

**IN THE SUPREME COURT OF MISSISSIPPI  
NO. 2010-IA-00247-SCT**

**EMPIRE ABRASIVE EQUIPMENT CORPORATION**

**APPELLANT**

**VS.**

**HENRY MORGAN, JR., INDIVIDUALLY AND ON  
BEHALFOF ALL WRONGFUL DEATH BENFICIARIES  
OF HENRYMORGAN, SR., DECEASED**

**APPELLEES**

**CONSOLIDATED WITH  
NO. 2010-M-00250-SCT**

**MINE SAFETY APPLIANCES CO.**

**APPELLANT**

**VS.**

**HENRY MORGAN, JR., INDIVIDUALLY AND ON  
BEHALFOF ALL WRONGFUL DEATH BENFICIARIES  
OF HENRYMORGAN, SR., DECEASED**

**APPELLEES**

**CONSOLIDATED WITH  
NO. 2010-M-00255-SCT**

**CLARK SAND CO., INC., ET AL.**

**APPELLANTS**

**VS.**

**HENRY MORGAN, JR., INDIVIDUALLY AND ON  
BEHALFOF ALL WRONGFUL DEATH BENFICIARIES  
OF HENRYMORGAN, SR., DECEASED**

**APPELLEES**

**INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF  
ADAMS COUNTY, MISSISSIPPI; CIVIL ACTION NO. 07-KV-0107-J**

---

**BRIEF OF THE APPELLANTS**

---

**ORAL ARGUMENT REQUESTED**

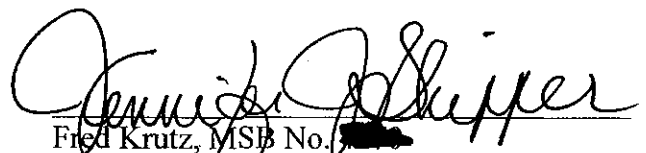
2. The alleged wrongful death beneficiaries of Henry Morgan, Sr.;
3. Timothy W. Porter, Esq., counsel for Plaintiff/Appellee;
4. Patrick C. Malouf, Esq., counsel for Plaintiff/Appellee;
5. John T. Givens, Esq., counsel for Plaintiff/Appellee;
6. R. Allen Smith, Jr., Esq., counsel for Plaintiff/Appellee;
7. American Optical Corporation, Defendant / Appellant;
8. Walter T. Johnson, Esq., counsel for Defendant/Appellant American Optical Corp.;
9. Joseph G. Baladi, Esq., counsel for Defendant/Appellant American Optical Corp.;
10. Empire Abrasive Equipment Corporation, Defendant/Appellant;
11. Ronald G. Peresich, Esq., counsel for Defendant/Appellant Empire Abrasive Equipment Corporation;
12. W. Mark Edwards, Esq., counsel for Defendant/Appellant Empire Abrasive Equipment Corporation;
13. Randi Peresich Mueller, Esq., counsel for Defendant/Appellant Empire Abrasive Equipment Corporation;
14. Katharine McKee Surkin, Esq., counsel for Defendant/Appellant Empire Abrasive Equipment Corporation;
15. Lone Star Industries, Inc., Defendant/Appellant;
16. David A. Barfield, Esq., counsel for Defendant/Appellant Lone Star Industries, Inc.;
17. Kimberly P. Mangum Esq., counsel for Defendant/Appellant Lone Star Industries, Inc.;
18. Mine Safety Appliances Company, Defendant/Appellant;
19. Charles R. Wilbanks, Jr., Esq. counsel for Defendant/Appellant Mine Safety Appliances Co.;
20. Matthew R. Dowd, Esq. counsel for Defendant/Appellant Mine Safety Appliances Co.;
21. Pearl Sands, Inc., Defendant/Appellant;

