2010-KA-946 COA RT

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ARGUMENT

I. The Mississippi Home Repair Fraud statute, Miss. Code Ann. §97-23-103 (1972), does not apply to contracts for new construction of residences.

The interpretation of a statute presents a question of law which this Court is required to review *de novo*. *Arceo v. Tolliver*, 19 So.3d 67, 70 (Miss. 2009)(citing *Sheppard v. Miss. State Highway Patrol*, 693 So.2d 1326, 1328 (Miss. 1997)). The doctrines of statutory construction and rule of lenity have been discussed in Appellant's original brief. However, it must be reemphasized that **convictions obtained by virtue of unforeseen judicial construction of criminal statutes violate the due process requirement that persons be provided with fair warning of criminalized conduct.** *Dunn v. U.S.*, 442 U.S. 100, 112 (1979). (emphasis added).

Contrary to the arguments contained in Appellee's brief, the Mississippi "Home Repair Fraud" statute, codified as Miss. Code Ann. § 97-23-103, does not apply to the new construction of residences. The evidence in the record conclusively shows that Appellant contracted with the Ederers to build them a new and unique home, that said contract was signed nearly two years after Hurricane Katrina, that said contract called for the construction of an original home that was in no way similar to the former residence, that Appellant had nothing to do with the clearing of the lot, or removal of the slab from the lot of the Ederers (nor ever saw it), and that the removal of the slab was not a term or condition of the contract the subject of this case. (R. 110, 112, 115, 122, 136, 137-38). Further, the evidence shows that Appellant's contract with the Ederers was specifically for an original residence with original floor plans to be constructed on a bare lot, or, as stated in the contract, "the owner agrees to purchase and the Contractor agrees to construct. . . single family residence elevated on concrete pilings approximately 16' above slab, exterior walls to be ICF construction 3 bedroom, 2 bath." (See Addendum "A"). Consequently, it is impossible for Appellant to be "replacing any real property designed or used as a residence"

because (1) the contract called for the new and original construction of a residence with original plans and (2) Appellant did not have anything to "replace", as he was building a home on a bare lot. Common sense indicates that a bare lot is not "primarily designed or used as a residence."

Astonishingly, and despite overwhelming weight to the contrary, Appellee contends that Miss. Code Ann. § 97-23-103 is not ambiguous. To refresh, Miss. Code Ann. § 97-23-103(1)(a) defines home repair as, "the fixing, replacing, altering, converting, modernizing, improving of or the making of an addition to any real property primarily designed or used as a residence." Appellee contends, as did the trial court judge during the motion hearing, that "the replacing . . . of any real property designed or used as a residence" clearly encompasses contracts for new construction of residences. To reach such a result, a reasonable person would have to completely ignore an entire phrase in the statute following the word "of". To illustrate, Appellee argues that the following words in bold typeface constitute an unambiguous statute: the fixing, **replacing**, altering, converting, modernizing, improving **of** or the making of an addition to **any real property primarily designed or used as a residence**. Such a reading completely ignores the phrase "or the making of an addition to" and would construe the statute liberally in favor of the **State** and strictly against **Appellant**, and thus, violate a bedrock rule in this State. To accept Appellee's analysis, the statute would clearly need to offset the phrase "or the making of an addition to" with commas. Appellant strongly contends that the statute reads as follows: "the fixing, **replacing**, altering, converting, modernizing, improving of or the making **of an addition to any real property primarily designed or used as a residence**." Making that contention all the more clear is the legislature's further defining of home repair in subsection (1)(a)(i),

> Home repair shall include the construction, installation, **replacement** or improvement of driveways, swimming pools, porches, kitchens, chimneys, chimney liners, garages, fences, fallout shelters, central air conditioning, central heating, boilers, furnaces, hot water heaters, electrical wiring, sewers, plumbing

> fixtures, storm doors, storm windows, awnings, carpets **and other improvements to structures** within the residence or upon the land adjacent thereto.

