IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIAM HOWARD — APPELLANT

VS. — NO. 2011-CA-0729-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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WILLIAM HOWARD **APPELLANT**

VS. **NO. 2011-CA-0729-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

In this direct appeal from summary denial of post-conviction collateral relief, WILLIAM HOWARD, seeks to erase from his record and resume a felony offense as a thrice convicted offender under our DUI/DWI laws, Miss.Code Ann. §63-11-30 *et seq.*

The lone issue ripe for appellate consideration is whether or not young Howard's second DUI conviction which, according to Howard, constituted an offense under the Zero Tolerance for Minors provisions of Miss.Code Ann. §63-11-30(3), can be used to enhance a violation of the adult provisions of §63-11-30(1)(2)(a)(b)(c) from a misdemeanor to a felony. According to Howard, zero tolerance cases are specifically excluded from the sentencing requirements of subsection (2) by the language of the statute. (Brief of Appellant at 13)

We wholeheartedly agree with the circuit judge who found as a fact and concluded as a matter of law " . . . that the statute does not directly address this issue." (C.P. at 18; appellee's exhibit A, attached)

Howard's second conviction in 2006, a plea of guilty in the Justice Court of Holmes County, appears to have been based upon a blood alcohol content of .023%, and the offense occurred at a time when Howard was only nineteen (19) years of age. His conviction via guilty plea in 2006, together with a prior conviction via guilty plea entered in Lexington Municipal Court in 2004, was used to enhance the grade of his third offense to a felony after he pled guilty on April 28, 2008, to his third offense in the Circuit Court of Oktibbeha County.

Howard cries foul!!!

He invites this Court to reverse the order of the circuit court denying post-conviction relief and "... render a decision finding that [Howard's] conviction of Third offense DUI and the sentence imposed for said conviction were illegal and improper, and should be set aside." (Brief of Appellant at 13)

STATEMENT OF FACTS

On April 28, 2008, WILLIAM HOWARD, a twenty-one (21) year old Caucasian male whose date of birth is February 28, 1987, and a high school graduate with no prior felony record who could both read and write (R. 3, 5), entered a voluntary plea of guilty in the Circuit Court of Oktibbeha County, Lee J. Howard, Circuit Judge, presiding, to an indictment charging him with DUI - 3rd Offense, a felony. (C.P. at 9; R. 1-11) No BAC was alleged here; rather, Howard was charged simply with being "under the influence, *et cetera* . . . said defendant having been convicted of the crime of DUI on two prior occasions." (C.P. at 9)

Following Howard's open plea of guilty in the presence of counsel, Judge Howard sentenced defendant Howard, age twenty (20) at the time, to serve five (5) years in the custody of the MDOC with the first year to be served on house arrest followed by supervised probation for four years upon successful completion of house arrest. Judge Howard also ordered defendant Howard to pay a fine

in the amount of $2,000 and costs of court. (R. 8; C.P. at 12-16)

A copy of the transcript of the plea-qualification hearing is a matter of record at R. 1-11. A copy of the petition to enter plea of guilty, which was read and signed by Howard (R. 5), has not been included in the official appellate record.

Howard's first DUI conviction via guilty plea took place on July 21, 2004, in the Municipal Court of Lexington, Mississippi. Howard, who was seventeen (17) years of age at the time, was charged with a BAC of .143%. (C.P. at 10) Howard's sentence was a fine, benevolently suspended, and assessments in the amount of $178.50. Obviously, the zero tolerance provisions of Miss.Code Ann. §63-11-30(3)(a) did not apply here because Howard's BAC was above .08%.

