**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**
**No. 2012-IA-00166-SCT**

CHARLES HOOKER, DAVID GATLIN,
NATHAN KERN AND ANTHONY MCCRAY
Appellants-Defendants

v.

JIM HOOD, ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI,
EX REL. THE STATE OF MISSISSIPPI
Appellee-Plaintiff

# BRIEF OF APPELLANTS CHARLES HOOKER, DAVID GATLIN, NATHAN KERN AND ANTHONY MCCRAY

INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI, FIRST JUDICIAL DISTRICT
HONORABLE TOMIE GREEN, SENIOR CIRCUIT JUDGE, PRESIDING

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## 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 of Mississippi may evaluate possible disqualification or recusal.

1. Honorable Tomie T. Green, Senior Circuit Judge, Seventh District Circuit Court of Hinds County, Mississippi.
2. State of Mississippi, Appellee/Plaintiff.
3. Hon. Jim Hood, Attorney General for the State of Mississippi, ex rel. the State of Mississippi, Appellee/Plaintiff.
4. Hon. Jim Hood, counsel for Attorney General for the State of Mississippi, ex rel. the State of Mississippi, Appellee/Plaintiff.
5. Hon. Bridgette Wiggins, Special Assistant Attorney General, counsel for Attorney General for the State of Mississippi, ex rel. the State of Mississippi, Appellee/Plaintiff.
6. Hon. Christopher Epps, Commissioner of Mississippi Department of Corrections, Appellee/Defendant.
7. David K. Scott, Special Assistant Attorney General, counsel for Hon. Christopher Epps, Commissioner of Mississippi Department of Corrections, Appellee/Defendant.
8. Charles Hooker, Appellant/Defendant.
9. David Gatlin, Appellant/Defendant.
10. Nathan Kern, Appellant/Defendant.
11. Anthony McCray, Appellant/Defendant.
12. Thomas M. Fortner, ERIK M. LOWERY, P.A., counsel for Charles Hooker, David Gatlin, Nathan Kern and Anthony McCray, Appellants/Defendants.
13. Erik M. Lowrey, ERIK M. LOWERY, P.A., counsel for Charles Hooker, David Gatlin, Nathan Kern and Anthony McCray, Appellants/Defendants.
14. Richard A. Filce, ERIK M. LOWERY, P.A., counsel for Charles Hooker, David Gatlin, Nathan Kern and Anthony McCray, Appellants/Defendants.
15. Kirby Tate, Appellant/Defendant.
16. Sylvia S. Owen, counsel for Kirby Tate, Appellant/Defendant.
17. Katherine Robertson, Appellant/Defendant.
18. Luther T. Munford, PHELPS DUNBAR, LLP, counsel for Katherine Robertson, Appellant/Defendant.
19. Robert Gregg Mayer, PHELPS DUNBAR, LLP, counsel for Katherine Robertson, Appellant/Defendant.

20. John M. Colette, JOHN M. COLLETTE & ASSOCIATES, counsel for Katherine Robertson, Appellant/Defendant.

21. Charles W. Pickering, Sr., CHARLES W. PICKERING SR. LAW OFFICE, counsel for Katherine Robertson, Appellant/Defendant.

22. Azikiwe Kambule, Appellant/Defendant.

23. Joshua Howard, Appellant/Defendant.

24. Cynthia A. Stewart, CYNTHIA A. STEWART, P.A., counsel for Azikiwe Kambule and Joshua Howard, Appellants/Defendants.

25. Aafram Sellers, counsel for Appellant/Defendant Joshua Howard.

26. Edward Blackmon Jr., BLACKMON & BLACKMON, PLLC, counsel for Azikiwe Kambule and Aaron Brown, Appellants/Defendants.

27. Emily Rebecca Hentz, Putative Intervenor.

28. Alison Oliver Kelly, counsel for Emily Rebecca Hentz, Putative Intevenor.

29. Haley Barbour, in His Capacity as Governor of the State of Mississippi at the Time of the Events Alleged in this Suit, Amicus Curiae in the Circuit Court ("Former Governor Haley Barbour, Amicus Curiae").

30. Charles E. Griffin, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, counsel for Former Governor Haley Barbour, Amicus Curiae.

31. E. Barney Robinson III, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, counsel for Former Governor Haley Barbour, Amicus Curiae.

32. Benjamin M. Watson, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, counsel for Former Governor Haley Barbour, Amicus Curiae.

33. Melissa Baltz, BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, counsel for Former Governor Haley Barbour, Amicus Curiae.

34. Hon. Phil Bryant, in his official capacity as Governor of the State of Mississippi.

35. Hon. Robert G. Waites, counsel for Hon. Phil Bryant, in his official capacity as Governor of the State of Mississippi.

36. Hon. Jack L. Wilson, counsel for Hon. Phil Bryant, in his official capacity as Governor of the State of Mississippi.

APPELLANTS CHARLES HOOKER, DAVID GATLIN, NATHAN KERN, AND ANTHONY MCCRAY

Thomas M. Fortner (MSB No. 5441)

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## STATEMENT OF THE ISSUES

1. Whether the trial court's assertion of subject matter jurisdiction comports with the textual dictates of the Mississippi Constitution, including the separation of powers, which establish that the power to grant reprieves and pardons is vested exclusively in the Governor?

2. In the alternative, whether any insufficiency of publication under Section 124 would constitute harmless constitutional error for which no remedy would lie?