22. Wade G. Manor, Esq., counsel for Defendant/Appellant Pearl Sands, Inc. and Pearl Specialty Sands, Inc.;
23. J. Scott Rogers, Esq., counsel for Defendant/Appellant Pearl Sands, Inc. and Pearl Specialty Sands, Inc.;
24. Clyde L. "Chaney" Nichols, III, Esq., counsel for Defendant/Appellant Pearl Sands, Inc. and Pearl Specialty Sands, Inc.;
25. Specialty Sand Co., Defendant/Appellant;
26. W. Wright Hill, Jr., Esq. counsel for Defendant/Appellant Specialty Sand Co.;
27. G. Martin Street, Jr., Esq. counsel for Defendant/Appellant Specialty Sand Co.;
28. Unimin Corporation, Defendant/Appellant;
29. Victor J. Franckiewicz, Esq., counsel for Defendant/Appellant Unimin Corporation;
30. J. Stevenson Ray, Esq., counsel for Defendant/Appellant Unimin Corporation;
31. Edward W. Mizell, Esq., counsel for Defendant/Appellant Unimin Corporation;
32. Bob Schmidt, Inc., Defendant;
33. Schmidt Manufacturing, Defendant;
34. Kelco Sales, Defendant;
35. Jeffrey P. Fultz, Esq., counsel for Defendants Bob Schmidt, Inc., Schmidt Manufacturing and Kelco Sales;
36. Clark Sand Co., Inc., Defendant/Appellant;
37. Custom Aggregates & Grinding, Inc., Defendant/Appellant;
38. Clemco Industries Corp., Defendant/Appellant;
39. Hanson Aggregates, Inc. f/k/a Hanson Aggregates Central, Inc. f/k/a Pioneer South Central Inc., f/k/a Pioneer Concrete of Texas, Inc., Defendant/Appellant;
40. Pangborn Corp., Defendant/Appellant;
41. Precision Packaging, Inc. f/k/a Quikrete Materials, Inc., Defendant/Appellant;
42. Southern Silica of Louisiana, Inc., Defendant/Appellant;

43. Fred Krutz, III, Esq., counsel for Clark Sand Co., Inc., Custom Aggregates & Grinding, Inc., Clemco Industries Corp., Hanson Aggregates, Inc. f/k/a Hanson Aggregates Central, Inc. f/k/a Pioneer South Central, Inc., f/k/a Pioneer Concrete of Texas, Inc., Pangborn Corp., Precision Packaging, Inc. f/k/a Quikrete Materials, Inc., and Southern Silica of Louisiana, Inc.;
44. Edwin S. Gault, Jr., Esq., counsel for Clark Sand Co., Inc., Custom Aggregates & Grinding, Inc., Clemco Industries Corp., Hanson Aggregates, Inc. f/k/a Hanson Aggregates Central, Inc. f/k/a Pioneer South Central, Inc., f/k/a Pioneer Concrete of Texas, Inc., Pangborn Corp., Precision Packaging, Inc. f/k/a Quikrete Materials, Inc., and Southern Silica of Louisiana, Inc.;
45. Jennifer J. Skipper, Esq., counsel for Clark Sand Co., Inc., Custom Aggregates & Grinding, Inc., Clemco Industries Corp., Hanson Aggregates, Inc. f/k/a Hanson Aggregates Central, Inc. f/k/a Pioneer South Central, Inc., f/k/a Pioneer Concrete of Texas, Inc., Pangborn Corp., Precision Packaging, Inc. f/k/a Quikrete Materials, Inc., and Southern Silica of Louisiana, Inc.;
46. Pulmosan Safety Equipment Corp., Defendant/Appellant;
47. E.D. Bullard, Defendant;
48. Thomas McHale, Esq., counsel for Defendant E.D. Bullard;
49. Mississippi Valley Silica Co., Defendant/Appellant;
50. John D. Cosmich, Esq., counsel for Defendant/Appellant Mississippi Valley Silica Co.;
51. Michael D. Simmons, Esq., counsel for Defendant/Appellant Mississippi Valley Silica Co.;
52. LaKeysha Greer Isaac, Esq., counsel for Defendant/Appellant Mississippi Valley Silica Co.

So CERTIFIED, this the 10<sup>th</sup> day of May, 2011.