Howard's second DUI conviction via guilty plea, the one presently the target of criticism, took place on September 26, 2006, in the justice court of Holmes County when Howard was nineteen (19) years of age. The abstract of court record reflects a BAC of .023% which admittedly would bring Howard within the parameters of the zero tolerance for minors law, §60-11-30(3)(a), although barely. Howard's plea was accepted, and he was adjudicated guilty. For whatever reason, however, Howard was sentenced as an adult to five (5) days in the Holmes County jail, followed by ten (10) days of community service. Howard was also fined $801.00 plus assessments of $236.50. (C.P. at 11) This was above and beyond the penalty authorized by the zero tolerance provisions of 60-11-30(3)(c) for a second conviction which authorizes a fine not exceeding $500.00 and a suspension of one driver's license for a period of one year.

There has been no complaint about this state of affairs until now.

In his petition for post-conviction relief filed on April 1, 2011, approximately three (3) years after his third offense guilty plea entered on April 28, 2008, Howard claimed his conviction and sentence for his third DUI offense were in violation of §63-11-30; his conviction and sentence were

in violation of his right to equal protection under the law; his sentence exceeded the maximum authorized by law, and he was entitled to an out-of-time appeal. (C.P. at 2-8)

The relief requested by Howard was the issuance of an order setting aside both his conviction and sentence. (C.P. at 8)

Howard, by declining to address the issues in his brief, has abandoned on appeal his claims targeting equal protection and his request for an out-of-time appeal. Howard's claims targeting the legality and duration of the sentence imposed for his third offense are viable issues.

In his appellate brief Howard invites this Court to reverse the order of the circuit judge denying post-conviction relief and render a decision finding that Howard's sentence for his third offense, a felony, was imposed illegally and should be set aside. (Brief of Appellant at 13)

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

SUMMARY OF THE ARGUMENT

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

We contend Howard, despite noble efforts, has failed to do so here.

The Court of Appeals reviews the dismissal of a motion for post-conviction relief under an abuse of discretion standard. **Hannah v. State,** 49 So.3d 654 (Ct.App.Miss. 2010).

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

It has also been said that a trial court's dismissal of a motion for post-conviction relief will

only be disturbed in cases "where the trial court's *decision* was clearly erroneous." **Crosby v. State,** 16 So.3d 74, 77 (¶5) (Ct.App.Miss. 2009) citing **Moore v. State,** 985 So.2d 365, 368 (¶9) (Ct.App.Miss. 2008)(citation omitted).

Stated somewhat differently, "[a] trial judge's finding will not be reversed unless manifestly wrong." **Hersick v. State,** 904 So.2d 116, 125 (Miss. 2004).

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

It is enough to say that *de novo* review of the conclusions of law reached by Judge Howard should result in a finding that the trial court did not abuse his judicial discretion in finding " . . . that the statute does not directly address th[e] issue [presented.]" (C.P. at 21)

Judge Howard's observations and interpretation of the statute under scrutiny were neither clearly erroneous nor manifestly wrong. Accordingly, an evidentiary hearing was not required, and Howard's papers were properly dismissed summarily.

ARGUMENT

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW REACHED BY JUDGE HOWARD ARE NEITHER CLEARLY ERRONEOUS NOR MANIFESTLY WRONG.

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

Howard, as noted previously, has not pursued on appeal the equal protection claim he presented to the lower court in his petition for post-conviction relief. Accordingly, we invite this court to consider the equal protection claim abandoned and all for naught.

In any event, as Judge Howard pointed out in his two page order denying relief, the case of

Mason v. State, 781 So.2d 99 (Miss. 2000), has already decided the issue of equal protection adversely to Howard.

The sole issue presented for appellate review is whether or not a prior Zero Tolerance for Minors violation as defined by Miss.Code Ann. §63-11-30(3)(a) whereby the minor, on a former day, pled guilty to his second offense of DUI but was punished as an adult, can be used later to enhance to a felony the penalty for a third violation of the provisions of §63-11-30(1). This subsection, *inter alia*, applies to persons "under the influence of intoxicating liquor" or persons who have " . . . an alcohol concentration of eight one-hundredths percent (.08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law, or two one-hundredths percent (.02%) or more for persons who are below the legal age to purchase alcoholic beverages under state law . . ."