3. In the further alternative, whether the trial court erred in refusing to dismiss the matter for lack of standing and/or improper joinder under Rule 20 of the Mississippi Rules of Civil Procedure.

4. In the further alternative, whether the trial court erred in re-assigning this matter away from the Judge to whom it was originally randomly assigned.

## STATEMENT OF THE CASE

Appellants-Defendants are four former felons convicted under the laws of the State of Mississippi. Each one was housed on the grounds of the Governor's Mansion and working as Mansion trusties when then Governor Haley Barbour formally pardoned all four Defendants on January 6, 2012. (R. 287-89, R.E. 91-93). The State of Mississippi released them ("the Four Released Defendants") from its custody on January 8, 2012. Governor Barbour's term of office ended at 12 noon on January 10, 2012, when Governor Bryant took his oath of office.

On or about January 11, 2012, State Attorney General Jim Hood filed suit in the First Judicial District of Hinds County Circuit Court seeking to nullify the pardons of the Four Released Defendants as well as the pardons given to 200 other former state felons. By implication, General Hood sought the return of the Four Released Defendants to the custody of the Mississippi Department of Corrections ("MDOC") and to prevent the release of five other pardoned felons who were in the custody of MDOC and who remain incarcerated even today. (R. 11, R.E. 36).

The Complaint alleges there is "reason to believe that some or all of the individuals" receiving pardons had "failed to publish sufficient notice" in an appropriate newspaper of their respective petitions for a pardon. (R. 14, R.E. 39). General Hood alleges that this failure to publish sufficient notice violates Section 124 of the Constitution of the State of Mississippi. Although the case had been randomly assigned after filing to Circuit Judge Weil, Senior Circuit Judge Green entered an Order of Re-Assignment which moved the case to her docket. (R. 62, R.E. 24).

On January 11, 2012, without notice to any of the Four Released Defendants, General Hood appeared before Senior Circuit Judge Green and requested a Temporary Restraining

Order.[1] At the hearing, the Attorney General did not present any proof that the Four Released Defendants' pardons were invalid. Instead, he simply stated that he did not possess information sufficient to satisfy himself that all of the pardons were valid (under his legal theory and interpretation of Section 124's publication provision), thus improperly and bizarrely forcing the *absent* Defendants to carry the burden of negating his lack of factual allegations. (*Tr. 01/11/12,* p. 13 lines 23-28; p. 7 line 9 through p. 11 line 8; p. 11 line 27 through p. 12 line 2; and p. 20 line 20 through p. 21 line 5, R.E. 176-78 and 185-86).

At the TRO hearing, Special Assistant Attorney General David K. Scott represented Defendant Christopher Epps, Commissioner of the MDOC. Despite being the only "defense" counsel present, Mr. Scott was unable to identify even one legal argument to be made on behalf of his client and in opposition to his employer, including, for example, that certain inmates who received pardons were still in the custody of MDOC and had not been served and that MDOC itself had requested publication of the Section 124 notices in the applicable newspapers for the five trusties whom Governor Barbour pardoned and MDOC had released from its custody. When Judge Green asked Mr. Scott if he had had an opportunity to review the Complaint, he responded only "I've briefly reviewed it," (*Tr. 01/11/12*, p. 5 lines 6-8, R.E. 170), and stated no opposition: "Your Honor, the Commissioner doesn't contest the petition and relies on the wise judgment of the Court in making a ruling on that." (*Tr. 01/11/12*, p. 32 lines 9-12, R.E. 197).

Mr. Scott was unable even to speak up to tell the Court the whole truth, of which he had

[1] Per the Order that was issued, the Four Released Defendants were given no notice because "their locations are unknown at this time." The Attorney General, however, did not represent to the Court that any effort had been made to contact them. To the contrary, he explained exactly how he would contact the Four Released Defendants – after the hearing. (*Tr. 01/11/12,* p. 12 lines 11-18, R.E. 177). After the hearing the Attorney General was in fact able to contact the Four Released Defendants to serve the TRO. The Four Released Defendants allege that it was not at all impractical for the Attorney General to give notice to the Four Released Defendants, and that there was no proper excuse for failing to do so, nor for the Circuit Court's failure to insist upon notice.

personal knowledge, on a key point of his employer's argument. The Attorney General began his presentation to the Court by blaming then Governor Barbour for the alleged insufficient notice. (*Tr. 01/11/12*, p. 6, lines 7-11, R.E. 171). Yet, as Mr. Scott personally knew, the Attorney General had in fact undertaken the express responsibility to publish notice on behalf of the Four Released Defendants. Mr. Scott had actual knowledge of this fact because it was he, personally, as Special Assistant Attorney General, who voluntarily undertook that responsibility on their behalf. *See* Affidavit of C. Daryl Neely (R. 533, R.E. 159) attesting to accuracy of text messages between himself and Mr. Scott (R. 506, R.E. 132). Rather than inform Judge Green of his personal involvement, Mr. Scott stated only that "the Department was instructed to go ahead and publish notification on the individuals who were still in custody." (*Tr. 01/11/12*, p. 21 line 18 through p. 22 line 5, R.E. 186-87). Mr. Scott's statement can hardly be regarded as an illustration of candor to the Court. *See also Tr. 01/11/12,* p. 24 lines 14-23 wherein Mr. Scott represents to the Court that MDOC relied on the Governor to ensure timely publication. (R.E. 189).