Respectively submitted,



Fred Krutz, MSB No. [REDACTED]

Edwin S. Gault, Jr., MSB No. [REDACTED]

Jennifer J. Skipper, MSB No. [REDACTED]

## TABLE OF CONTENTS

TITLE	PAGES
CERTIFICATE OF INTERESTED PERSONS .....	i
TABLE OF CONTENTS .....	v
TABLE OF AUTHORITIES .....	vi
STATEMENT OF THE ISSUE .....	1
1.    Is This Wrongful Death Action Barred By The Statute Of Limitations? .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF THE FACTS .....	2
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT .....	4
I.    The Statute Of Limitations Expired Before This Case Was Filed .....	4
II.   This Case Is Not Saved By The Savings Statute .....	5
III.  This Case Is Not Saved By A Tolling Of The Statute Of Limitations .....	6
IV. <i>Clark Sand Co., Inc. v. Kelly</i> Is Dispositive Of This Appeal .....	7
V.    Conclusion .....	7
CERTIFICATE OF SERVICE .....	10

## **TABLE OF AUTHORITIES**

### **CASES**

<i>Canadian National/Illinois Central Railroad Co. v. Smith</i> , 926 So. 2d 839 (Miss. 2006) . . . .	3, 5
<i>Caves v. Yarbrough</i> , 991 So. 2d 142 (Miss. 2008) . . . . .	5
<i>Clark Sand Co., Inc. v. Kelly</i> , No. 2008-IA-01437-SCT, 2011 WL1586263 at *10 (Miss. April 28, 2011) . . . . .	4, 6, 7
<i>Delta Health Group, Inc. v. Estate of Pope</i> , 995 So. 2d 123 (Miss. 2008) . . . . .	6
<i>England v. England</i> , 846 So. 2d 1060 (Miss. Ct. App. 2003) . . . . .	6
<i>Gentry v. Wallace</i> , 606 So. 2d 1117 (Miss. 1992) . . . . .	6
<i>Janssen Pharmaceutica v. Armond</i> , 866 So. 2d 1092 (Miss. 2004) . . . . .	5

### **STATUTES**

Miss. Code Ann. § 15-1-49 . . . . .	4
Miss. Code Ann. § 15-1-69 . . . . .	4, 5
Miss. Code Ann. § 91-7-233 . . . . .	6

## **STATEMENT OF THE ISSUE**

- 1. IS THIS WRONGFUL DEATH ACTION BARRED BY THE STATUTE OF LIMITATIONS?**

## STATEMENT OF THE CASE

Henry Morgan, Jr. ("Morgan, Jr.") filed this wrongful death action on May 23, 2007. (Tab 2, R. 1-27) Morgan, Jr.'s complaint, styled "Henry Morgan, Jr., individually and on behalf of all wrongful death beneficiaries of Henry Morgan, Sr., Dec.," seeks recovery from 32 defendants for Henry Morgan, Sr.'s (Morgan, Sr.) wrongful death which was allegedly caused by exposure to silica dust. *Id.* Morgan, Sr. died on September 14, 2002, more than four years before this action was filed.

Several Defendants filed a motion for summary judgment based on the statute of limitations. The trial court denied defendants' motion. (Tab 8, R. 652-654) Several Defendants petitioned this Court to grant interlocutory review. This Court granted one defendant's petition on October 28, 2010, granted the other Defendants' petitions on December 1, 2010, and consolidated the three appeals.

This brief is filed on behalf of all Defendants/Appellants in the three appeals.

## STATEMENT OF THE FACTS

Morgan, Sr. was diagnosed by his litigation (not treating) doctor with a silica-related lung condition on June 2, 2002, using the same x-ray that his asbestos litigation doctor used to diagnose him with an asbestos-related lung condition. On September 9, 2002, Morgan, Sr., and 141 other plaintiffs, sued 88 defendants in Jones County, Mississippi claiming silica-related injuries in *Ellzey R. Arthur, et al. v. Pulmosan Safety Equip., et al.*, No. 2002-277-CV9. (Tab 3, R. 345-409) Four days earlier, the same lawyers filed a case for Morgan, Sr. and others claiming asbestos-related lung injuries. Morgan, Sr. died on September 14, 2002. (Tab 3, R. 410)

Defendants removed *Arthur* to federal court, and the case was transferred to the multidistrict court (MDL) in Corpus Christi, Texas. Ultimately, the MDL judge remanded all cases back to state court. While those cases were on their way back to Mississippi, this Court



decided *Canadian National/Illinois Central Railroad Co. v. Smith*, 926 So. 2d 839, 845 (Miss. 2006), holding that misjoined and improperly venued plaintiffs should be dismissed, and, under the savings statute, allowed one year to re-file in a proper venue. *Id.* Based on *Canadian National*, all 141 *Arthur* plaintiffs were dismissed on May 23, 2006. (Tab 3, R. 493) Prior to the dismissal, no effort was made to substitute Morgan, Sr.'s estate and/or the wrongful death beneficiaries as plaintiffs.