Judge Howard found as a fact that at the time of Howard's second DUI conviction via guilty plea entered in Holmes County Justice Court, Howard was listed at being nineteen (19) years of age and his BAC was listed at .023%.

Admittedly this would appear to qualify Howard for sentencing under the Zero Tolerance for Minors portion of Miss.Code Ann. §63-11-30 as defined in subsection (3)(a) and punished seriatim in subsections (3)(b)(c) and (d). Nevertheless, upon conviction via guilty plea of his second DUI offense, Howard, for whatever reason, was sentenced as an adult as follows: a fine of $801.00 and an assessment of $236.50 and ordered to serve, and did serve, five (5) days in the Holmes County Jail followed by ten (10) days of community service. (C.P. at 11) This exceeds the punishment authorized by subsection (3)(c) of the zero tolerance for minors provisions found in 60-11-30(3)(a) which amounts to a misdemeanor.

In his order denying post-conviction relief, Judge Howard noted and quoted petitioner's argument that "[n]othing with the provisions of §63-11-30 *allows* for a conviction obtained on

evidence falling within the 'Zero Tolerance for Minor' parameters to be used as a prior conviction for charging a violation as a felony." (C.P. at 18)

After reviewing the entirety of §63-11-30, Judge Howard found as a fact " . . . that the statute does not directly address this issue." (C.P. at 18)

We concur.

Contrary to defendant Howard's position, Judge Howard found that nothing within the provisions of §63-11-30 *disallows* a conviction obtained on evidence falling within the Zero Tolerance for Minor parameters to be used as a prior conviction for charging a violation as a felony. Stated differently, a prior Zero Tolerance for Minor Conviction does not appear to be an exception to sentence enhancement " . . . **as otherwise provided in subsection (3)**"

Relying, in part, upon general language in **Arnold v. State,** 809 So.2d 753 (Ct.App.Miss.2002), and Attorney General Opinion Number 2001-WL 1082587, Judge Howard concluded as a matter of law that Howard's three convictions in five years via guilty pleas entered in 2004, 2006, and 2008 were all that is required to subject Howard to being sentenced under §63-11-30(2)(c) governing third offense DUI's.

In **Arnold**, *supra*, the Court of Appeals opined:

> "Our statute on DUI/third offense reads as follows: [language of §63-11-30(2)(c) here omitted] We read the statute to say that *any* third conviction of the crime of driving under the influence under Miss.Code Ann. §63-11-30(1) (Rev.1996), may be sentenced as a felony charge. * * * "

The attorney general's opinion, appellee's exhibit B, attached, while not directly in point, was, nevertheless, considered persuasive by Judge Howard.

Howard's first and third convictions clearly passed muster under the definition found in 63-11-30(1) as well as the seriatim sentencing requirements found in subsections (2)(a) and (2)(c).

While Howard's second conviction apparently fell within the parameters of the Zero Tolerance for Minors provisions of subsection (3)(a), he was sentenced, nevertheless, as an adult under section (2)(a)(b) which provides for a maximum sentence as follows: a fine not less than $600.00 nor more than $1500.00 and imprisonment for " . . . not less than five (5) days nor more than one (1) year and community service work for not less than ten (10) days nor more than one (1) year."

Howard's sentence, we note, for his second offense was a fine of $801.00, plus an assessment of $236.50 and five (5) days in jail followed by ten (10) days of community service, all of which the record reflects he served, completed, and paid. (C.P. at 11)

Howard pled guilty and was adjudicated guilty. A valid guilty plea operates as a waiver of many valuable rights. **Anderson v. State,** 577 So.2d 390 (Miss. 1991). A logical explanation for his penalty as an adult would be that Howard did not want his driver's license suspended for one (1) year as authorized by subsection (3)(a)(c) of the zero tolerance for minors provisions which states " . . . such person *shall* be fined not more than Five Hundred dollars ($500.00) and *shall* have his driver's license suspended for one (1) year."