Despite General Hood's admitted lack of evidence, Judge Green granted the TRO. (R. 43, R.E. 11). Although styled a "restraining" order, the TRO is also a mandatory injunction, directing that Defendants (a) "shall obtain and provide plaintiff and the Court documented and sufficient proof" of compliance with Section 124, as interpreted by the Attorney General; (b) appear for a preliminary injunction hearing on January 23; and (c) contact MDOC "every 24 hours to provide accurate information on their exact locations and any plans to travel beyond their homes."

Following entry of the TRO, General Hood filed a First Amended Verified Complaint. (R. 63, R.E. 52). The First Amended Complaint added as named defendants the five pardoned defendants who were then and are now still in the custody of the MDOC, viz., Katherine

Robertson, Kirby Glenn Tate, Aaron Brown, Joshua L. Howard, and Azikiwe Kambule. This new pleading also alleged dates and locations of the publication of notice by some of the named Defendants. In response, the Four Released Defendants filed two motions: 1) Special Appearance for Purposes of Motion to Transfer and/or Motion to Dismiss (including a separately filed Supplement); and 2) Motion to Disqualify the Office of the Attorney General. (R. 177, 184, 442).

On the day of the January 23 hearing, General Hood filed a Motion to Extend Temporary Restraining Order and for Preliminary Injunction. (R. 330). At the hearing, the trial court extended the TRO for another 11 days and set a hearing on the motion for preliminary injunction for February 3, 2012 at 1:00 p.m. When doing so, the trial court made clear that it was by-passing the issues of jurisdiction, separation of powers, standing or the other defenses of the Four Released Defendants and that it would go directly to compliance with the 30-day publication provision. (*Tr. 01/23/12*, p.38, R.E. 242). The Order denying the motion to dismiss held that the Complaint did not infringe on the Governor's power to pardon and that the burden of proving proper publication would be on each pardoned Defendant. (R. 495, R.E. 27).

The following day the trial court entered its order denying the motion to disqualify General Hood and Special Assistant Scott. (R. 493, R.E. 25). The trial court entered on January 25 an order denying the motion to transfer or dismiss. (R. 494, R.E. 26). That same day, the Four Released Defendants filed a Response to and Joinder in the Motion for Leave to Submit Amicus Curiae Brief filed earlier on behalf of Haley Barbour, in his capacity as the Governor of Mississippi at the time of the events alleged in the Complaint. (R. 496, R.E. 122). The trial court entered its written order extending the TRO on January 26. (R. 540, R.E. 28).[2] Finally, on

[2] The trial court later entered an "Order of Clarification Regarding Named Defendants and the Court's Prior Order Permitting Amendments for Does 1-200" (R. 542, R.E. 30) and a "Supplemental Order Extending Temporary Restraining Order" (R. 546, R.E. 34).

January 27, the Four Released Defendants filed their Answer and Defenses. (R. 548). Defendants then sought, and obtained from this Court, a stay of the trial court proceedings and permission to appeal the interlocutory orders of the trial court.[3]

[3] The same day the Supreme Court of Mississippi entered its stay of the proceedings in the trial court, General Hood hand-delivered a letter to Judge Green attaching a document purporting to be a "proposed stipulation." *See* Appendix A hereto. Contrary to the commonly accepted and understood practice, neither General Hood who signed the letter nor any of his Special Assistants who are counsel of record in these proceedings had first submitted the "proposed stipulation" to any of counsel for the Four Released Defendants or any of the counsel for the five pardoned and incarcerated defendants before sending the letter to Judge Green. When General Hood or his Special Assistant hand delivered the February 1 letter to Judge Green, he mailed the letter and enclosed stipulation to counsel opposite through the U.S. Postal Service.

## SUMMARY OF THE ARGUMENT

The Governor has exclusive and absolute authority to grant clemency pursuant to Section 124 of the Mississippi Constitution. In pertinent part, Section 124 also states that "no pardon shall be granted until the applicant therefor shall have published for thirty days, in some newspaper in the county where the crime was committed, ... his petition for pardon." However, the Governor, alone, can determine the "sufficiency of the facts" underlying each pardon. *Montgomery v. Cleveland*, 98 So. 111, 114 (Miss. 1923); *Pope v. Wiggins*, 69 So. 2d 913 (Miss. 1954). Therefore, the particular manner or number of days a specific pardonee may have published is not subject to judicial review. *See State v. Metts*, 88 So. 525, 530 (Miss. 1921) (Ethridge, J., dissenting). In denying the Four Released Defendants' motion to dismiss, the circuit court failed to give due deference to the important constitutional principle of separation of powers. Contrary to the trial court's assertions, this is not a simple case about counting the days of publication. Rather, this case is about whether the judicial branch may hear a claim seeking a remedy (to invalidate the pardons granted by the Governor based on General Hood's interpretation of Section 124) which does not exist under the Constitution or laws of this State and which violates Section 124 and the Separation of Powers provisions of the State Constitution.

Section 124 makes plain that the 30-day publication provision calls for constructive notice only, neither requiring a summons, nor creating a *right* for any respondent to be heard. There is no enabling legislation giving jurisdiction to the courts to enforce the publication provision or providing for any penalties for non-compliance. The remedies available for a violation of Section 124 are only those defined by the text of the Constitution, namely: impeachment of the Governor, election (or defeat) of the Governor, and amendment of the Constitution.

