus to the circuit court, the panel reminds the circuit court that certain issues may arise in post-conviction matters which meet an exception to the successive writ bar, requiring the circuit court's attention. Additionally, because of the recent changes to the Mississippi Uniform Post-Conviction Collateral Relief



Act, which took effect on March 16, 2009, inmates are permitted to file a successive motion for post-conviction relief seeking post-conviction DNA testing.

IT IS THEREFORE ORDERED that Howard's pro se Motion for Post-Conviction DNA Testing is hereby dismissed.

IT IS FURTHER ORDERED that the Clerk of this Court shall forward a copy of this order to Joe Howard and the Circuit Court of Webster County.

SO ORDERED, this the 16th day of April, 2010.





MICHAEL K. RANDOLPH, JUSTICE

Mississippi Legislature 2010 Regular Session

Senate Bill 2891

[Senate Calendar](#) | [House Calendar](#) | [Main Menu](#)
[Code Sections](#) | [Additional Information](#)

Bill Text for All Versions **Explanation**

 |  *As Introduced*

Description: DNA testing; revise in context of post-conviction relief.

Background Information:

Disposition: Dead

Deadline: General Bill/Constitutional Amendment

Revenue: No

Vote type required: Three/Fifths

Effective date: July 1, 2010

History of Actions:

- 1 01/18 (S) Referred To Judiciary, Division B
- 2 02/02 (S) Died In Committee

Code Section: A 099-0049-0001, A 099-0039-0005, A 099-0039-0007, A 099-0039-0009, A 099-0039-0011, A 099-0039-0023

----- Additional Information -----

Senate Committee: Judiciary, Division B*

Principal Author: Tollison

Title: AN ACT TO AMEND SECTION 99-49-1, MISSISSIPPI CODE OF 1972, TO REVISE POST-CONVICTION DNA TESTING OF PRISONERS, CREATE A SHORT TITLE AND STATEMENT OF PURPOSE THEREFOR, AND TO REVISE DEFINITIONS; TO CREATE NEW SECTION 99-49-101, MISSISSIPPI CODE OF 1972, TO PROVIDE FOR FILING OF A MOTION FOR POST-CONVICTION DNA TESTING; TO CREATE NEW SECTIONS 99-49-103 AND 99-49-105, MISSISSIPPI CODE OF 1972, TO IMPOSE CERTAIN REQUIREMENTS ON THE FILING OF SUCH A MOTION; TO CREATE NEW SECTION 99-49-107, MISSISSIPPI CODE OF 1972, TO SPECIFY THE CIRCUMSTANCES UNDER WHICH SUCH A MOTION MAY BE FILED; TO CREATE NEW SECTION 99-49-109, MISSISSIPPI CODE OF 1972, TO PROHIBIT FILING OF SUCH A MOTION IN CERTAIN CASES; TO CREATE NEW SECTION 99-49-111, MISSISSIPPI CODE OF 1972, TO PROVIDE THE PROCEDURE FOR CONSIDERATION OF A MOTION UNDER THE ACT; TO CREATE NEW SECTION 99-49-113, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT FILING OF A MOTION UNDER THE ACT CONSTITUTES CONSENT FOR OBTAINING A DNA SAMPLE WHICH MAY BE ENTERED INTO DATABASES; CONSTITUTES WAIVER OF ANY STATUTE OF LIMITATIONS ON ANY A

IN WHICH



THE MOVANT MAY BE IMPLICATED BY THE ANALYSIS OF HIS DNA; AND TO SPECIFY IN WHAT WAS TEST RESULTS SHALL BE DISSEMINATED; TO CREATE NEW SECTION 99-49-115, MISSISSIPPI CODE OF 1972, TO PROVIDE FOR THE PAYMENT OF COSTS; TO AMEND SECTIONS 99-39-5, 99-39-7, 99-39-9, 99-39-11 AND 99-39-23, MISSISSIPPI CODE OF 1972, TO CONFORM; AND FOR RELATED PURPOSES.

Information pertaining to this measure was last updated on 03/15/10 at 11:38

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IN THE CIRCUIT COURT OF WEBSTER COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS.