Howard suggests that a zero tolerance violation cannot be used as one of the three (3) violations within a five (5) year period to elevate a third offense to a felony.

According to Howard,

> "[i]t takes three violations of .08% or above within a five (5) year period to constitute a felony offense. In [Howard's] case, he was improperly convicted of a felony where he had perhaps one violation of .08% or above in the Lexington Municipal Court; one violation in the Justice Court of Holmes County, which clearly is subject to the Zero Tolerance for Minors provisions; and the offense that he was indicted on, for which nothing in the record reveals what category it falls under." (Brief of Appellant at 11)

This argument, we think, overlooks the "under the influence" provision found in 63-11-30(1) which

does not require any BAC.

While this is a legitimate argument on behalf of Howard who is now an adult, we cannot agree that there must be three violations of *".08% or above"* within a five (5) year period to constitute a felony offense. Rather, it seems to us, as Judge Howard found, it takes only three DUI *convictions* within five (5) years to elevate the offense to a felony.

Where, as here, Howard's third conviction was for being "under the influence" and not based upon a particular BAC, and where, as here, Howard was sentenced, not as a minor, but as an adult upon pleading guilty to his second offense, Howard's sentence was properly enhanced to a felony. Accordingly, Howard did not receive an illegal sentence for his third DUI conviction.

Understandably, Howard, now 24 years of age (C.P. at 18) and currently on supervised probation, does not want a felony conviction tarnishing his record and resume. Nevertheless, Judge Howard's interpretation of the statute that a zero tolerance violation resulting in conviction can be used to enhance to a felony a non-zero tolerance violation resulting in a third conviction was neither unreasonable nor imprudent. This is especially true where, as here, Judge Howard relied, in part, on the attorney general's opinion " . . . that even a non-adjudicated charge of DUI sentenced under the Zero Tolerance Law may be used as a prior conviction if the Defendant does not successfully complete the terms of his non-adjudication." (C.P. at 19) As we stated previously, while it is not directly in point, Judge Howard found the attorney general's opinion persuasive and so do we. And, while Howard's second conviction in Holmes County Justice Court may have fallen within the parameters of zero tolerance under §63-11-30(3)(a)and (c), his punishment for that second offense was within the range authorized for an adult under §63-11-30(2)(b). "This court reviews the denial of post-conviction relief under an abuse of discretion standard." **Phillips v. State,** 856 So.2d 568, 570 (Ct.App.Miss. 2003). A trial court's dismissal of a motion for post-conviction relief will

only be disturbed in cases "where the trial court's decision was clearly erroneous." **Crosby v. State,** 16 So.3d 74, 77 (¶5) (Ct.App.Miss. 2009).

We respectfully submit that Judge Howard did not abuse his judicial discretion in denying Howard's request for post-conviction relief for the reasons stated in his two page order denying relief.

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

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

CONCLUSION

According to Howard he successfully completed house arrest and is presently on supervised probation under the direction of the MDOC. (C.P. at 4) The practical effect of a ruling in Howard's favor would be to discontinue the remainder of supervised probation and reduce Howard's third conviction of DUI to a misdemeanor.

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

It has also been said that a trial court's dismissal of a motion for post-conviction relief will only be disturbed in cases "where the trial court's *decision* was clearly erroneous." **Crosby v. State,** *supra,* 16 So.3d 74, 77 ¶5) (Ct.App.Miss. 2009) citing **Moore v. State,** *supra*, 985 So.2d 365, 368 (¶9) (Ct.App.Miss. 2008)(citation omitted).

"This Court reviews the denial of post-conviction relief under an abuse of discretion

standard." **Phillips v. State,** 856 So.2d 568, 570 (Ct.App.Miss. 2003).

The circuit judge was neither clearly erroneous nor manifestly wrong and did not abuse his judicial discretion in denying post-conviction relief summarily.