On May 23, 2007, more than four years after Morgan, Sr.'s death, Morgan, Jr. filed this wrongful death action. (Tab 2, R. 1-27) Morgan, Jr.'s complaint, styled "Henry Morgan, Jr., individually and on behalf of all wrongful death beneficiaries of Henry Morgan, Sr., Dec.," seeks recovery from 32 defendants for Morgan, Sr.'s wrongful death which was allegedly caused by exposure to silica dust. *Id.*

Defendants filed motions for summary judgment based on the statute of limitations. (Tabs 3 & 4; R. 340-554; 561-566) The trial court denied defendants' motions. The order stated:

That both plaintiffs and defendants in the multi-plaintiff Jones County action treated that case as if Henry Morgan, Sr. had not died, and during that period of time the statute of limitations that defendants contend ran against the plaintiff on the wrongful death claim was tolled.

That there could have been certain actions taken while the Jones County litigation was still pending by either side, but none were undertaken. Therefore, because this action was filed within one year, this action was saved by virtue of Section 15-1-69 in a fair and liberal reading of that statute.

(Tab8, R. 652-653) Defendants petitioned this Court for interlocutory appeal, which was granted.

### **SUMMARY OF THE ARGUMENT**

Morgan, Jr. and the wrongful death beneficiaries had three years from Morgan, Sr.'s death on September 14, 2002 to file a wrongful death action. They did not. Instead, they waited almost five years until May 23, 2007 to file this wrongful death action. Because this wrongful

death action was not filed within three years of Morgan, Sr.'s death, the Court should reverse the trial court, and render judgment for defendants.

This case cannot be saved by the savings statute, Miss. Code Ann. § 15-1-69. For the savings statute to apply, the second-filed complaint (Morgan, Jr.'s) must allege the same cause of action as the first case (Morgan, Sr.'s). That statutory requirement is not met in this case. The savings statute cannot, and does not, save separate and distinct actions like Morgan, Jr.'s wrongful death suit.

This case cannot be saved by a tolling of Morgan, Sr.'s statute of limitations. The trial court erred in ruling that a wrongful death plaintiff (Morgan, Jr.) could borrow - - and toll - - the statute of limitations from a personal injury plaintiff (Morgan, Sr.). This Court has never allowed one plaintiff to exchange his statute of limitations for another plaintiff's.

Although the mandate has not issued at the time of the filing of this brief, a recent decision of this Court is dispositive of the issues in this appeal. *Clark Sand Co., Inc. v. Kelly*, No. 2008-IA-01437-SCT, 2011 WL1586263 (Miss. April 28, 2011).

## **ARGUMENT**

### **I. THE STATUTE OF LIMITATIONS EXPIRED BEFORE THIS CASE WAS FILED.**

The dispositive question in this case is: Was Morgan, Jr.'s wrongful death action filed within the statute of limitations? The answer is no.

Morgan, Sr. died on September 14, 2002. Morgan, Jr. filed this wrongful death action on May 23, 2007 -- four years, eight months and nine days after Morgan, Sr. died. Mississippi's three-year general statute of limitations applies to wrongful death actions such as this one. Miss. Code § 15-1-49. The statute of limitations begins to run on the date of the decedent's death.

*Caves v. Yarbrough*, 991 So. 2d 142, 149 (Miss. 2008). Thus, the statute of limitations expired before this case was filed.

## II. THIS CASE IS NOT SAVED BY THE SAVINGS STATUTE.

Thousands of mass tort plaintiffs faced an uncertain fate after *Janssen Pharmaceutica v. Armond*, 866 So. 2d 1092 (Miss. 2004) and its progeny clarified Mississippi's joinder rules. In light of the problems with severing and transferring thousands of plaintiffs, this Court was "forced to provide some procedural remedy to . . . plaintiffs facing severance." *Canadian National*, 926 So. 2d at 843. The remedy was for "all misjoined plaintiffs who lacked proper venue in the forum court . . . [to] file a new complaint in an appropriate venue selected by that plaintiff." *Id.* at 845 (emphasis added). This Court explained:

a dismissal of plaintiff's "duly commenced" case based solely on misjoinder and improper venue would constitute dismissal for a matter of form, bringing into play the provisions of Miss. Code Ann. Section 15-1-69, which provides that "**the plaintiff** may commence a new action **for the same cause**, at any time within one year . . . ."