(emphasis added). The plain language of this section makes it clear that the legislature intended to limit the application of "home repair" to improvements and/or additions to **existing structures**, and not to the construction of a new residence. No reasonable explanation can be concocted as to why this section would not simply state "new construction" or "construction of a new residence" other than that it simply **does not apply**. Construction of a new residence would be the largest scale construction to be covered, so why would the legislature fail to specifically include same in its clarification of the home repair definition?

Further, Appellee's contention that Miss. Code Ann. 97-23-103 (1972) is unambiguous disputes the State's own attorney at trial who conceded the statute's ambiguity on multiple occasions. As stated in his Appellant's brief, the State confessed ambiguity by relating, "[Y]our honor, I believe if there's one thing Mr. Holder and I can agree is [sic] is that the **statute is not very well written**. I think we can all agree to that." (R. 9) (emphasis added). The State further added, "[Y]our honor, as it relates to these other states and their statute, I mean, we would probably be in a **better position if the legislature would go back in, redo the statute**." (R. 10) (emphasis added).

The State contends that the legislature intended for the phrase "the replacing . . . of any real property primarily designed or used as a residence" to encompass contracts for new construction. Regardless of the statute's patent ambiguities, such a statutory construction under any analysis is a reach at best and certainly violates the rule of lenity. Appellee's brief states, "[T]he straightforward language of the statute is designed to address exactly this situation, a fraudulent promise to rebuild a damaged home in the exact spot it originally stood, made to consumers who were in the precarious situation of recovering from a natural disaster which

caused great property damage." Appellee's Brief, p. 3. Reading this argument, one would assume that the statute *sub judice* was meant to apply only in natural disasters. Nothing could be further from reality. Miss. Code Ann. § 97-23-103 (1972) applies the same to any citizen of Tupelo wanting home remodeling or repair as it does to the unfortunate victims of Hurricane Katrina in south Mississippi. Whether the damage (or remodeling, repair, etc.) is from termites or wind is not determinative. It applies equally at all times and is not limited to occurrences following Mother Nature's wrath. Yet under Appellee's view, **identical conduct** from two separate new home builders could subject one builder to harsh criminal sanctions while the other builder has committed no crime. Additionally, under this interpretation, if the Ederers had decided to build their new home on an adjacent lot, Appellant could not have been criminally liable because he did not "replace the structure" and "rebuild their home on the same residential lot."

The State's position as to "replacing" is wrong. To illustrate their manifest error, consider this hypothetical: The Ederers own adjacent lots, and want new residences on both. They hire one contractor to perform both jobs, and the contractor is unable to begin performance on either after receiving a down payment. Under the State's interpretation, the contractor would face severe criminal penalties as to the residence on the lot where their original residence stood, while not facing any criminal responsibility on the adjacent lot, only civil liability for this identical conduct at the same time.

And, where is the line drawn from a perspective of time and space? If a home devastated by a storm is rebuilt ten (10) years later, would this constitute "replacing . . . of any real property primarily designed or used as a residence?" What if the "replacement" home was built fifty (50) miles away? These illustrations clearly show why the legislature did not intend for contracts of

new construction to fall under the home repair fraud statute's purview. It is intended for application to damaged "structures within the residence or upon the land adjacent thereto."

Sound practical reasons exist for excluding new home construction, as these contracts normally involve title searches, oversight of banks and attorneys, performance and payment bonds, etc. that projects for "home repair" rarely entail. As touched on in detail in Appellant's brief, many or all of these reasons have been considered by our legislature in other parts of the Code in distinguishing "new construction" and "home repair". The lawmaking body of this State has created positive, undeniable distinctions between new construction and home repairs in other portions of the Code.

This Court's primary objective is to employ that interpretation which best suits the legislature's true intent or meaning." Why then should we accept Appellee's contention that the legislature intended to differentiate between builders and remodelers in other sections of the code but completely ignore same in the instant case? Such a disputation flies in the face of common sense. Thankfully, the legislature provides clarification in subsection (1)(a)(i) as to what constitutes home repair,

> Home repair shall include the construction, installation, replacement or improvement of driveways, swimming pools, porches, kitchens, chimneys, chimney liners, garages, fences, fallout shelters, central air conditioning, central heating, boilers, furnaces, hot water heaters, electrical wiring, sewers, plumbing fixtures, storm doors, storm windows, awnings, carpets **and other improvements to structures within the residence or upon the land adjacent thereto**.