Finally, we invite this Court to eschew oral argument and decide the single issue presented on the basis of the briefs provided. Judge Howard was either right or wrong with respect to his ruling. In our opinion nothing new could be added at a later date.

Appellee respectfully submits this case is devoid of any claims sufficiently worthy of a reversal of the trial court's decision denying Howard's petition for post-conviction relief.

Accordingly, the judgment entered in the lower court denying William Howard's "Petition for Post-Conviction Relief" should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

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IN THE CIRCUIT COURT OF OKTIBBEHA COUNTY, MISSISSIPPI
APRIL TERM, 2011

WILLIAM HOWARD — PETITIONER

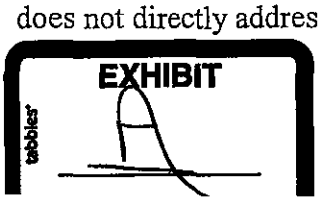
VS. — CAUSE NO. 2011-0148-CV H

STATE OF MISSISSIPPI — RESPONDENT

ORDER

Came on to be considered this day the above styled and numbered post conviction matter; and the Court, after having reviewed the record of proceedings in the trial court, the petition to enter guilty plea, the plea colloquy, the sentencing order and the pleadings herein; is of the opinion that Petitioner's Motion for Post-Conviction Collateral Relief is without merit and not well-taken.

The Petitioner pled guilty to a DUI 3rd and was sentenced in this Court on April 28, 2008. Petitioner's prior convictions for DUI were from Holmes County Justice Court on September 26, 2006 and Lexington, Mississippi Municipal Court on July 21, 2004. Petitioner is now alleging that his previous conviction from Holmes County should not have been used as a prior conviction for DUI 3rd because that one conviction fell under the Zero Tolerance for Minors, § 63-11-30 (3)(a) MCA, section of the DUI sentencing laws. After reviewing the exhibit to Petitioner's motion, the abstract of the Holmes County conviction, the Court does take note that the Petitioner's Blood Alcohol Content was listed at .023% and he was nineteen at the time of the offense. Petitioner states in his motion that "[n]othing within the provisions of § 63-22-30 allows for a conviction obtained on evidence falling within the "Zero Tolerance for Minor" parameters to be used as a prior conviction for charging a violation as a felony." The Court has reviewed the entirety of § 63-11-30 MCA and all its annotations and has found that the statute does not directly address this issue. However, the case of *Arnold v. State, 809 So.2d 753* (2002)



722 states that a Defendant merely has to have been convicted of DUI three times within five years, and the Attorney General Opinion, Number 2001-0492, *2001 WL 1082587*, interprets the statute as stating that even a non-adjudicated charge of DUI sentenced under the Zero Tolerance Law may be used as a prior conviction if the Defendant does not successfully complete the terms of his non-adjudication. Therefore, the Court finds this issue to be without merit. In addition, Petitioner's allegation that he received an incorrect sentence because he was convicted and sentenced based on a misapplication of § 63-11-30 MCA is without merit.

The Petitioner further alleges his constitutional right to equal protection since an adult with the same alcohol concentration would not have been charged with the same offense. The Court finds the case of *Mason v. State, 781 So.2d 99* (Miss. 2000) to be on point on this issue, as the appellate court found that the drunk driving statute does not violate equal protection since it serves to protect public safety by prohibiting under-age drinking and driving.

The Court therefore finds that the issues raised by the Petitioner are solely matters of law and do not require an evidentiary hearing.

IT IS THEREFORE ORDERED, that this petition be, and the same is hereby dismissed without the necessity of a hearing. The Circuit Clerk is directed to send a copy of this Order to all parties.

SO ORDERED, this the 2nd day of May, 2011.

