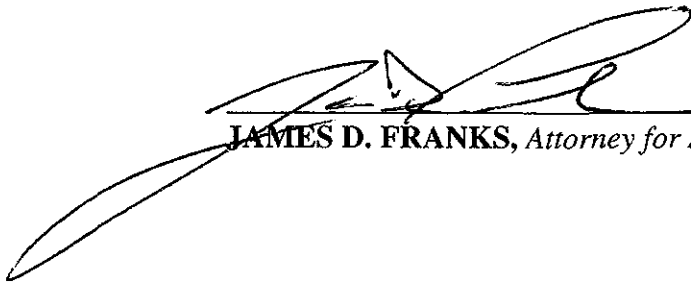


**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the Court of Appeals may evaluate possible disqualification or recusal:

- |    |                                |   |
|----|--------------------------------|---|
| 1. | Jeffrey Dale Chapell           | Appellant/Defendant   |
| 2. | Honorable James D. Franks      | Attorney of Record for Appellant/ Defendant                   |
| 3. | Honorable Susan Brewer         | Assistant District Attorney                                   |
| 4. | Honorable John Champion        | District Attorney   |
| 5. | Honorable Robert P. Chamberlin | Desoto County Circuit Court Judge<br>(Plea & Sentencing)      |
| 6. | Honorable Jimmy McClure        | Desoto County Circuit Court Judge<br>(Post-Conviction Relief) |



**JAMES D. FRANKS**, *Attorney for Appellant/Defendant*

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## **STATEMENT OF ISSUES**

- ISSUE I:**     **The Lower Court Erred in Finding that the Sentencing Court Was Not Required to Find Personal or Subject Matter Jurisdiction Before Imposing a Sentence.**
- ISSUE II:**    **The Lower Court Erred in Finding that the Issue of Sentence Proportionality Is Barred From Review.**
- ISSUE III:**   **The Lower Court Erred in Finding that the Sentence Imposed Against Chapell Was Not Disproportionate.**
- ISSUE IV:**    **The Lower Court Erred in Finding that Chapell Was Not Entitled to Credit For Time Served on House Arrest.**

## STATEMENT OF THE CASE

This cause originated in Desoto County Circuit Court Cause No. CR2006-0719CD wherein the Defendant/Appellant, Jeffrey Dale Chapell (hereinafter referred to as "Chapell"), entered open pleas of guilty as to three (3) counts of sexual battery pursuant to MCA §97-3-95(1)(d)) and two (2) counts of fondling/molestation pursuant to MCA §97-5-23. (R. 62-66). On July 27, 2007, the Desoto County Circuit Court sentenced Chapell to 25 years in the custody of the Mississippi Department of Corrections on each of the three (3) sexual battery counts, each to run concurrent to each other. The Court further sentenced Chapell to fifteen (15) years post-release supervision on each of the two (2) molestation charges, each to run concurrent with each other, but consecutive to sentences imposed in the sexual battery counts. (R. 72-75).

On July 21, 2010, Chapell filed a *Petition for Post-Conviction Relief* in Desoto County Circuit Cause No. CV2010-0200. On February 23, 2011, Honorable Jimmy McClure, Desoto County Circuit Court Judge, entered an **Order** denying Chapell's *Petition for Post -Conviction Relief*. (R. 39-43). Chapell herein appeals that **Order** denying Post-Conviction Relief.

## STATEMENT OF FACTS

On June 27, 2006, Chapell was indicted on three (3) counts of fondling/molestation and seven (7) counts of sexual battery. (R. 53-56). Chapell's bond was set at \$480,000.00 by the Southaven Municipal Court Judge. (R. 36-37). On July 26, 2006, an *Order Modifying Ten Percent Bond Requirements* was entered by the Desoto County Circuit Court. Pursuant to said *Order Modifying Ten Percent Bond Requirements*, Chapell was to live in the home of his father, to be in the presence of his mother and/or father at all times, to not be in the presence of any person under the age of eighteen (18) at any time, and to be under house arrest supervised electronically by ankle monitor through Justice Network, a private house arrest supervision agency frequently used by the

Desoto County Circuit Court. (R. 36-37). On July 27, 2006, Chapell posted a 10% Clerks's Bond with the Desoto County Circuit Court Clerk, and was released from the Desoto County Jail on bond pursuant to the conditions specified in the *Order Modifying Ten Percent Bond Requirements*. (R. 36-37). Chapell remained under house arrest until his plea hearing on June 25, 2007.