(emphasis added). Once again, this language makes it clear that the legislature intended to limit the application of "home repair" to improvements and/or additions to **existing structures**, and not to the construction of a new residence.

It is interesting and revealing that Appellee failed to cite this clarification section in the statute, as same clearly proves that its position is untenable. Clear and unambiguous language

indicating new construction fits under section 97-23-103's parameters could include, for example (1) "construction of a new home or residence"; or (2) "contracts for new construction apply to this chapter"; or (3) "contracts to rebuild homes"; or (4) "erection or construction of a dwelling on a fixed foundation of land." Said examples are obviously not foreign to our legislature, as they have incorporated same repeatedly in the Code. Such an inclusion would have been incredibly simple, unambiguous, and most importantly, obvious. Given the protections, oversight, and safeguards consumers have in the normal contract for new homes, it is readily apparent that the legislature omitted new construction from the home repair fraud statute to protect honest home builders such as Appellant from the constitutional violation of imprisonment for debt. *Miss. Const. Art. 3*, § 30. Attempting to include contracts for new construction in an ambiguous statute by using the language "the replacing . . . of any real property primarily designed or used as a residence" would certainly fail to give the fair warning of criminalized conduct required by *Dunn*, especially when the statute clarifies itself in the following section by explaining that the word "replace" is **intended for existing structures** and not new residences. (Emphasis added). Allowing Appellant's conviction to stand would certainly impose punishment for actions that are not "plainly and unmistakably proscribed", something courts must decline to carry out. *Dunn*, 442 U.S. at 100. While Miss. Code Ann. § 97-23-103 (1972) is patently ambiguous, the rule of lenity is clear and profound in stating that penal statutes must be construed strictly in favor of the accused. Therefore, the Mississippi home repair fraud statute cannot be said to include new construction and Appellant's conviction must be reversed.

II. The Verdict of Guilty was Against the Overwhelming Weight of the Evidence and Reflected Bias and Prejudice on the Part of the Jury.

Appellant adamantly asserts that the jury's verdict is against the overwhelming weight of the evidence. Certain facts cited in Appellee's brief are undisputed, such as Appellant

knowingly entering into a contract with the Ederers in excess of $5,000.00, that Appellant promised performance, that the Ederers issued Appellant a down payment in the amount of $27,000.00 to build them a new home, and that the home was never completed. However, other "facts" mentioned by Appellee are inconsistent with the evidence in this case. The facts contained in the record cannot reasonably be shown to prove intent to defraud, and thus, the jury verdict of guilty was both against the overwhelming weight of the evidence and showed bias and prejudice.

Appellee contends that "Serge knowingly entered into a contract in excess of $5,000.00, with the Ederers, for home repair." Such an averment is incorrect, as the contract between Appellant and the Ederers was for the construction of a new and original home. Nowhere in the contract does the language "replace" or "repair" appear. The contract was to build a new home on a bare lot in Ocean Springs, Mississippi. A former home is never mentioned nor is "replacement of a home" referred to in the contract. Additionally, Appellee states the testimony of Investigator Kenny Allen revealed that Appellant used the down payment to pay his own bills. Such a blanket statement is misleading, as the record reflects the down payment was disbursed for materials, labor, and other expenses on other projects, to keep his business operational to fulfill all contents, not for any illicit personal gain. (R. 223, 263-65). Margo Brown had, on occasion, assisted Appellant financially and was being repaid through the Petty project's draws. (R. 222). Margo Brown, in addition to having her home under construction by Appellant at this time, was in the door and window supply business. Appellant had purchased some doors and windows from Margo Brown's business which were specialty items suitable for no other use than the home they were designed for. When the doors and windows were received by Appellant to use in his project, they were not satisfactory, could not be modified, and Appellant refused to

pay. Margo Brown became upset and refused to endorse the checks constituting the Petty draw and further refused to pay the last draw on her construction. (R. 223-225; 257-261). The obstinance of Brown occurred **after Appellant had entered into the contract with the Ederers and after the Ederers' funds had been deposited into the account of CDG.**