CAUSE NO. 4202, 4203, 4204

JOE HOWARD

STATE'S RESPONSE TO REQUEST FOR DISCOVERY

1. WITNESSES FOR THE STATE

All witnesses listed in the attached documents including but not limited to the following:

Lois Manus - Rt. 1, Box 277, Eupora, MS
Joseph Conway Manus - Rt. 1, Box 277, Eupora, MS
Ryan Lyda - Rt. 1, Box 89C, Eupora, MS
Debba Lyda - Rt. 1, Box 89C, Eupora, MS
Larry Lyda - Rt. 1, Box 89C, Eupora, MS
Robert Cooksey - Webster County Sheriff's Office
Michael Weeks - Rt. 1, Box 89C, Eupora, MS
James Howard - Eupora, MS (Defendant's brother)

2. RECORDED STATEMENTS OF DEFENDANT TO LAW OFFICERS

NONE

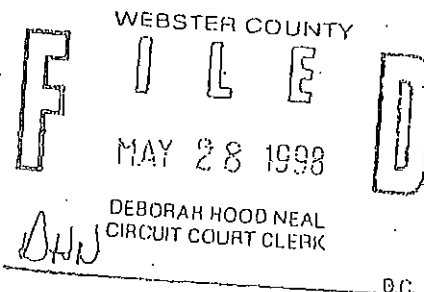
3. CRIMINAL RECORD OF DEFENDANT FOR IMPEACHMENT

NONE

4. CRIME LAB REPORTS or TESTS:

NONE

5. OFFICERS REPORTS, ETC.



-Justice Court Warrant for Touching of a Child for Lustful Purposes (2 of them)

-General Affidavit (2 of them)

-Identification sheets (2 of them)

6. PHYSICAL EVIDENCE/PHOTOGRAPHS:

NONE

7. EXCULPATORY EVIDENCE:

NONE

8. WITNESS STATEMENTS:

Statement of Lois Manus

Statement of Debba Lyda

FOR THE STATE:

Mickey Mallette
HON. MICKEY MALLETT

FOR THE DEFENDANT:

DATE:

HON. HENRY ROSS

CERTIFICATE OF SERVICE

I, MICKEY MALLETT, Attorney for State, do hereby certify that I have this day hand delivered/mailed, postage prepaid, a true and correct copy of the above and foregoing answer to the Honorable HENRY ROSS at his usual place of business in Eupora, Mississippi.

WITNESS MY SIGNATURE, on this the 28th day of May, 1998.

Mickey Mallette
Assistant District Attorney

WEBSTER COUNTY

F

I

L

E

D

MAY 28 1998

CERTIFICATE OF SERVICE

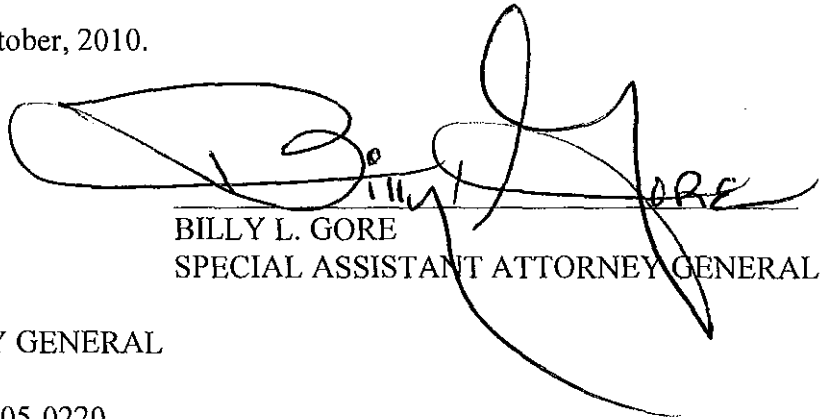
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Joseph H. Loper, Jr.
Circuit Court Judge, District 5
Post Office Box 616
Ackerman, MS 39735

Honorable Doug Evans
District Attorney, District 5
Post Office Box 1262
Grenada, MS 3902-1262

Joe Howard, #R5023
CMRCF
33714 Hwy 35
Vaiden, MS 39176

This the 15th day of October, 2010.



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