IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MISSISSIPPIANS EDUCATING FOR SMART JUSTICE, INC.; MISSISSIPPI CURE, INC.; ROBERT SIMON; RODNEY GRAY; and BENNY JOE STEVENS	**APPELLANTS**
V.	**2011-CA-00632**
MISSISSIPPI DEPARTMENT OF CORRECTIONS	**APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS MISSISSIPPIANS EDUCATING FOR SMART JUSTICE INC., MISSISSIPPI CURE, INC., ROBERT SIMON, RODNEY GRAY, AND BENNY JOE STEVENS

Michael J. Bentley (MBN[redacted])
BRADLEY ARANT BOULT CUMMINGS LLP
One Jackson Place
188 East Capitol Street, Suite 400
Post Office Box 1789
Jackson, MS 39215-1789
Telephone: (601) 948-8000
Facsimile: (601) 948-3000

David Neil McCarty (MBN[redacted])
DAVID NEIL MCCARTY LAW FIRM, PLLC
416 East Amite Street
Jackson, MS 39201
Telephone: (601) 874-0721
Facsimile: (866) 236-7731

James Michael Priest, Jr.
GILL, LADNER & PRIEST, PLLC
403 South State Street
Jackson, MS 39201
Telephone: (601) 352-5700
Facsimile: (601) 352-5353

Attorneys for Appellants

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This appeal presents a classic choice between openness and secrecy in government. The legislature, through the APL, has mandated openness and MDOC has violated that mandate by promulgating its Execution Procedure in secret. The Citizens are proper parties to challenge that violation; they have done so in a timely fashion and pursuant to the proper procedures – procedures prescribed by the APL. The remedy sought by the Citizens is neither extraordinary nor burdensome; they ask only that MDOC follow the standard procedures for notice and comment set forth in the APL. As the Attorney General has recognized, there is no downside to this approach: "An agency faced with a close question as to whether [proposed] instructions constitute a rule could simply submit the instructions to the APA's filing and notice procedures, thereby assuring that the public purposes of the APA are upheld." Miss. Atty. Gen'l Op. 2006-0056, 2006 WL 1184430 (Mar. 10, 2006).

The Mississippi Department of Corrections ("MDOC") asks this Court to ignore the plain language of the facility-specific exception to Mississippi's Administrative Procedures Law ("APL") and declare the agency's Execution Procedure exempt from the law for three reasons: (1) MDOC executes only inmates and, therefore, its procedure is related only to inmates; (2) other states have exempted their execution procedures from rule-making requirements; and (3) complying with the APL is too time and resource consuming for MDOC. Section I of this reply brief explains why these arguments should be rejected. Section II of this brief addresses MDOC's arguments that this appeal should be dismissed on statute of limitations, standing, or administrative exhaustion grounds. These attempts to avoid the merits of the Citizens' claims should be rejected as well.

This Court should reverse the circuit court and order MDOC to promulgate its Execution Procedure openly, in accordance with the APL's notice and comment procedures.

I. The Execution Procedure does not satisfy the APL's facility-specific exception.

MDOC's Execution Procedure, which governs 29 categories of personnel, outside witnesses, and members of the news media, does not satisfy the plain language of the APL's facility-specific exception, which exempts only regulations that are "*directly related only to inmates* of a correctional or detention facility . . . *if adopted by that facility* . . . ." Miss. Code § 25-43-1.102(*i*)(ii)(6) (emphasis added). MDOC suggests that this Court should depart from the plain language of the APL on the basis of policy reasons from other states and because compliance with the APL's notice and comment procedures is too time consuming. These arguments, which amount to a request that the Court expand MDOC's authority to set death penalty policies without public or legislative scrutiny, should be presented to the Mississippi Legislature. If MDOC believes that secrecy is the best policy for developing execution procedures – and there are sound reasons to believe otherwise[1] – it may lobby the legislature for a broad exemption. In the meantime, MDOC must respect the APL's narrowly-drawn, facility-specific exception.

A. The Execution Procedure must be published because it does not relate exclusively to inmates and was not adopted by a specific correctional facility.

MDOC argues that its Execution Procedure is exempted from the APL's notice and comment requirements because the agency executes only inmates and, therefore, the rule is "directly related only to inmates of a correctional or detention facility . . . if adopted by that facility . . . ." Miss. Code § 25-43-1.102(*i*)(ii)(6)) (emphasis added). This argument fails for two reasons. First, as the Citizens explained in their principal brief, the rule does not apply "exclusively" or "solely" to inmates. The Execution Procedure regulates the conduct of

[1] *See* Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 Yale L. & Pol'y Rev. 259 (2008-09). As Professor Berger explains, a state agency's refusal to submit execution procedures to public scrutiny on the front end (at the policy-making stage) leaves inmates with no alternative to challenge those procedures other than to seek judicial intervention. *Id.* at 301-14. Agency secrecy converts what should be an open policy debate, involving corrections officials, legislators, and members of the public, into a closed litigation matter before a court. *See id.* This is not a preferable outcome.