*Id.* (emphasis added).

The full text of the savings statute reads:

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or administrator may, in case of the plaintiff's death, commence such new action, within the said one year.

Miss. Code. Ann. § 15-1-69. For the savings statute to apply, the subsequent action must allege the same cause of action as the original action. *Id.* ("the plaintiff may commence a new action for the same cause . . . .").

Morgan, Jr.'s wrongful death action is not the same cause of action as Morgan, Sr.'s personal injury claim. Mississippi's wrongful death statute "creates a new cause of action that accrues at death in favor of the heirs listed in the statute." *England v. England*, 846 So. 2d 1060, 1066 (Miss. Ct. App. 2003) (internal citations omitted). "Thus, 'wrongful death has been recognized as a tort separate and distinct from other personal injury claims.'" *Id.* (quoting *Gentry v. Wallace*, 606 So. 2d 1117, 1119 (Miss. 1992)). See also, *Clark Sand Co., Inc. v. Kelly*, No. 2008-IA-01437-SCT, 2011 WL1586263 at \*10 (Miss. April 28, 2011)(The re-filed action "must be a new and independent wrongful-death action, brought by [the plaintiff] without the savings statute and separate and distinct from [the decedent's] personal-injury claim. . .")

Morgan, Jr.'s complaint does not assert a survival claim pursuant to Miss. Code. Ann. § 91-7-233. Only an estate can assert a survival claim. *Delta Health Group, Inc. v. Estate of Pope*, 995 So. 2d 123, 125-126 (Miss 2008). No estate has been opened for Morgan, Sr. (Tab 7, T. 7)

Because Morgan, Sr.'s personal injury claim was separate and distinct from Morgan, Jr.'s wrongful death claim, the savings statute does not apply.

### **III. THIS CASE IS NOT SAVED BY A TOLLING OF THE STATUTE OF LIMITATIONS.**

This case cannot be saved by a tolling of Morgan, Sr.'s statute of limitations. The trial court erred in ruling that a wrongful death plaintiff (Morgan, Jr.) could borrow - - and toll - - the statute of limitations from a personal injury plaintiff (Morgan, Sr.) with a different cause of action. This Court has never allowed one plaintiff to exchange his statute of limitations for another plaintiff's. See, *Kelly*, 2011 WL1586263 at \*10 (Miss. April 28, 2011)(When the prior case is "dismissed without prejudice, its pendency [does] not serve to toll the statute of limitations on [plaintiff's] ability to bring a wrongful-death action . . .")

#### IV. *CLARK SAND CO., INC. V. KELLY* IS DISPOSITIVE OF THIS APPEAL.

Although the mandate has not issued at the time of the filing of this brief, a recent decision of this Court is dispositive of the issues in this appeal. *Kelly*, 2011 WL1586263 (Miss. April 28, 2011). With respect to the issues in this appeal, *Kelly's* facts are identical. Bozeman died during the pendency of his personal injury lawsuit, and subsequently the case was dismissed without amendment to claim the separate cause of action of wrongful death. *Id.* at \*1, 4. Within a year of the dismissal and with reference to the savings statute, Kelley filed a wrongful death action. *Id.* at \*2. This Court held that Kelley's wrongful death action was "separate and distinct" from Bozeman's personal-injury action and therefore the savings statute did not apply Kelley's second-filed action:

But this action could not have been brought under the saving statute, because Kelley had not yet been appointed Bozeman's executrix when she filed suit, and she was not substituted as the party plaintiff in Bozeman's *McBride* claim after Bozeman died but before *McBride* was dismissed. This action must be a new and independent wrongful-death action, brought by Kelley without the saving statute and separate and distinct from Bozeman's personal-injury claim in *McBride*.