Appellee argues that Appellant knowingly promised performance which he did not intend to perform or knew would not be performed. While it is undisputed that Appellant failed to complete the construction of the subject residence, the evidence clearly shows that he was acting in good faith and fair dealing at the time the contract was executed. Appellant operated his business, as do many construction companies, using draws from various jobs to maintain the needed cash flow. The testimony as to the use of draws collected by a business to maintain its total operation was unanimous among the witnesses testifying to this business practice. The loss of cash flow/failure to collect large outstanding receivables can be devastating to a company. The evidence is clear that at the time the contract was signed, Appellant had several construction projects underway and anticipated receiving large draws amounting to approximately $93,000.00 within the same time frame that the contract with the Ederers was signed. (R. 219-221). In fact, a draw in the amount of $52,160.68 (in two checks) had already been paid from the Petty project, but required the signature of Margo Brown to negotiate, and draws from the Margo Brown project were due in the approximate amount of $41,000.00. At the time of contracting with the Ederers, Appellant anticipated no problem in receiving these draws, as he had been paid on previous draws on the Petty and Brown projects, as he had on numerous other jobs. Appellant testified he depended on draws to keep his cash flow sufficient to allow the completion of all his projects, including the Ederers' home. (R. 226-227; 263-265). The dissipation of Appellant's cash flow caused his inability to perform the contract, and this inability to perform was obviously

unknown to him at the time the contract was executed. The record is clear that he was expecting sufficient draws to maintain his business. Certainly, it was proven that Appellant anticipated the infusion of the funds from the draws, not the destruction of his cash flow and business in such a short period.

Other evidence points to the good faith of Appellant in both the operation of his business and with the Ederers. When the contract with the Ederers was signed, Appellant was building other homes. The Ederers personally viewed one home at the open house (which was over 90% complete) just days before the contract signing. Additionally, the Ederers became aware of a second home being constructed by Appellant before signing the contract, as they knew the people the home was being built for and contacted them for a reference before entering into the contract with Appellant. (R. 108-109; 143). Appellant had **already ordered the engineering plans for the Ederers' home and requested an elevation certificate from Mrs. Ederer** prior to realizing his business had collapsed, both of which were required before construction could begin. This is overwhelming evidence of Appellant's good faith, as why would he order plans and an elevation certificate for a home he had no intention of building, particularly if he was intending to file bankruptcy within a few days? (R. 140, 233-234, R.E. 15). Certainly, this is evidence of intention to perform and good faith. There were times in the course of the business, when cash flow was strained, that **Appellant and his wife did not cash their payroll checks**, these checks being introduced as evidence at trial. (R. 246-249). Further, a look at his home shows no penchant for luxury. (R.E. 13). This certainly shows every effort of Appellant to satisfy all obligations and against intending to defraud persons of thousands of dollars. The only "smell" of impropriety consists in the unfortunate coincidence that the business collapse

occurred so suddenly and shortly thereafter the contract with the Ederers was signed, but such is not the substance of criminal convictions.

The State failed to introduce any evidence showing that the down payment of the Ederers was used for personal gain, illicit purposes, or any purpose other than the operation of Appellant's business so he could construct the Ederers their new home. The evidence from every witness asked, both government and defense, indicated all businesses use funds from draws to operate. (R. 125). Investigator Allen concurred. (R. 170). Investigator Allen subpoenaed the bank records of CDG, feeling their importance in his investigation. Yet knowing this importance, he failed to have an audit done. Shockingly, and in seeming self-contradiction, **he then stated what Appellant did with the funds of the Ederers, or whether Appellant personally took any of it for his own use was of no importance.** (R. 171; 181-182). It was Appellant who introduced CDG's bank records into evidence, as same clearly show beyond a reasonable doubt that **Appellant never converted funds for personal use.** What would show intent to defraud more than bilking one of funds and immediately converting it to your own personal use? Using the funds in the operation of the business so that all obligations can be completed and satisfied does not show fraudulent intent. The failure of the State to garner such evidence shows that the verdict was against the overwhelming weight of the evidence and the jury showed extreme bias and prejudice in arriving at same. No reasonable juror could have found beyond a reasonable doubt that Appellant intended to defraud, and thus, Appellant's conviction should be reversed.