29 categories of MDOC personnel, numerous outside witnesses (including family of the victim and inmate), and even the manner in which members of the news media are selected to report on executions. *See* R.E. 7-30. Because the Execution Procedure governs the conduct of persons other than inmates, including persons that are not employed by MDOC, it cannot be "*directly related only to inmates*" in the plain and ordinary sense of that phrase.

Second, MDOC's position renders the second clause of the exemption meaningless. The exemption provides that "'rule' does not include . . . [a] regulation or statement directly related only to inmates of a correctional or detention facility . . . *if adopted by that facility* . . . ." Miss. Code § 25-43-1.102(*i*)(ii)(6) (emphasis added). Under accepted rules of statutory construction, the second clause must be given some meaning. *McCaffrey's Food Market, Inc. v. Miss. Milk Comm'n*, 227 So. 2d 459, 463 (Miss. 1969). The only reasonable reading of the second clause is that the exception applies *narrowly* to regulations and statements that are adopted by a specific correctional or detention facility. *See* Blue Br. at 8-10. The Execution Procedure was not adopted by a "facility;" it was adopted by MDOC and is expressly declared to be the "policy of the Mississippi Department of Corrections." R.E. 9. MDOC is a state *agency*, not a correctional *facility*. Therefore, the second clause of the exemption is not satisfied.

The fact that MDOC executes only inmates does not mean that its Execution Procedure is *directly related* only to inmates. The Execution Procedure plainly applies to persons other than inmates. Further, the Execution Procedure is a state-wide policy, adopted by the MDOC, not a facility-specific regulation. Therefore, it is not exempt from the APL.

B. MDOC may not rely on the broader APL exemptions in other states to expand Mississippi's facility-specific exemption beyond its plain language.

MDOC's Execution Procedure is not exempt under the plain language of the Mississippi APL because it does not relate exclusively to inmates and it was not adopted by a specific correctional facility. This should end the inquiry. MDOC argues that this Court should look

beyond the plain language of Mississippi's APL and rely on authority from other states to construe the statute. The outside authorities cited by MDOC do not aid the Court, however, because none of them interpreted the precise and narrow language used in Mississippi's APL.

MDOC concedes that other jurisdictions are split on the question of whether a lethal injection procedure is exempt from state rule-making laws. *See* Red Br. at 9 (citing *Conner v. N.C. Council of State*, 716 S.E.2d 836, 843 (N.C. 2011)). The decisions vary because each court must apply the specific language used in its version of the APA. *See Conner*, 716 S.E.2d at 843. MDOC relies on cases from Missouri, Tennessee, Texas, North Carolina, and Arkansas because those cases support the *result* that it prefers. In each case, however, the result is dictated by the language of the particular statute before the court.

MDOC relies most heavily on the Missouri Supreme Court's sharply-divided opinion in *Middleton v. Missouri Dep't of Corrections*, 278 S.W.3d 193 (Mo. 2009). In *Middleton*, four judges of the seven-judge court held that Missouri's execution protocol qualified for an exception to the Missouri administrative procedures law for rules "concerning only inmates." *Id.* at 196-97. Although the execution procedure mentioned witnesses, the majority applied the exception because the procedure did not alter the statutory requirements for the attendance of witnesses at executions. *Id.*[2] The *Middleton* decision was not based on the plain language of the statute, but on a policy rationale unique to Missouri: all portions of the execution procedure other than the lethal drug cocktail itself are expressly declared to be "closed records" in Missouri

[2] MDOC argues that its Execution Procedure does not alter any of the Mississippi Code's requirements for witnesses at executions. *See* Red. Br. at 6 (citing Miss. Code § 99-19-55(1)). This is neither surprising nor relevant; no agency may *change* the law. MDOC's Execution Procedure *expands on the law* by establishing how witnesses are selected, when witnesses may arrive at the execution site, and the manner in which they must conduct themselves while attending the execution. *See* R.E. at 21-23. None of these provisions appear in the statute. Moreover, the Execution Procedure establishes the method for selecting members of the news media to report on the execution and dictates the access that selected reporters will have to agency officials and the execution site. *See* R.E. at 24-25. None of these provisions appear in the statute providing for press coverage of an execution. *See* Miss. Code § 99-19-55(2). The agency's Execution Procedure does not simply repeat the statutory provisions for witnesses and members of the news media; it significantly expands upon them.

and, therefore, the majority reasoned that subjecting the execution procedure to public notice and comment would defeat the purpose of making it a closed record. *Id.* Three judges dissented, sharply criticizing the majority for failing to apply the plain language of the administrative procedures law. *Id.* at 198-99 (Teitelman, J., dissenting, joined by Stith, C.J. and Wolff, J.); *id.* at 199-201 (Wolff, J., dissenting).