Even if the publication provision is subject to judicial enforcement, which it is not, the plain language of Section 124 references publication *only where there is an applicant.* The Four Released Defendants served as Mansion trusties and none ever applied to Governor Barbour or the Mississippi Parole Board for a pardon. Because the Governor initiated the exercise of his constitutional pardon power, the Four Released Defendants were not required to publish anything. Last, any alleged insufficiency of the publication that MDOC undertook on behalf of the Four Released Defendants would amount to harmless constitutional error under *Chapman v. California*, 386 U.S. 18, 22 (1967), and its progeny, in this erroneous attempt by General Hood to make a collateral attack on their pardons and have them set aside in a subsequent civil action. Even were the trial court with the authority to do so (and it is not), General Hood should not be entitled to void the pardons entirely because of an alleged constitutional violation unless he can show that the violation resulted in actual prejudice. The Office of the Attorney General has neither pled nor shown this prejudice.

The Order denying the Defendants' Motion to Transfer or Dismiss should also be reversed on the basis of a lack of standing and improper joinder. General Hood, acting on behalf of the State, fails to demonstrate any particularized adverse effect from the issuance of the pardons. *See, Hall v. City of Ridgeland*, 37 So. 3d 25 (Miss. 2010). Equally fatal to the Plaintiff's pleading is its effort to bring a de facto class suit against some 200 pardon recipients, each of whom has a different set of underlying facts regarding the pardon process. This mis-joinder of claims violates Rule 20 of the Mississippi Rules of Civil Procedure

The trial court also erred in denying Defendants' request to have this matter transferred back to the Judge to whom it was originally randomly assigned. By re-assigning the case to herself, the trial court judge who heard all of the motions and entered all of the orders violated the Uniform Rules of Circuit and County Court which require random assignment. Therefore, in

the alternative, Defendants request that all orders entered by the trial court be set aside and the matter be remanded with instructions that it be returned to the docket of the originally assigned Circuit Judge.

## STANDARD OF REVIEW

A motion to dismiss under Rule 12(b) of the Mississippi Rules of Civil Procedure raises issues of law. *T.M. v. Noblitt*, 650 So. 2d 1340, 1342 (Miss.1995). Thus, review by the appellate court should be *de novo. Young v. N. Miss. Med. Ctr.*, 783 So. 2d 661 (Miss. 2001).

## ARGUMENT

## I. WHETHER THE TRIAL COURT'S ASSERTION OF SUBJECT MATTER JURISDICTION COMPORTS WITH THE TEXTUAL DICTATES OF THE MISSISSIPPI CONSTITUTION, INCLUDING THE SEPARATION OF POWERS, WHICH ESTABLISH THAT THE POWER TO GRANT REPRIEVES AND PARDONS IS VESTED EXCLUSIVELY IN THE GOVERNOR?

### A. Constitutional Text Dictates the Result

The act of granting a pardon has been entrusted by the people under Section 124 of the Constitution of the State of Mississippi to the Governor as the chief executive officer. The Judiciary does not have the authority under the Constitution to review the actions taken by another branch of government, including the Chief Executive, with respect to discharge of duties that the Constitution grants exclusively to that other branch. Miss. Const. §§ 1-2 (1890). *See, e.g., Tuck v. Blackmon,* 798 So. 2d 402 (Miss. 2001); *Pope v. Wiggins*, 69 So. 2d 913 (Miss. 1954); *Montgomery v. Cleveland*, 98 So. 111, 114 (1923); *State v. Metts*, 88 So. 525, 530 (Miss. 1921) (Ethridge, J., dissenting).

The framers of the Mississippi Constitution of 1890 were familiar with the sound principle of separation of powers, which was part of the positive law of Mississippi when the present Constitution was adopted, and is explicitly enshrined in Sections One and Two of the State Constitution. *Compare Hunt v. Wright,* 11 So. 608 (Miss. 1892), *with Ex Parte Wren,* 63 Miss. 512 (1886). Had the framers of the Constitution believed that the 30-day notice provision of Section 124 was to be treated as a substantive limitation on the clemency power, or that any review by the State Judicial or Legislative Departments of an applicant's compliance was permitted, the framers would have expressly provided for such review just as they expressly provided for senate review of the exercise of the clemency power in cases of treason. Miss. Const. § 124 (1890).

Appellant respectfully submits that it is highly instructive that the non-justiciability of the publication clause in Section 124 has been specifically discussed by the foremost Constitutional

scholar in the history of the State. George H. Ethridge, author of *Mississippi Constitutions* (1928), served on this Court from 1916 until 1941. As Justice Ethridge explained in clear, concise and unmistakable language, a Court may not review compliance with the publication language in Section 124:

> The Governor has many questions to decide in the performance of his duties, and his decisions on these questions are final and conclusive on the other departments of the Government. For instance, he is limited in granting a pardon to such cases as where publications have been made for 30 days in a newspaper of the county, but his decision as to whether the publication was made is not open to judicial review.

*State v. Metts*, 88 So. 525, 530 (Miss. 1921) (Ethridge, J., dissenting).

Put another way, whether or not a person being considered for a pardon has given appropriate notice is a matter about which the Governor is the sole judge for it goes to the "sufficiency of the facts and the propriety of granting the pardon ...." *Montgomery v. Cleveland*, 98 So. at 114.