On June 25, 2007, in Desoto County Circuit Cause No. CR2006-719-C(D), Chapell filed a *Petition to Enter Plea of Guilty* and entered open pleas of guilty as to the following charges in the indictment against him: Count III (Sexual Battery of Ashley Oswald pursuant to MCA §97-3-95(1)(d)); Count IV (Sexual Battery of Ashley Oswald pursuant to MCA §97-3-95(1)(d)); Count VI (Molestation of Amelia Hall pursuant to MCA §97-5-23); Count VII (Molestation of Amelia Hall pursuant to MCA §97-5-23), and Count VIII (Sexual Battery of Lizzie Eddington pursuant to MCA §97-3-95(1)(d)). In exchange for Chapell's guilty plea on these counts, the State agreed to remand Counts I, II, V, IX, and X. (R. 77).

On June 25, 2007, there was a plea hearing in this matter at which the aforesaid guilty pleas were accepted by the Trial Court. At the conclusion of this hearing, Chapell was remanded into the custody of the Desoto County Sheriff's Department to await sentencing. On June 27, 2007, this Court entered its Order styled *Plea of Guilty and Continued for Sentencing* finding Chapell guilty as to Counts III, IV, VI, VII, and Count VIII, and continued sentencing to July 27, 2007. (R. 67).

On July 27, 2007, the Trial Court held a sentencing hearing, wherein Chapell presented uncontested evidence of his significantly diminished mental capacity. Chapell entered into evidence a *Psychological Evaluation* prepared by Joseph Angelillo, Ph.D. indicating that he has a full scale IQ of 67 and is "operating at about the level of an 8 or 9-year-old child." At the conclusion of this hearing, the Court sentenced Chapell to twenty-five (25) years in the custody of the Mississippi Department of Corrections as to each of Counts III, IV, and VIII (the sexual battery charges), to run

concurrent to each other, with credit for sixty-four (64) days time served in custody. In addition, as to Count III, Chapell was sentenced to a \$1,000 fine, \$1,000 in restitution to the Children's Trust Fund, plus all court costs. As to Counts VI and VII (the fondling/molestation charges), the Court sentenced Chapell to fifteen (15) years post-release supervision to run concurrent with each other, but consecutive to the sentences imposed in Counts III, IV, and VIII. (R. 70 - 75). In accordance with the sentences imposed by the Court, a sentencing Order styled *Plea of Guilty and Judgment of the Court* (as to Counts III, IV, and VIII of sexual battery) was entered by this Court on July 30, 2007 (R. 70 - 71), and a Sentencing Order styled *Sentencing Order for Post Release Supervision* (as to Counts VI and VII of molestation) was entered by this Court on July 30, 2007. (R. 72 - 75). Both sentencing Orders were filed on July 31, 2007.

Pursuant to the *Plea of Guilty and Judgment of the Court*, Chapell was given credit for 64 days served in custody, although he was on house arrest for a period of 365 days prior to sentencing. (R. 70 - 71).

On July 21, 2010, Chapell filed a *Petition for Post-Conviction Relief* in Desoto County Circuit Cause No. CV2010-0200 alleging error as to several issues. (R. 4 - 37). Due to a conflict of interest not relevant to the original plea/sentencing, the original sentencing judge, Robert P. Chamberlin, recused himself, and Honorable Jimmy McClure was assigned to hear Chapell's *Petition for Post-Conviction Relief*. On February 23, 2011, Circuit Judge McClure summarily entered an **Order** denying Chapell's *Petition for Post -Conviction Relief* without benefit of an evidentiary hearing. (R. 39 - 43). Chapell herein appeals that **Order** denying Post-Conviction Relief.