This Court should apply the plain language of Mississippi's APL, not *Middleton*'s policy rationale. *Middleton* does not apply because (1) Mississippi's execution procedure, unlike Missouri's, regulates members of the media, and (2) Mississippi's execution procedure is not exempt from the Mississippi Open Records Act, Miss. Code § 25-61-1 *et seq.* These important distinctions, combined with Mississippi's public policy of "[o]penness in government," *City of Vicksburg v. Vicksburg Printing and Pub. Co.*, 434 So. 2d 1333, 1336 (Miss. 1983), and the APL's express policy favoring public participation in agency rulemaking, Miss. Code § 25-43-1.101(2), lead to the conclusion that MDOC's Execution Procedure should be promulgated openly, not secretly. Indeed, that is exactly what the plain language of the APL requires.

Moreover, none of the cases relied on by MDOC construed the language in Mississippi's facility-specific exception to the APL. For example:

- the Missouri APL exempts "[a] statement concerning only inmates of an institution under the control of the department of corrections . . . when issued by such an agency[,]" Mo. Rev. Stat. § 536.010(6)(k); *see Middleton*, 278 S.W.3d at 195-96;
- the Tennessee APA exempts "[s]tatements concerning inmates of a correctional or detention facility[,]" Tenn. Code § 4-5-102(12)(G); *see Abdur' Rahman v. Bredesen*, 181 S.W.3d 292, 310-11 (Tenn. 2005);
- the Texas APA exempts "a rule or internal procedure of the Texas Department of Criminal Justice or Texas Board of Criminal Justice that applies to an inmate or any

other person under the custody or control of the department or to an action taken under that rule or procedure[,]" Tex. Gov't Code § 2001.226; *see Foster v. Tex. Dep't of Criminal Justice*, 344 S.W.3d 543, 547-48 (Tex. Ct. App. 2011);

- the North Carolina APA exempts "[t]he Department of Correction, with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees[,]" N.C. Gen'l Stat. § 150B-1(d)(6); *see Conner*, 716 S.E.2d at 845-46;
- the Arkansas statute includes the following express exemption: "The policies and procedures for carrying out the sentence of death and any and all matters related to the policies and procedures for the sentence of death including but not limited to the director's determinations under this subsection are not subject to the Arkansas Administrative Procedure Act . . . ." Ark. Code § 5-4-617(a)(5)(A); *see Ark. Dep't of Correction v. Williams*, 2009 WL 4545103 (Ark. Oct. 29, 2009).

In contrast to the broader exemptions in those states, the Mississippi Legislature chose narrower language when drafting the Mississippi APL: "'Rule' does not include . . . [a] regulation or statement *directly related only to inmates* of a correctional or detention facility . . . *if adopted by that facility* . . . ." Miss. Code § 25-43-1.102(*i*)(ii)(6) (emphasis added).[3] None of the cases cited by MDOC considered an exception with the unique and narrowing second clause – "if adopted by that facility" – that appears in the Mississippi APL. And none of these cases considered an Execution Procedure like Mississippi's that governs the news media.

[3] When the bill to create the Mississippi APL was introduced, it provided an exception for "[a] regulation or statement *concerning* only inmates of a correctional or detention facility . . . if adopted by that facility." *See* H.R. 651 as Introduced (emphasis added), 2003 Regular Session of the Mississippi Legislature, available at http://billstatus.ls.state.ms.us/2003/pdf/history/HB/HB0651.htm (vis. Feb. 3, 2012). The bill was amended, however, to replace the phrase "concerning only inmates" with "directly related only to inmates" in the final Act. The Mississippi Legislature's deliberate adoption of the more narrow "directly related" language, and rejection of the broader "concerning" language, indicates its intent to craft a more narrow exception in Mississippi than had been adopted by other states.