CONCLUSION

Miss. Code Ann. § 97-23-103 (1972) as enacted by the legislature does not include new or original home construction in its criminal parameters, as same only applies to construction activity relating to repairs or improvements of existing structures primarily used or designed as a residence. Due to the statute's ambiguity and the dictates of the rule of lenity in requiring strict construction of a criminal statute, expansion of the covered construction activity included in home repair fraud is not proper. As noted *infra*, Appellee's construction of the statute's language is incorrect, and even if considered correct, the statute obviously does not apply to contracts for new construction. Expanding the boundaries of the fraud covered by the statute is a legislative function, not judicial.

Intent to defraud, as defined in the home repair fraud statute, must exist at the time the contract was signed and the evidence in this case clearly reveals no such intent of Appellant, as all his actions were toward maintaining his business and completing all construction projects. Given that home repair fraud does not include contracts for new construction and that the overwhelming weight of the evidence points to a lack of intent to defraud, Appellant is entitled to have his conviction reversed and judgment rendered discharging him.

RESPECTFULLY SUBMITTED, this 2nd day of June, 2011.

W.F. HOLDER II
Counsel for Appellant
P.O. Box 863
Long Beach, Mississippi 39560
(228) 863-4999
(228) 863-5002 FAX
MSB# [redacted]

CERTIFICATE

I, W.F. Holder II, attorney for Appellant, Patrick Michael Serge, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Reply Brief to the persons shown below:

Honorable Lawrence Bourgeois, Jr.
Circuit Court Judge
P.O. Box 1461
Gulfport, Mississippi 39502

Honorable Cono Caranna
Honorable Kimberly M. Henry
Honorable Crosby Parker
Office of the Harrison County District Attorney
P.O. Drawer 1180
Gulfport, Mississippi 39502

Honorable Jim Hood
Attorney General
P.O. Box 220
Jackson, Mississippi 39205-0220

So certified, this the 2nd day of June, A.D., 2011.

W.F. HOLDER II

W.F. Holder II
Lawyer
Post Office Box 863
400 East Railroad Street
Long Beach, Mississippi 39560-0863
(228)863-4999
(228)863-5002 FAX
MSB# 02503

"A"

Central Development Group, Inc.

FIXED AMOUNT CONTRACT

THIS AGREEMENT, Made as of August 15, 2007

Between the Owner: Mr. and Mrs. Mark Ederer
E Beach Dr
Ocean Springs, MS 39564
228-875-6135
228-875-9345

And the Contractor: Central Development Group, Inc.
Mississippi License # R03819
528 Klondyke Road, Suite D
Long Beach MS 39560
228-865-0356

For the Project: Ederer Residence

Construction Lender: Unknown

ARTICLE 1. CONTRACT DOCUMENTS

1.1 The Contract Documents consist of this agreement, General Conditions attached hereto and incorporated herein as Exhibit 1, Project Allowances attached hereto and incorporated herein as Exhibit 2, Description of Materials and Building Plans provided by Owner, all of which are attached hereto and incorporated herein as Exhibit 3, construction draw schedule, all addenda issued prior to execution of this agreement and all change orders or modifications issued and agreed to by both parties. These contract documents represent the entire agreement of both parties and supersede any prior oral or written agreement.

ARTICLE 2. SCOPE OF WORK

2.1 The Owner agrees to purchase and the Contractor agrees to construct the above a residence pursuant to and referred to above in paragraph 1.1 at { E Beach Dr Ocean Springs } Mississippi according to the construction documents, allowances, finish schedule, all addenda, change orders, modifications and specifications set forth in the specification booklet. Single family residence elevated on concrete pilings approximately 16' above slab., exterior walls to be ICF type construction 3 bedroom, 2 bath.

ARTICLE 3. TIME OF COMPLETION

3.1 The substantial commencement date of the project shall be {October 2nd 2007 } The substantial completion date of the project shall be { April 1st 2008 } however any change orders and/or unusual