### **STANDARD OF REVIEW**

This Court's standard of review of a trial court's denial of post-conviction relief is well-

settled. "A post-conviction relief petition which meets basic pleading requirements is sufficient to mandate an evidentiary hearing unless it appears beyond doubt that the [petitioner] can prove no set of facts in support of his claim which would entitle him to relief." Robertson v. State, 669 So.2d 11, 13 (Miss. 1996)(quoting Harveston v. State, 597 So.2d 641, 643 (Miss.1992)). "In reviewing a trial court's decision to deny a petition for post-conviction relief [we] will not reverse such a denial absent a finding that the trial court's decision was clearly erroneous." Moss. v. State, 940 So2d 949, 951 (Miss. App. 2006) (citing Kirksey v. State, 728 So.2d 565, 567 (Miss.1999) (citing State v. Tokman, 564 So.2d 1339, 1341 (Miss.1990)). Questions of law are reviewed de novo. Boddie v. State, 875 So.2d 180, 183 (Miss. 2004)(citing Brown v. State, 731 So.2d 595, 598(¶ 6) (Miss.1999).

### **SUMMARY OF THE ARGUMENT**

The sentencing Trial Court, as well as the Trial Court on review of Chapell's *Petition for Post-Conviction Relief*, erred in numerous respects in this cause. As a result of the errors made by the Trial Court, the Defendant was unfairly prejudiced and deprived of his constitutional rights. Therefore, the Trial Court's sentence should be reversed and vacated, and this cause should be remanded to the Desoto County Circuit Court for re-sentencing.

### **ARGUMENT**

#### **ISSUE I: The Lower Court Erred in Finding that the Sentencing Court Was Not Required to Find Personal or Subject Matter Jurisdiction Before Imposing a Sentence.**

The Trial Court failed to make a finding of personal jurisdiction or subject matter jurisdiction at the sentencing hearing. In denying Chapell's *Petition for Post-Conviction Relief*, the Lower Court first states that it does not understand Chapell's argument as to this issue, then assumes that Chapell is arguing that "because he was retarded the Court could not sentence him". (R. 39 - 43).

In fact, what Chapell is arguing is simply that, because the sentencing Court failed to make a finding of personal or subject matter jurisdiction on the record at sentencing, that Court did not

have authority to impose a sentence upon Chapell, Chapell was deprived of due process, and the sentence is invalid. In order for a sentence or judgment to be valid, the Court must have personal jurisdiction of the parties. Blakeney v. Warren County, 973 So.2d. 1037, 1039 (Miss. App. 2008).

The Trial Court erred in failing to make a finding of personal jurisdiction or subject matter jurisdiction at the sentencing hearing, and in denying Chapell's *Petition for Post-Conviction Relief* as to this issue, and Chapell was prejudiced as a result.

**ISSUE II: The Lower Court Erred in Finding that the Issue of Sentence Proportionality Is Barred From Review.**

The Lower Court, on review of Chapell's *Petition for Post-Conviction Relief*, held that Chapell's proportionality argument is time barred, and cites Hamilton v. State in support of its opinion. (R. 39 - 43). Hamilton v. State, a Mississippi Court of Appeals decision, incorrectly opines that, pursuant to the Mississippi Supreme Court's holding in Trotter v. State, if a Defendant fails to directly appeal the issue of proportionality of his sentence, he is barred from raising such issues in post-conviction relief proceedings. Hamilton v. State, 44 So.3d 1060, 1065 (Miss. App., 2010). However, this is not what the Supreme Court said in Trotter v. State. Rather, Trotter v. State simply references M.C.A. §99-35-101 for the proposition that an appeal from the circuit court to the supreme court is not appropriate where the defendant enters a plea of guilty, then goes on to state that "an appeal from a sentence imposed pursuant to a guilty plea is not equivalent to an appeal from the guilty plea itself." Trotter v. State, 554 So.2d 313, 315 (Miss. 1989)(citing Burns v. State, 344 So.2d 1189 (Miss. 1977)). It is clear that the Hamilton court made an illogical jump in reasoning. Furthermore, the Hamilton Court's holding completely ignores Mississippi Rule of Appellate Procedure 22 and Mississippi's Post Conviction Relief Act which both clearly state that post-conviction relief proceedings are appropriate for any prisoner in custody after sentencing who claims that "the . . . sentence was imposed in violation of the Constitution of the United States or

the Constitution or laws of Mississippi". *Mississippi Code Annotated (1972) as amended §99-39-5; Mississippi Rule of Appellate Procedure 22*. Lastly, Chapell's proportionality argument could not have been made on direct appeal as it requires facts and information not apparent or available from the record, such as a compilation of and comparison of other sentences given in similar cases in this and other local jurisdictions. A direct appeal is on the record. However, a post-conviction relief petition seeks, by separate new hearing, to present evidence which is not available to the Trial Court at sentencing and which requires further development or investigation.