The most analogous case from another jurisdiction supports the Citizens' position. *See Morales v. California Dep't of Corrections and Rehab.*, 85 Cal. Rptr. 3d 724 (Cal. Ct. App. 2008). Although *Morales* did not consider an exemption to the APL like the one at-issue in this appeal, the court held that California's execution procedure was subject to the APA because it governed more than simply the lethal injection protocol; the execution procedure established the manner in which the execution team would be selected and trained, governed how the execution team would perform its task, and prescribed the method for selecting members of the media to witness the execution. *Id* at 726-28. Moreover, the court rejected the argument that the execution procedure fell under California's exemption for "[r]ules issued by the director applying solely to a particular prison or other correctional facility." *Id* at 732 (citing Cal. Penal Code § 5058(c)(1)). Execution procedures, like those in California and Mississippi that apply to prison personnel, external witnesses and the news media, constitute state-wide policies, not facility-specific regulations. *See id.*

This Court, however, need not rely on cases from other jurisdictions to construe the plain language of Mississippi's APL.

C. The APL's straightforward public notice and comment rules are not too time and resource consuming for MDOC to follow.

MDOC also complains that complying with the APL's notice and comment requirements would be too "time and resource-consuming" for the agency. Red Br. at 3, 5. Even if true, this policy argument for an APL exemption should be presented to the Mississippi Legislature, not this Court. But it is not true. The APL's notice and comment requirements can be satisfied, and a final rule can be adopted, within 55 days of the first date of publication if no hearing is held. *See* Miss. Code § 25-43-3.103 (providing a 25-day notice period before filing final rule); § 25-

43-3.113 (providing that final rule becomes effective 30 days after filing).[4] Indeed, *while this appeal was pending*, MDOC followed the APL procedures to promulgate a "re-formatted" 79-page compilation of its various rules and regulations. *See* Sec. of State Administrative Bulletin, Miss. Dep't of Corrections Administrative Procedures Notice Filing (Dec. 21, 2011).[5] If MDOC is capable of complying with the APL's notice and comment provisions for this re-formatting purpose, there is no reason to believe that it cannot comply with the same provisions when promulgating the Execution Procedure.

Moreover, the Attorney General has implicitly recognized that the APL's notice and comment provisions are not so burdensome as to justify an agency's desire to ignore them. *See* Miss. Atty. Gen'l Op. 2006-0056, 2006 WL 1184430 (Mar. 10, 2006) (opinion issued to Mississippi Workers Compensation Commission). In that opinion, the Attorney General declared that "an agency must exercise diligence to ensure that public purposes of the APA are not subverted," and offered this advice in close cases: "An agency faced with a close question as to whether [proposed] instructions constitute a rule could simply submit the instructions to the APA's filing and notice procedures, thereby assuring that the public purposes of the APA are upheld." *Id.* As explained in the sections above, this is not a close case; MDOC is required by the plain language of the APL to publish its Execution Procedure. The fact that some time and agency resources will be consumed in the process does not excuse MDOC from its duty to follow the laws of this state, including the APL.

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[4] The Mississippi Secretary of State's website provides a helpful explanation of the timing requirements for notice and comment under the APL. *See* Miss. Sec. of State, "Administrative Procedures FAQs," available at http://www.sos.ms.gov/regulation_and_enforcement_admin_procedures_faqs.aspx (vis. Feb. 3, 2012).

[5] The Notice is available on the Secretary of State's Website. *See* Sec. of State Administrative Bulletin, Notice (Dec. 21, 2011), available at http://www.sos.ms.gov/ACProposed/00018339a.pdf (vis. Feb. 3, 2012). The full text of MDOC's published rule is also available there. *See* Sec. of State Administrative Bulletin, Full Text (Dec. 21, 2011), available at http://www.sos.ms.gov/ACProposed/00018339b.pdf (vis. Feb. 3, 2012). These notices are public records that may be judicially noticed by this Court. *See* Miss. R. Evid. 201(b)(2); *Ditto v. Hinds County, Miss.*, 665 So. 2d 878, 880-81 (Miss. 1995).

D. MDOC has waived its right to invoke the "internal management" exemption and, in any event, the exemption does not apply to the Execution Procedure.

For the first time in this litigation, MDOC argues that the Execution Procedure qualifies for the APL's exception for "[a] regulation or statement concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public[.]" *See* Red Br. at 7 (quoting Miss. Code § 25-43-1.102(*i*)(ii)(1)). MDOC did not claim this exception in the trial court and, therefore, the trial court did not have an opportunity to consider it. *See* R.E. at 3-6. This Court should not consider it for the first time on appeal. *Fitch v. Valentine*, 959 So. 2d 1012, 1021 (Miss. 2007) ("Issues not raised at trial cannot be raised on appeal."); *see Morales*, 85 Cal. Rptr. 3d at 740-41 (holding that California DOC's attempt to invoke "internal management" exception for first time on appeal was procedurally barred).