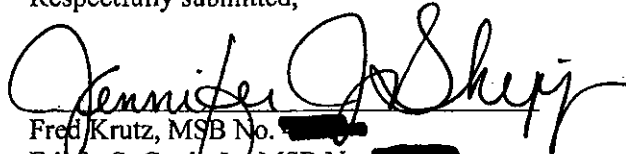
*Id.* at \*10.

#### V. CONCLUSION.

Morgan, Jr.'s separate and distinct wrongful death claim arose on the date of Morgan, Sr.'s death, September 14, 2002. The statute of limitations expired on that claim on September 14, 2005. The statutory clock expired before the filing of this case, and the trial court should have dismissed this action with prejudice. Defendants request this Court reverse this decision, and render judgment for Defendants.

This the 10<sup>th</sup> day of May, 2011.

Respectfully submitted,



Fred Krutz, MSB No. [REDACTED]

Edwin S. Gault, Jr., MSB No. [REDACTED]

Jennifer J. Skipper, MSB No. [REDACTED]

Attorneys for Petitioners Clark Sand Company, Clemco Industries Corporation, Custom Aggregates & Grinding, Inc., Hanson Aggregates, Inc. f/k/a Hanson Aggregates Central, Inc. f/k/a Pioneer South Central, Inc. f/k/a Pioneer Concrete of Texas, Inc., Pangborn Corporation, Precision Packaging, Inc. f/k/a Quikrete Materials, Inc., and Southern Silica of Louisiana, Inc.

OF COUNSEL:

FORMAN PERRY WATKINS KRUTZ & TARDY, LLP

200 South Lamar St. Ste. 100

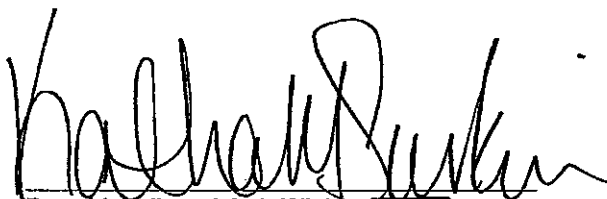
Jackson, Mississippi 39201

Post Office Box 22608

Jackson, Mississippi 39225-2608

Phone: (601) 960-8600

Facsimile: (601) 960-8613



Ronald G. Peresich, MSB No. [REDACTED]

W. Mark Edwards, MSB No. [REDACTED]

Randi Peresich Mueller, MSB No. [REDACTED]

Katharine McKee Surkin, MSB No. [REDACTED]

Attorneys for Petitioner Empire Abrasive Equipment Corporation

OF COUNSEL:

PAGE MANNINO PERESICH & MCDERMOTT

460 Briarwood Dr., Ste. 415

Jackson, Mississippi 39206

Post Office Box 16450

Jackson, Mississippi 39236-6450

Phone: (601) 896-0114

Facsimile: (601) 896-0145

**CERTIFICATE OF SERVICE**

I, the undersigned attorney, on behalf of defendants, do hereby certify that I have served by United States mail, postage prepaid, and via email and/or facsimile, a true and correct copy of the above and foregoing document, to plaintiff's counsel of record, defense counsel and the trial court.

R. Allen Smith, Jr., Esq. (via U.S. Mail)  
The Smith Law Firm, PLLC  
681 Town Center Blvd. Ste. B  
Ridgeland, MS 39157

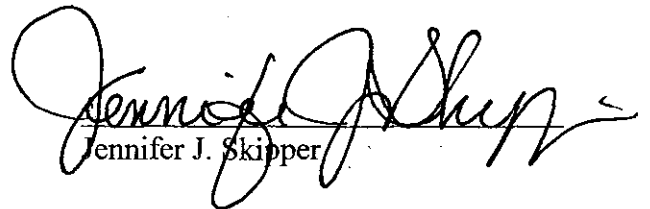
John T. Givens, Esq. (Via U.S. Mail)  
Porter & Malouf  
P.O. Box 12768  
Jackson, MS 39236

Honorable Forrest A. Johnson (Via U.S. Mail)  
Adams County Circuit Court  
P. O. Box 1372  
Natchez, MS 39121

All known defense counsel (Via email)

Ms. Kathy Gillis  
The Clerk of Mississippi Supreme Court (with 5 copies)(Via Hand Delivery)  
P.O. Box 117  
Jackson, MS 39205

THIS, the 10<sup>th</sup> day of May, 2011.

  
Jennifer J. Skipper