**ISSUE III: The Lower Court Erred in Finding that the Sentence Imposed Against Chapell Was Not Disproportionate.**

The sentencing Court sentenced Chapell to twenty-five (25) years in the custody of the Mississippi Department of Corrections as to each of the three (3) sexual battery charges, to run concurrent to each other. As to each of the two (2) fondling/molestation charges, the Court sentenced Chapell to fifteen (15) years post-release supervision to run concurrent with each other, but consecutive to the sentences imposed in the sexual battery counts. In effect, Chapell was sentenced to twenty-five (25) years to serve, followed by fifteen (15) years on post-release supervision.

On review of Chapell's *Petition for Post-Conviction Relief*, the Lower Court held that Chapell's sentence was not disproportionate. The Lower Court first cited Calhoun v. State in support of its finding that "when a sentence is within the limits fixed by statute, the sentence cannot be said to be excessive." (R. 40). The Lower Court further justified Chapell's sentence by noting that Chapell "was given less than the maximum" and that he only got "five (5) years over the minimum". (R. 40 - 41). In support of its opinion, the Lower Court also cited a case in which this Court found that a sentence of 30 years without probation/parole was not disproportionate to the crime of sexual battery. (R. 40 - 41). However, these simple facts/rules do not excuse the Lower Court from

conducting a proportionality review pursuant to Solem v. Helm, the well-established standard for such determination. Instead, the Lower Court summarily and erroneously dismissed Chapell's proportionality argument. Furthermore, the Lower Court failed to acknowledge that, although Chapell received only five (5) years over the minimum, the sentence was still disproportionate to the sentences imposed in this and surrounding jurisdictions for similar crimes. (R. 25 - 35). The 20 year minimum sentence did not require the sentencing court to order Chapell to serve 20 years. Rather, the sentencing court could have suspended some or all of the 20 year minimum to remain in compliance with the statutory minimum while also imposing a sentence proportionate to others imposed in this and local jurisdictions for similar offenses. In fact, suspension of a portion or all of the sentence was an option which has been repeatedly used in this and surrounding jurisdictions. (R. 25 - 35). Chapell's sentence constituted 25 years of "hard time" to serve, when the total sentence could have been split between "hard time" and post release supervision or suspended time such as in many of the other local cases cited by Chapell in his *Petition for Post-Conviction Relief*. (R. 4 - 37).

At sentencing, Chapell presented mitigation and proportionality evidence, none of which was contradicted by State evidence or argument. Although he did not attempt to mitigate the gravity of the crimes he was pleading guilty to, Chapell did present uncontroverted evidence of his diminished mental capacity, in the form of testimony, as well as a *Psychological Evaluation* prepared by Joseph Angelillo, Ph.D. which was entered into evidence at sentencing. The *Psychological Evaluation* done by Angelillo indicated that Chapell has a full scale IQ of 67, which is equivalent to the 1st percentile, and a verbal IQ of 69 and a performance IQ of 70, which are both equivalent to the 2nd percentile. Dr. Angelillo reported that Chapell has "poor social judgment . . . related to his shortcomings in abstract intellectual functioning" and a very immature level of decision-making skills so that he

appears to be "operating at about the level of an 8 or 9-year-old, and consistent with a 3rd grade level in functioning in these areas." (R. 21).

Dr. Angelillo further stated that Chapell's cognitive limitations were accompanied by limitations in his moral reasoning, as well. Dr. Angelillo noted Chapell's immature reasoning which he indicated were characteristic of a child eleven years old or younger. By way of example, during the evaluation, Chapell was asked to explain what factors made his offenses wrong, and he stated "because they [the offender] would get in trouble." (R. 21).