Moreover, MDOC's argument lacks merit. The Execution Procedure prescribes the manner in which a person will be put to death. This is not a simple internal management issue, but "substantially affects" the condemned person's substantive rights and the public's procedural right to participate in the formulation and adoption of the state's most severe corrections policy. For these reasons, courts have refused to apply the "internal management" exception to execution procedures. *See Bowling v. Kentucky Department of Corrections*, 301 S.W.3d 478, 488-90 (Ky. 2009); *Evans v. Maryland*, 914 A.2d 25, 78-80 (Md. 2006). MDOC's Execution Procedure also governs the selection and conduct of witnesses and members of the news media; these provisions affect the rights of members of the public. As the Maryland Supreme Court explained, execution procedures promulgated by a corrections agency "affect not only the inmates and the correctional personnel, but the witnesses allowed to observe the execution and the public generally, through its perception of the process." *Evans*, 914 A.2d at 80.

The Court should reject MDOC's invocation of the "internal management" exception.

II. This Court should reject MDOC's procedural defenses and reach the merits of the legal question presented by the Citizens' APL challenge.

For the reasons given above, this Court should reach the merits of this case just as the trial court did, and it should reverse the trial court's decision. MDOC raises three arguments for avoiding the merits: (1) the Citizens' suit is barred by the APL's one-year limitations period; (2) the citizens groups, MESJ and MS-CURE, lack standing to challenge MDOC's actions under the APL; and (3) the inmates were required to exhaust MDOC's internal grievance procedures before pursuing a claim under the APL. Each of these arguments is addressed in turn and each should be rejected by this Court.

A. The Citizens' challenge to the validity of the Execution Procedure is not barred by the statute of limitations.

MDOC first argues that the Citizens' challenge to the Execution Procedure is barred by the APL's one-year statute of limitations. *See* Red Br. at 11. Under the APL, "[a]n action to contest the validity of a rule on the grounds of its noncompliance with any provision of Sections 25-43-3.102 through 25-43-3.110 must be commenced within (1) year after the effective date of the rule." Miss. Code § 25-43-3.111(2). The Execution Procedure was revised on March 29, 2011. R.E. 08. The Citizens filed this suit contesting the validity of the Execution Procedure *only sixteen days later*, on April 13, 2011. R. 3-11. Therefore, this challenge was brought well within the APL's one-year limitations period. MDOC's statute of limitations defense fails.

Moreover, the Citizens do not concede that the statute of limitations was triggered by MDOC's secret promulgation of the Execution Procedure. By its plain terms, the APL's limitations period begins to run on the "effective date of the rule." Miss. Code § 25-43-3.111(2). Under the APL, "each rule adopted after July 1, 2005, *becomes effective thirty (30) days after its proper filing* in the Office of the Secretary of State." Miss. Code § 25-43-3.113(1) (emphasis added). MDOC has never filed its Execution Procedure with the Secretary of State and,

therefore, the statute of limitations has not been triggered. MDOC may not promulgate rules in secret and then invoke a limitations period that is triggered by a *public* filing to avoid challenges to its secret rules.

Finally, MDOC's statute of limitations argument is procedurally barred because MDOC did not cross-appeal the trial court's ruling on its affirmative defense. "In order for the appellee to gain reversal of any part of the decision of a trial court about which the appellant brings no complaint, the appellee is required to file a cross-appeal." *Delta Chemical and Petroleum, Inc. v. Citizens Bank of Byhalia, Miss.*, 790 So. 2d 862, 878 (Miss. Ct. App. 2001). A notice of cross-appeal must be filed within 14 days after the initial notice of appeal is filed. Miss. R. App. P. 4(c) & cmt.

MDOC raised the statute of limitations as an affirmative defense and pursued it before the trial court. *See* R. 89-93 (Answer); *see also* Memorandum of Authorities in Support of Motion to Dismiss, at 9-10.[6] In ruling on the applicability of the APL, the trial court reached the merits of the issues presented by the Citizens' claims, and in doing so implicitly denied MDOC's affirmative statute of limitations defense. *See* R.E. at 3-6 (Order). To preserve the defense for appellate review, MDOC was required to cross-appeal. *See Delta Chemical*, 790 So. 2d at 878. In *Delta Chemical*, the court of appeals refused to consider the appellee's statute of limitations argument "because the issue was not raised on direct appeal, and the appellees failed to file a cross-appeal." *Id.* MDOC never raised the statute of limitations in a notice of cross-appeal and, therefore, the issue is not properly before this court. *Id.*

The Court should reject MDOC's statute of limitations argument because the Citizens' challenge is timely under the APL and MDOC's defense is procedurally barred.