Contrary to the arguments put forth on behalf of the State by General Hood, application by this Court of Sections One and Two of the Constitution (the separation of powers doctrine) does not effectively "read" the publication clause out of Section 124. The publication portion of the text is alive and well, and there are remedies for a violation. However, the only remedies available for such a violation are remedies under the Constitution. The Constitution provides three. First, the Executive may be impeached by the House of Representatives. Miss. Const. § 49 *et seq.* (1890). Secondly, the people may elect an executive who shares their view on the proper exercise of the pardon power. Miss. Const. §§ 116 & 252 (1890). Third, the people may amend Section 124. Miss. Const. § 273 (1890). Any other remedy, such as invalidation of the pardon by judicial review, is beyond the framework of our Constitution and should be rejected.

### 1. Detailed review of Separation of Powers Doctrine and Section 124

The three distinct branches of State government are defined in Section One and Two of the Constitution of the State of Mississippi (1890), which also set forth the strict separation of powers principle of our state government. In the eloquent language of the Nineteenth Century, the framers explain that the executive, legislative, and judicial departments shall be, "each of them confided to a separate magistracy." *See* Miss. Const. § 1 (1890). Section Two elaborates on the separation of powers, stating that no one branch "shall exercise any power properly belonging to either of the others." *See* Miss. Const. § 2 (1890). This Court noted the essential critical nature of these provisions in *Alexander v. State By and Through Allain*, 441 So. 2d 1329 (Miss. 1983). In rejecting a legislative encroachment on executive powers, this Court stressed that the separation of powers doctrine is not only made explicit in our Constitution (unlike the implicit doctrine in the Constitution of the United States), but it is prominently placed in Article 1, Sections 1-2. There can be no debate of the need to vigorously protect this well-entrenched fundamental precept of our Government. See *Limbert v. Mississippi University for Women Alumnae Ass'n Inc.*, 998 So. 2d 993 (Miss. 2008) (holding that as long as executive agency acted within the scope of its authority, trial court was precluded by separation of powers from reviewing agency's implementation of its own policies).

Within the separate spheres of government, the Constitution provides that "chief executive power of this State shall be vested in the Governor...." Miss. Const. § 116 (1890). The chief executive power includes the express constitutional authority to grant reprieves and pardons, Miss. Const. § 124 (1890), the exercise of which is an act taken on behalf of the sovereign state, not the Office of the Governor alone. *See Montgomery v. Cleveland,* 98 So. 111, 114 (Miss. 1923). Miss. Const. § 124 (1890), provides in its entirety:

> In all criminal and penal cases, excepting those of treason and impeachment, the Governor shall have power to grant reprieves and pardons, to remit fines, and in

> cases of forfeiture, to stay the collection until the end of the next session of the Legislature, and by and with the consent of the Senate to remit forfeitures. In cases of treason he shall have power to grant reprieves, and by and with the consent of the Senate, but may respite the sentence until the end of the next session of the Legislature; but no pardon shall be granted before conviction; and in cases of felony, after conviction no pardon shall be granted until the applicant therefor shall have published for thirty days, in some newspaper in the county where the crime was committed, and in case there be no newspaper published in said county, then in an adjoining county, his petition for pardon, setting forth therein the reasons why such pardon should be granted.

As can be seen, there are certain substantive limitations on the constitutional pardon power granted to the Governor. The Governor does not have the authority to grant a pardon in any criminal or penal case before there has been a conviction. Further, the Governor's authority to grant a reprieve or to remit a forfeiture is reviewable in the sense that another branch of state government may question the act of the Governor in two specific instances. First, the Governor has the power to grant reprieves in cases of treason subject to the consent of the Senate. Second, the Governor has the power to remit forfeitures in criminal or penal cases - except for cases of treason or impeachment - subject to the consent of the Senate.

Thus, it is only the Senate, a chamber of the Legislative Department, that has the authority to review the clemency acts of the Governor, and the authority of the Senate is limited to certain special cases involving reprieves for treason and the remission of forfeitures in criminal or penal cases. These are the only acts of the Governor taken under Section 124 that are reviewable by another Department of State Government. If the framers of the Mississippi Constitution had wanted to provide for the review by another branch of state government of the Governor's exercise of the authority to pardon in any other contexts, they could have expressly placed this review power in Section 124. *See* W. Ethridge, MODERNIZING MISSISSIPPI'S CONSTITUTION 53-54 (1950) (The constitution does "grant to the Governor the exclusive pardoning power, the power to grant reprieves, and by implication the power of commutation."). Further, the State Constitution does not list review of executive clemency exercised under

Section 124 among any of the expressly enumerated grants of jurisdictional power of the judiciary. See Miss. Const. §§ 146, 156, 159, 160, 161 & 273(9) (1890).[4]

This is wholly unremarkable because the gubernatorial pardon power – which does not extend to cases of treason, impeachment, or cases in which there is no conviction – is an express constitutional check and balance on the "judicial power" of the State's trial and appellate courts found in Section 144. It would defy common sense to permit this constitutional pardon power of the Chief Executive - once carried out - to then be reviewed by the state judiciary. By its express terms, the grant of a pardon by the Governor carried out as a part of his "chief executive power" under Section 116 is, as noted by this court, an act exercised on behalf of the State as sovereign and is therefore final and unreviewable. *See Montgomery v. Cleveland,* 98 So. 111, 114 (Miss. 1923).