In summary, Dr. Angelillo concluded that Chapell's significant mental defect and cognitive impairments affected his ability to know the nature and quality of his criminal acts and that he had a limited ability (equivalent to that of a pre-teenager) to conceive and appreciate the wrongfulness of his actions. (R. 21). The State did not present any evidence in rebuttal on this issue. Both the Mississippi and U.S. Supreme Courts recognize that a criminal sentence must be proportionate to the crime for which the Defendant is being sentenced, lest it violate the Eighth Amendment of the U.S. Constitution and Article 3, Section 28 of the Mississippi Constitution protecting all persons against cruel and unusual punishment. Clowers v. State, 522 So.2d 762, 764 (Miss. 1988); Solem v. Helm, 463 U.S. 277, 290 (1983). A "trial court has authority to review a . . . sentence in light of constitutional principals of proportionality as expressed in Solem v. Helm." Clowers at 765. "When a threshold comparison of the crime to the sentence leads to an inference of 'gross disproportionality', the reviewing court will conduct a proportionality analysis using three factors from Solem v. Helm." Oby v. State, 827 So.2d 731, 734 (Miss.Ct.App. 2002)(cert. denied). The Solem v. Helm factors which courts should consider in proportionality analysis are: (1) the gravity of the offense and the harshness of the penalty; (2) comparison of the sentence with sentences imposed on other criminals in the same jurisdiction; and (3) comparison of the sentences imposed

in other jurisdictions for commission of the same crime with the sentence imposed in this case. Clowers at 764 (citing Solem v. Helm, 463 U.S. 277, 290-91 (1983)). Furthermore, a claim of excessive punishment "is judged by the currently prevailing standards of decency." Atkins v. Virginia, 536 U.S. 304, 304 (2002)(citing Trop v. Dulles, 356 U.S. 86, 100-101)).

The U.S. Supreme Court has held that "today's society views mentally retarded offenders as categorically less culpable than the average criminal." Atkins at 304. Furthermore, the Court found that:

Clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability.

Id. at 305.

Likewise, the United States Supreme Court, using the same reasoning, has consistently held that juvenile defendants also have diminished culpability which should be considered when affixing punishment. Roper v. Simmons, 543 U.S. 551 (2005). In Roper, the Supreme Court reasoned that:

juveniles' susceptibility to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. The Thompson plurality recognized the import of these characteristics with respect to juveniles under 16. The same reasoning applies to all juvenile offenders under 18.

Id. (citing Thompson v. Oklahoma, 487 U.S. 815, 833-838 and Stanford v. Kentucky, 492 U.S. 361,

395). See also Graham v. Florida, 2010 WL 1946731 (U.S. Sup Ct).

In comparison to the sexual battery and/or fondling sentences imposed in this jurisdiction and surrounding jurisdictions from the years 2006 through 2008, Chapell's sentence was among the most severe imposed. Furthermore, no other Defendant presented expert evidence at sentencing regarding the Defendant's mental retardation. Only one other defendant, Timmy Terrell Hardin (Desoto County Circuit Cause No. CR2007-0401), who received a sentence of 20 years in the custody of the Mississippi Department of Corrections, was even questionably mentally deficient, although his diminished mental capacity was simply mentioned in passing at sentencing through his mother's testimony at sentencing, and was not established by an expert. Certainly there was no defendant who functioned at the level of a 8 or 9-year-old child, such as Chapell, who was sentenced by this Court or courts in the surrounding jurisdictions. In fact, the vast majority of juvenile offenders, were transferred to Youth Court. No defendant younger than 15 years of age at the time of the offense was sentenced by this Court or courts in surrounding jurisdictions to a sentence comparable to that of Chapell's sentence. (R. 25 - 35).

However, in this case, the Court sentenced Chapell to a term of 25 years in prison, followed by 15 years post-release supervision. The uncontroverted evidence in this case is clear that Chapell is significantly mentally retarded, and functions on the cognitive, moral, and decision-making level of a eight-year-old child to a pre-teen child. Mississippi law has also clearly established that both mentally retarded persons and juveniles have diminished culpability for the reasons stated above. This Court would not have, and rightly should not have, sentenced a 8 or 9-year-old offender to a sentence commensurate to the sentence imposed in this case, since that sentence would likely be determined disproportionate. In fact, under Mississippi law, an 8 or 9-year old could not even be held criminally responsible, because the legislature, through Mississippi Code Annotated (1972) as

amended §43-21-151(3), prohibits criminal prosecution of persons under 13 years of age. Since, due to his mental retardation, Chapell has the functioning level of an 8 or 9-year-old child, his sentence in this case was also disproportionate.