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[6] Pursuant to circuit court practice, MDOC's memorandum of authorities was submitted to the trial judge, but not filed with the Circuit Clerk.

B. The citizens groups have standing to challenge the Execution Procedure.

MDOC next argues that the citizens groups, Mississippians Educating for Smart Justice ("MESJ") and Mississippi CURE, Inc. ("MS-CURE"), lack standing to pursue this challenge under the APL. This argument is flawed for the reasons given below. The Court need not address the standing issue, however, because MDOC does not challenge appellant (and death row inmate) Robert Simon's standing in this case. The Court should proceed to the merits so long as a single party has standing to pursue the claims presented.

"It is well settled that Mississippi's standing requirements are quite liberal." *Hall v. City of Ridgeland*, 37 So. 3d 25, 33 (Miss. 2010) (internal quotations marks omitted). There is a key difference between federal and state standing requirements. "[W]hile federal courts adhere to a stringent definition of standing, limited by Art. 3, § 2 of the United States Constitution to a review of actual cases and controversies, the Mississippi Constitution contains no such restrictive language." *Id.* (internal quotation marks omitted); *see* Miss. Const. art. 3, § 24. In particular, the Mississippi Supreme Court has been "more permissive in granting standing to parties who seek review of governmental actions," as the Citizens do in this case. *Id.*

"In Mississippi, parties have standing to sue when they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law." *Burgess v. City of Gulfport*, 814 So. 2d 149, 152-53 (Miss. 2002) (internal quotations marks omitted). An interest is "colorable" so long as the claim "appear[s] to be true, valid, or right." *Hall*, 37 So. 3d at 33 n.6. "Further, for a plaintiff to establish standing on grounds of experiencing an adverse effect from the conduct of the defendant/appellee, the adverse effect experienced must be different from the adverse effect experienced by the general public." *Id.* at 33-34. But the adverse affect "need not be quantifiable or measurable in monetary terms." JEFFREY J. JACKSON AND MARY MILLER, 3

ENCYCLOPEDIA OF MISSISSIPPI LAW § 19:161 (West 2001). The plaintiff must simply show that he "has a direct stake in the outcome that differentiates him or her from the public at large." *Id.*

Both Simon, the death row inmate, and MESJ and MS-CURE, the citizens groups, satisfy Mississippi's liberal standing requirements. Each will be addressed in turn.

1. Robert Simon has standing to challenge the Execution Procedure because he is subject to it.

As a death row inmate, Robert Simon has standing to bring this challenge under the APL. As a person who is subject to the Execution Procedure, including the specific lethal drug cocktail prescribed therein, Simon has a colorable interest in ensuring that the procedure is promulgated lawfully under the APL. Moreover, Simon will experience an adverse affect, distinct from that of the general public, if he is executed by an invalid procedure. Recognizing these facts, MDOC does not challenge Simon's standing. Therefore, the question of whether any other party has "standing" to pursue this claim is irrelevant. *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 n.11 (5th Cir. 2008) (noting that "[t]he presence of one party with standing is sufficient"). This appeal should proceed to a decision on the merits.

2. MESJ and MS-CURE also have organizational standing to challenge the Execution Procedure on behalf of their members' unique interests.

In addition, the citizens groups that filed suit jointly with Simon have standing to challenge MDOC's secret promulgation of the Execution Procedure as a violation of the APL. It is settled law that interest groups may bring suit to vindicate the rights and interests of their members. *Miss. Manufactured Housing Ass'n v. City of Canton*, 870 So. 2d 1189, 1192-94 (Miss. 2004); *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 664 (Miss. 1998). An organization may sue on behalf of its members if: (1) the organization's members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested require an

individual member to participate in the suit. *City of Canton*, 870 So. 2d at 1192; *see Pro-Choice Mississippi*, 716 So. 2d at 665 (holding that interest group had standing because it "represent[ed] the interests of a large number of women").

The two citizens groups in this case, MESJ and MS-CURE, joined Simon in filing this case because they represent members that are uniquely interested in conditions at and policies promulgated by correctional agencies such as MDOC. As alleged in the Complaint, "MESJ is a corporation and an association of citizens dedicated to education about the need for criminal justice reform in the State of Mississippi." R. 4. "MS-CURE is a corporation and association of families of prisoners, former prisoners, and other concerned citizens dedicated to reform of the correctional system of the State of Mississippi." R. 4. The members that these citizens groups represent – former prisoners, family members of current prisoners, and citizens with a particular interest in correctional policies – would have individual standing to challenge MDOC's violation of the APL. The unique goals of the organizations and their members vest them with a colorable interest in the subject matter of the litigation. In short, they are exactly the type of plaintiff found to have standing in *Pro-Choice Mississippi*. Therefore, the organizations have standing.