CIRCUIT JUDGE

MB 168
Pgs 721-722

OKTIBBEHA COUNTY
MAY 02 2011
CIRCUIT CLERK

2001 WL 1082587 (Miss.A.G.)

Office of the Attorney General
State of Mississippi

Opinion No.
2001
-
0492

August 10, 2001

Honorable Michael A. Boland
Flowood City Prosecutor
Post Office Box 400
Brandon, Mississippi 39043
Re: Zero tolerance for Minors Law

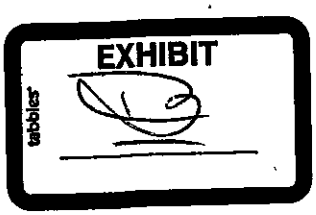
Dear Mr. Boland:

Attorney General Mike Moore has received your letter of request and has assigned it to me for research and reply. Your letter asks:

1. If a minor is charged with DUI for a breath test result of.08 or greater (Miss. Code Ann. Section 63-11-30(1)) but the testimony at trial shows that the minor's blood alcohol content was.08 or less at the time he was stopped, does the Judge have the discretion to adjudicate the minor guilty under the Zero Tolerance Law rather than under Section 63-1-30(1)?
2. Concerning the issue of non-adjudication as it relates to a minor's first offense under Zero Tolerance, may a non-adjudicated charge of DUI under the Zero Tolerance Law be used for enhancement where the same minor receives another DUI under the Zero Tolerance Law? For instance, assume that a minor has been charged under the Zero Tolerance Law and his charge has been non-adjudicated. Assume also that the minor has been given a period of probation. If that same minor commits another DUI related offense within a 5 year period, may the Court revoke the original status of non-adjudication with respect to the first offense and deem the first offense to be a charge with an adjudication of guilty so that the original conviction can then be used for enhancement purposes if the minor is convicted of the subsequent DUI offense?

In response to your first question, it is the opinion of this office that if the evidence at trial shows that a minor's BAC was less than.08 at the time of the offense, then the judge may sentence the minor under the Zero Tolerance for Minors provisions.

In response to your second question, under the non-adjudication provisions of the Zero Toler-



ance for Minors law, the defendant must enter a guilty plea to the offense. The court then has the power to withhold acceptance of the plea and forego sentencing pending successful completion of certain conditions imposed by the court. Upon successful completion of the court-imposed conditions, the court shall dismiss the charges and close the case and such care may not be used to enhance a subsequent conviction. On the other hand, if the defendant fails to successfully complete the court-imposed conditions, the court may, after a due process hearing, accept the previously entered guilty plea and impose a sentence. Such conviction may then be used for enhancement purposes in subsequent DUI trials. Therefore, the answer to your second question is yes.

If we may be of further service to you, let us know.

Very truly yours,
Mike Moore
Attorney General

By: David K. Scott
Special Assistant Attorney General

2001 WL 1082587 (Miss.A.G.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

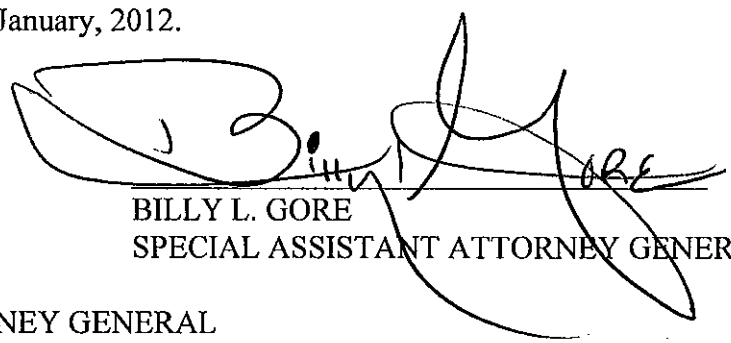
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Lee J. Howard
Circuit Judge, District 16
Post Office Box 1344
Starkville, MS 39760

Honorable Forrest Allgood
District Attorney, District 16
Post Office Box 1044
Columbus, MS 39703

James H. Powell, Esquire
Post Office Box 2166
Grenada, MS 38902-2166

This the 6th day of January, 2012.



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