Under the unique circumstances in this cause concerning Chapell's diminished culpability, and in comparison to other sentences imposed by this Court and courts in surrounding jurisdictions for similar offenses, Chapell's sentence is grossly disproportionate to the crime charged. Furthermore, the sentence imposed constitutes cruel and unusual punishment in violation of the Eighth Amendment of the U.S Constitution and Article 3, Section 28 of the Mississippi Constitution.

**ISSUE IV: The Lower Court Erred in Finding that Chapell Was Not Entitled to Credit For Time Served on House Arrest.**

On July 27, 2006, Chapell was released from jail pending disposition of the case on a special 10% bond on the condition that he be placed on house arrest supervised electronically through Justice Network, a private house arrest supervision agency frequently used by the Desoto County Circuit Court. Pursuant to the 10% Bond requirements, he was confined to his father's home under the aforesaid electronic monitoring and further ordered to be in the physical presence of his mother/father at all times and to not be in the presence of any person under the age of eighteen (18) at any time. (R. 36 - 37).

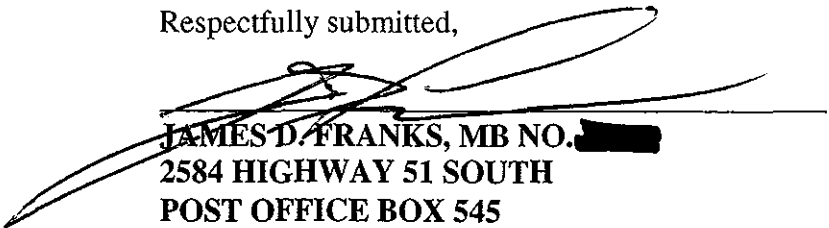
The sentencing Court below gave Chapell credit for 64 days served in custody prior to trial (the time he served in jail), however he was not given credit for 365 days which he served on aforementioned house arrest conditions prior to sentencing. (R. 70 - 71). On review of Chapell's *Petition for Post-Conviction Relief*, the Lower Court erroneously held that, because Chapell was out on bond during his house arrest, he was not entitled to credit for said 365 days against his sentence. (R. 41 - 42).

However, Mississippi law simply states that, "the number of days spent by a prisoner in incarceration . . . while awaiting trial on a criminal charge . . . shall be applied on any sentence rendered by a court of law." *Mississippi Code Annotated* §99-19-23. Merriam-Webster's Dictionary defines "incarcerate" as "to put into confinement". Clearly, Chapell was confined during the period of time he was placed on house arrest, as he was not free to come and go as he pleased and his access to the general public was restricted. Furthermore, he was subject to electronic ankle monitoring through Justice Network. As such, he was incarcerated during said period of time, and should be given credit for the time he served on house arrest prior to trial (equal to 365 days) toward the sentence imposed by the Court. Chapell was prejudiced as a result of the Trial Court's failure to give him credit for this time.

### CONCLUSION

The sentencing Court below erred in numerous respects in this cause. Furthermore, the Lower Court, in reviewing Chapell's *Petition for Post-Conviction Relief*, was clearly erroneous and failed to apply the law in denying his *Petition for Post-Conviction Relief*. As a result of the errors made by the sentencing court, as well as the Lower Court's errors in reviewing Chapell's *Petition for Post-Conviction Relief*, Chapell was unfairly prejudiced and was deprived of his constitutional rights. Therefore, Chapell's sentence should be vacated and this cause should be remanded to the original Trial Court for re-sentencing.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, James D. Franks, do hereby certify that I have this day mailed, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellant* to the following individuals at their regular mailing addresses:

Ms. Kathy Gillis  
Mississippi Court of Appeals  
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Jackson, MS 39205-0249

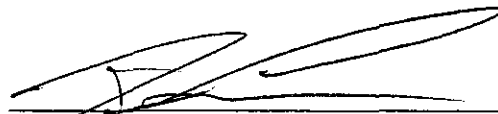
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