Moreover, recognizing that MESJ and MS-CURE have standing to pursue this challenge under the APL perpetuates the important policies underlying the Act. The APL contemplates that private citizens will bring civil actions to enforce agency compliance with the law. *See* Miss. Code § 25-43-3.111(2). This is not unusual. "[T]here are many proceedings affecting the public interest where the legislature has provided a regime of private enforcement which relaxes traditional standing requirements." 3 ENCYCLOPEDIA OF MISSISSIPPI LAW § 19:161. The APL is just such a regime, and the Legislature has invested *all* Mississippians with a colorable interest in this case by enacting a law that depends on private enforcement by ordinary citizens. By suing to enforce the APL, MESJ and MS-CURE are fulfilling the express legislative goals of public

participation and openness in government. If such organizations are denied standing to pursue suits under the APL, challenges to improper governmental action would be rare and the public would suffer as a result. *See, e.g., Van Slyke v. Board of Trustees of State Institutions of Higher Learning*, 613 So. 2d 872, 875 -876 (Miss. 1993) (citizen's challenge of constitutionality of state board allowed "under our liberal standing requirements").

Under the established rules for organizational standing, the Legislature's grant of public interest standing in the APL, and Mississippi's well-recognized liberal standing requirements, both MESJ and MS-CURE have standing to pursue this challenge under the APL.

3. The "standing" cases cited by MDOC do not apply to the Citizens.

MDOC bases its standing argument on two cases, neither of which applies in this situation. MDOC first points to a case where the plaintiffs attempted to establish the statutory standing required for seeking a writ of mandamus. *See Bennett v. Board of Sup'rs of Pearl River County*, 987 So. 2d 984, 984-85 (Miss. 2008). In *Bennett*, a group of citizens from Pearl River County sought a writ of mandamus to force their Board of Supervisors to allow a vote regarding the county landfill. *Id.* The writ was sought under a specific state law that requires "four essentials" to be met before the writ of mandamus can issue—a much higher burden than the normal test for standing. *Id.* at 986. The Court ultimately ruled that the plaintiffs did not meet this higher burden, and dismissed their claims. *Id.*

Unlike the plaintiffs in *Bennett*, the citizens groups seek standing under the broader and more general standing requirements embodied in the Mississippi Constitution and cases establishing Mississippi's liberal general standing requirements. While their complaint requested a writ of mandamus if necessary to compel MDOC to follow the APL, this was an additional form of relief. The Citizens suit was primarily one for a declaratory judgment and injunctive relief. R. 3-11. These claims are governed by the general, and liberal, standing

requirements set forth above, not the specific requirements for writ standing at-issue in *Bennett*. The *Bennett* case is not applicable to this matter.

The second case cited by MDOC is a Maryland case that explicitly addresses standing "under Maryland common law principles." *Evans*, 914 A.2d at 68. As the court's discussion in that case demonstrates, Maryland's standing requirements are more stringent than Mississippi's. Needless to say, the standing principles of another state do not trump this Court's well-established rules for standing, discussed above.

C. The inmates were not required to exhaust administrative remedies prior to pursuing a challenge under the APL.

Finally, MDOC argues that the inmates' challenge under the APL is barred because the inmates failed to pursue the agency's internal grievance procedure for "offenders" before filing suit. Red Br. at 13-14 (citing Miss. Code § 47-5-803(2)). This argument should be rejected for two reasons: (1) MDOC failed to preserve the exhaustion argument by filing a cross-appeal, and (2) the inmates were not required to exhaust administrative remedies prior to bringing an APL challenge to MDOC's secret rule-making.

This argument applies only to Simon, the remaining inmate in this appeal. The citizens groups, MESJ and MS-CURE, are not "offenders" in its custody and MDOC does not argue that they were required to pursue internal grievance procedures.

1. MDOC's failure to cross-appeal bars consideration of this issue.

Because MDOC failed to file a cross-appeal on the exhaustion of remedies issue, its argument is barred. Just as with the statute of limitations issue, discussed *supra*, MDOC raised the exhaustion of administrative remedies as a defense and pursued it before the trial court. *See* R. 89-93 (Answer); *see also* MDOC's Memorandum of Authorities in Support of Motion to Dismiss at 12. In ruling on the applicability of the APL, the trial court reached the merits of the Citizens' claims, and in doing so implicitly denied MDOC's defense that the inmates were

required to exhaust administrative remedies. *See* R.E. 3-6. MDOC did not appeal the trial court's determination of this matter. As a result, MDOC may not raise arguments that it failed to preserve by filing a cross-appeal. *See Delta Chemical*, 790 So. 2d at 878; Miss. R. App. P. 4(c) & cmt. MDOC's exhaustion of remedies argument is procedurally barred.