For a court to entertain a lawsuit that seeks to nullify a pardon granted by the Governor in any case other than those already mentioned violates the strict separation of powers principles of the State Constitution. *See Alexander v. State ex rel. Allain,* 441 So. 2d 1329 (Miss. 1983). This issue has been the subject of several Mississippi Supreme Court decisions, all of which have uniformly held that the power to pardon belongs solely to the Governor. Thus, in *State v. Kirby,* 51 So. 811 (Miss. 1910), the court held that the Constitution grants the power to pardon solely to

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[4] Section 156 of the State Constitution provides: "The circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law." This Court has held that if the question for review is within the peculiar competency of another branch of state government, then the circuit court has no jurisdiction under Section 156. *See Foster v. Hardin,* 536 So. 2d 905 (Miss. 1988) (circuit court without jurisdiction to decide if person certified as political party's nominee of Senate district met the residency requirements of the State Senate). Whether an applicant for a pardon has complied with the 30-day notice provision sufficient to ensure notice to members of the public is a fact that this Court has noted is within the judgment and sound discretion of the Chief Executive Officer who, as the Governor, has the sole authority to grant clemency. *Montgomery v. Cleveland,* 98 So. at 114. Thus, the circuit court has no authority under section 156 to inquire into whether the purpose of the 30-day notice provision of Section 124 has been fulfilled. Similarly, the express grant of authority given to the chancery courts under Sections 159-60 of the State Constitution and the express concurrent grant of authority given circuit and chancery courts under Section 161 also show our trial courts do not have the authority to review the actions of the Governor when exercising his clemency power under Section 124.

the Governor, and it cannot be delegated elsewhere by the Legislature. *See State v. Jackson*, 109 So. 724 (Miss. 1926); *Ex Parte Chain*, 49 So. 2d 722 (Miss. 1951).

In affirming the Lieutenant Governor's power to pardon when the Governor is absent from the state, the court eloquently wrote about the breadth of the constitutional power in general:

> he is the sole judge of the sufficiency of the facts and of the propriety of granting the pardon, *and no other department of the government has any control over his acts or discretion in such matters.* Nevertheless he acts for the public. He dispenses the public mercy and grace .... [N]o authority other than his judgment and conscience can determine whether it is proper to grant or refuse the pardon....

*Montgomery v. Cleveland,* 98 So. 111, 114 (Miss. 1923) (emphasis added). There, the court's limited review was to determine if the governor was indeed "absent" from the State under Section 131 of the State Constitution so that the Lieutenant Governor could act in his stead as authorized by Section 131, not to question the pardoning power given to the governor. 98 So. at 112-14. Notably, the State Supreme Court expressly rejected the argument that the power conferred under Section 124 was not a duty but a right that the Lieutenant Governor could not exercise under Section 131 while the Governor was temporarily absent. *Id.* at 114. When doing so, this Court explained that the clemency power is the dispensation of "public mercy and grace" that "flows from the sovereign ... and not the personal act of the Governor." *Id.*

As noted in *Whittington v. Stevens*, 73 So. 2d 137 (Miss. 1954), the general rule in most states is that where the constitution vests the power to pardon in the Governor, the exercise of his right to pardon, including commutation of sentences, once complete, may not be restricted. This power is one "inherently vested in the people and they may vest it where they choose," and in Mississippi they chose to vest this power with the Governor. *Id.* at 139. The court in *Whittington* went on to explain:

> We hold that under the Constitution the governor is vested with the exclusive power to pardon with the sole exception that the legislature may provide for the

> commutation of the sentence of convicts for good behaviors; that the power to pardon includes the power to commute sentences in criminal cases.

*Id.* at 140; *see Randall v. Robinson,* 736 So. 2d 1083 (Miss. Ct. App. 1999) (no state court may infringe on the Governor's power to pardon, citing *Whittington, supra*).

In *Pope v. Wiggins*, the Court was asked to exercise judicial review over a Governor's decision to revoke an act of clemency which had conditionally suspended Mr. Pope's prison sentence. In holding that the Governor could revoke conditional clemency without any kind of hearing to determine whether the conditions of the original grant had been met, the Court made clear the unfettered discretion of the Chief Executive Officer:

> Neither the judicial nor the legislative departments of the state are empowered to impose upon the chief executive the duty to perform judicial functions in the conduct of regular hearings in his office, even though in the exercise of his constitutional power of granting executive clemency there may be involved judgment and discretion in determining when he may be justified in revoking a suspended sentence 'for any reason deemed sufficient to the governor.' *He is the judge of the sufficiency of the information, from whatever source, in determining whether he has a reason that he is entitled to deem sufficient for his action.*

*Pope v. Wiggins*, 69 So. 2d 913, 916 (Miss. 1954) (emphasis added).

The Supreme Court very recently dismissed a matter that dealt with the Governor's pardoning power. In *Turner v. State of Mississippi*, No. 2012-RR 0033 (Jan. 26, 2012), the Court stated: "As Turner's requests relate to any eventual petition for clemency from the Governor, the Court finds that the power to grant reprieves and pardons is vested exclusively in the Governor by Section 124 of the Mississippi Constitution of 1890 and that any request for testing as it relates to a clemency request should be dismissed without prejudice. Turner may pursue relief from the Executive Branch."