2. Administrative exhaustion by the inmates is not required for the legal question of whether MDOC complied with the APL.

Because the courts do not require the exhaustion of remedies when it is a futile exercise, this case must proceed to a decision on the merits. It is bedrock law that "[w]henever exhaustion will be futile it is not required." *Pro-Choice Miss.*, 716 So. 2d at 670 (internal quotations omitted). As the Mississippi Supreme Court has explained, "[w]hen the agency is causing or threatening to cause irreparable injury through clearly illegal action, exhaustion is unlikely to be required . . . ." *MDEQ v. Weems*, 653 So.2d 266, 277 (Miss. 1995) (internal quotations and citations omitted). In addition, exhaustion is not generally required when the only issue presented is "a dispositive question of law peculiarly within judicial competence . . . ." *Id.* (internal quotation marks omitted). "When judicial expertise on a question of law appears to be the answer, exhaustion will likely be unnecessary absent strong countervailing factors." 1 ENCYCLOPEDIA OF MISSISSIPPI LAW § 2:87.

The question in this case is purely a legal one: does MDOC's Execution Procedure qualify for an exemption under the APL? This is a question of law to be determined by this Court, not a fact-intensive inmate grievance that is capable of resolution by MDOC. The question of law presented by this appeal is one of first impression in our State. The parties have presented their legal arguments to this Court and the question is ripe for judicial determination. Referring Simon to an administrative process that is not suited for resolving such legal questions would serve no useful purpose. As a result, exhaustion is not required prior to filing suit to challenge unlawful agency action under the APL.

Morever, exhaustion would be futile in this case. MDOC secretly adopted its new Execution Procedure and has maintained throughout this litigation that the APL does not apply to the procedure. Through this litigation, MDOC has clearly informed Simon and this Court that any administrative challenge to the Execution Procedure based on the applicability of the APL *will be denied.* Requiring Simon to pursue an administrative remedy through MDOC's internal grievance procedure would be futile because the outcome is pre-ordained.

Because exhaustion of administrative remedies is not required for the legal question presented in this appeal under the APL, and would be futile in any event, this Court should proceed to the merits of the claim.

CONCLUSION

The Execution Procedure is invalid because it was not promulgated in accordance with the public notice and comment provisions of the APL. This challenge, which was brought sixteen days after the adoption of the Execution Procedure, is not time-barred. Finally, the citizens groups, MESJ and MS-CURE have standing to pursue this challenge under the APL and the inmates were not required to exhaust administrative remedies before pursuing their challenge. This Court should reverse the trial court's decision and remand the case with instructions that the Execution Procedure be declared invalid and its operation enjoined until such time as it is promulgated pursuant to the APL.

RESPECTFULLY SUBMITTED, this the 6th day of February, 2012.

MISSISSIPPIANS EDUCATING FOR SMART JUSTICE, INC., et al.
Appellants

By: _____
MICHAEL J. BENTLEY (MBN [redacted])

OF COUNSEL:

Bradley Arant Boult Cummings LLP
One Jackson Place, Suite 400
188 East Capitol Street
Jackson, Mississippi 39201-1789
Telephone: 601-948-8000
Facsimile: 601-948-3000

David Neil McCarty
Miss. Bar No. [redacted]
DAVID NEIL MCCARTY LAW FIRM, PLLC
416 East Amite Street
Jackson, Mississippi 39201
T: 601.874.0721
F: 866.236.7731
E: dnmlaw@gmail.com

James M. Priest, Jr.,
Miss. Bar No. [redacted]
GILL, LADNER & PRIEST, PLLC
403 South State Street
Jackson, Mississippi 39201

CERTIFICATE OF SERVICE

I, the undersigned, one of the attorneys for Appellants, do hereby certify that I have this day served a true and correct copy of the above and foregoing document by sending the same by United States Mail with postage fully prepaid to the following:

Honorable William A. Gowan
Hinds County Circuit Court Judge
Post Office Box 22711
Jackson, MS 39225

Counsel for Mississippi Department of Corrections

Jim Hood
Attorney General of the State of Mississippi

Harold E. Pizzetta, III
Marvin L. White
Assistant Attorneys General

Jason Davis
Special Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205

This, the 6th day of February, 2012.

Michael J. Bentley