The reference to publication of notice of the application does not require that ***actual*** notice of a felon's application for pardon be given to anyone, even the victim of a crime, his or her family members, or their representatives. It is not limited to felons who are incarcerated. It

applies to every convicted felon, even one who has re-entered the free world and is working as a productive member of society. Publication of the application is a form of constructive notice that may be satisfied by publishing the notice in "some" newspaper and in certain instances in a newspaper other than the county where the conviction occurred.

In those instances where the representatives of the victim believe that the convicted felon is incapable of rehabilitation and wholly incorrigible or the sensational nature of the crime created extensive media coverage, publication in a newspaper of the submission of the application is often superfluous because members of the local community will have told the Parole Board, the Governor, and the general public about their opposition to clemency through meetings or communications with his staff, press conferences, and organized letter writing campaigns undertaken by sympathetic organizations.

The decisions of the Mississippi Supreme Court finding that the Governor's final act of granting a pardon is unreviewable are in accord with those states with similar constitutional provisions.[5] Courts as early as 1883 held that the state judiciary is without authority to inquire into a pardon. In *Knapp v. Thomas,* 39 Ohio St. 377, 391 (1883), the appellate court wrote that it would be a "usurpation of authority" if the court tried to interfere with the governor's pardon power. The court explained that each branch of government can best safeguard its own powers and jurisdiction by refraining from interfering with those rights held by the other branches.

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[5] The State seeks to avoid the import of the Mississippi court decisions that directly deal with pardons under the Mississippi Constitution by citing cases from other jurisdictions. The State cherry picks certain quotes in support of its position, even though those decisions address different issues. In *Anderson v. Commonwealth,* 107 S.W.3d 193 (Ky. 2003), a felon brought suit claiming the governor's pardon included the restoration of his right to sit on a jury. The court said that the plain language of the pardon was limited to a restoration of his rights to vote and to hold office. There was no dispute as to the ability of the governor to issue the pardon. And in *State ex. rel. Maruer v. Sheward,* 71 Ohio St. 3d 513, 644 N.E.2d 369 (1994), and *Jamison v. Flanner,* 116 Kan. 624, 228 P. 82 (1924), the constitutional pardoning provisions under review were significantly different from those of the 1890 Mississippi Constitution in that they expressly provided that the exercise of the governor's clemency power as to ***all*** pardons was subject to regulation by the legislature.

Over 100 years later, the Florida Supreme Court reaffirmed this principle:

> Whatever may have been the reasons for granting [or denying] the pardon, the courts cannot decline to give [the decision] effect ... and no court has the power to review grounds or motives for the action of the executive in granting [or denying] a pardon, for that would be the exercise of the pardoning power in part, and any attempt of the courts to interfere with the governor in the exercise of the pardoning power would be the manifest usurpation of authority.

*Wade v. Singletary*, 696 So. 2d 754, 756 (Fla. 1997).

As one noted legal encyclopedia explains:

> An executive may grant a pardon for good reason or bad, or for any reason at all, and the act is final and irrevocable. Even for the grossest abuse of this discretionary power the law affords no remedy; the courts have no concern with the reasons for the pardon. The constitution clothes the executive with the power to grant pardons, and this power is beyond the control, or even the legitimate criticism, of the judiciary.

59 Am Jur. 2d *Pardon and Parole* § 44 (2002).

The legal authorities cited by the Attorney General involve judicial review of very different actions taken by a governor. In *Barbour v. State ex. rel. Hood,* 974 So. 2d 232 (Miss. 2008), the court determined that a statute was ambiguous and that the governor's construction of the statute, even if different from that of the attorney general's interpretation, was permissible. *Id.* at 242. In *Fordice v. Bryan,* 651 So. 2d 998 (Miss. 1995), the court reviewed whether the governor could veto parts of a legislative enactment and then sign the bill into law. The Constitution grants the governor the power to veto parts of an "appropriation" bill. Miss. Const. § 73 (1890). The court stated the "case turns on whether House Bills 1613 and 1502 are 'appropriation bills.'" *Id.* at 1000. It found that because the bills were not appropriation bills, the governor could not veto parts of them before signing them into law. *Barbour v. Delta Correctional Facility Authority,* 871 So. 2d 703 (Miss. 2004), and *Holder v. State,* 23 So. 643, 645 (Miss. 1898), contain a similar analysis turning on whether a bill is an appropriation bill.

Thus, in these cases the State Supreme Court was not reviewing a constitutional power exclusively granted to the Governor, whose act once taken is an act of the sovereign, but an act

of the Governor that unlawfully amended legislation duly adopted by the State Legislative Department.[6] The only judicial review permitted is to determine whether the pardon was signed by the Governor. *See Montgomery v. Cleveland*, 98 So. at 114.

Accordingly the decision of the Governor to issue pardons to these individuals is not subject to judicial review. As set forth in *Montgomery* and *Pope*, the Governor alone is the judge of the sufficiency of the information on which the pardon is based. Any exercise of jurisdiction by the state judiciary would violate separation of powers. The grant of a pardon is a specific political question in which the judicial branch must defer to executive branch. For all of these reasons, there is no case or controversy presented in the Complaint which is within the proper jurisdiction of the courts of this State, and the Circuit Court's denial of the Four Released Defendants' Motion to Dismiss should be reversed and rendered.

**2. Publication provision creates neither rights nor judicial penalties and therefore cannot be judicially enforced**

The judicial precedents of the State Supreme Court cited herein show that the 30-day notice provision is a matter related to the Governor's exercise of his exclusive authority. The Legislature has never enacted enabling legislation creating jurisdiction for the courts to enforce the publication provision. *See Groves v. Slaughter*, 40 U.S. 449 (1841) (constitutional provision required enabling legislation to become effective). Moreover, the publication language provides merely for constructive notice (as opposed to actual notice by personal service or even summons by publication). Thus, unlike notice requirements under Rules 4 and 81 of the Mississippi Rules of Civil Procedure, Section 124 does not create due process rights for any "respondents" to the

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[6] General Hood also cites *Haym v. United States*, 7 Ct. Cl. 443 (1871), for the proposition that: "gubernatorial pardons are extraordinary acts requiring strict adherence at any conditions on them." However, the *Haym* court reviewed the language of the actual pardon granted to the plaintiff. *Haym* found that since the presidential pardon on its face required the person being pardoned to sign an oath and that person had not yet signed the oath, he was not yet pardoned. There was no judicial review of the "sufficiency of the facts or of the propriety of granting the pardon" prior to the President's exercise of the pardon power, and *Haym* is inapposite.

publication. In short, notice is not accompanied by a right to be heard. Further, there is no constitutional or statutory provision requiring the Governor to do anything in response to the publication. In fact, there is no constitutional provision or enabling legislation providing for anything to happen as a result of the proposed publication.

In addition, the Legislature has not created a civil remedy or penalty, or made it a crime for the recipient of a pardon to fail to comply with the 30-day notice period found in Section 124. Assuming for the sake of argument that the Legislature has the authority to adopt such legislation, any such applicant is certainly entitled to know as a matter of due process what legal effect arises from failure to comply with the 30-day provision, including the penalties or forfeitures to which he or she will be subjected. Miss. Const. § 14 (1890); U.S. Const. Fourteenth Amend. The trial courts of Mississippi cannot put someone who has been pardoned and released back in jail because he has allegedly violated the 30-day publication provision of Section 124. Section 33 of the Mississippi Constitution vests the "legislative power" in the State Legislature, Miss. Const. § 33 (1890), and only the State Legislature has the authority to make it a criminal offense or create a penalty for the failure of the recipient of a pardon to comply with the 30-day publication provision. Causing the Four Released Defendants to suffer any penalty, including forfeiture of their pardons, is wholly beyond the judicial power conferred by the Mississippi Constitution upon the state trial and appellate courts. Any such order would violate the separation of powers provisions of Miss. Const. §§ 1-2 (1890), which give legislative power solely to the Legislature. *See Tuck v. Blackmon,* 798 So. 2d 402 (Miss. 2001).

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Supreme Court of the United States held that there should be no retroactive application of a new rule of law where, in the face of reliance on the prior rule of law, the new decision "could produce substantial inequitable results if applied retroactively." *Id.* at 106-07. Here, where the Mississippi Supreme Court has

repeatedly held that the application of procedural requirements is solely within the discretion of the branch to which the procedures are delegated, it would be fundamentally unfair to not only change the law, but to hold that prior, good faith reliance on 125 years of decisions is misplaced. Accordingly, no matter how the Court now rules concerning the publication provision of Section 124, any such new rule should only be applied prospectively.

### 3. Appellants are not required to publish because they are not "applicants"

Section 124 of the Mississippi Constitution of 1890 contains two sentences. The first sentence confers the Governor's general pardon power and states that in all criminal and penal cases, "the governor shall have the power to grant reprieves and pardons . . . ." The second sentence contains limitations on the general pardon power in cases of treason, and it also provides that "after conviction, no pardon shall be granted until the ***applicant*** therefor shall have published for thirty days, in some newspaper . . . ." (emphasis added.) According to the plain language of Section 124, publication is implicated *only where there is an applicant.* In the case of the Four Released Defendants, they served as Mansion trustees and never applied to Governor Barbour or the Mississippi Parole Board for a pardon. Instead, Governor Barbour decided to exercise the general pardon powers conferred solely upon the chief executive by the first sentence of Section 124 and to pardon the Four Released Defendants.

Black's Law Dictionary (9th ed. 2009) defines an applicant as "[o]ne who requests something; a petitioner, such as a person who applies for letters of administration." As set forth above, the Four Released Defendants never requested anything. Therefore, under the plain meaning of the term "applicant," they are not subject to the publication clause.

Even if the Court were to go beyond the plain language of Section 124, and it should not, this reading of Section 124 makes common sense in the broader picture. Where the Governor knows and has observed the acts of persons such as the Four Released Defendants, it is the

Governor's prerogative to grant a pardon, or not, as he sees fit. Thus, there is no need for an application and no need for publication.

Where one convicted of a felony, however, decides to apply independently to the Governor for a pardon, in most cases the Governor will have no information concerning the applicant and additional information may assist him in making a clemency decision. The obvious purpose of the publication provision is to allow those who know the applicant as well as those that have been affected by the applicant's crime to come forward and give the Governor information that he can consider in making a pardon decision.

In contrast, where the Governor has made the decision to grant a pardon based on his own knowledge and investigation, the publication provision does not serve a purpose that authorizes the State Judicial Department to intervene and interfere with a decision that Section 124 vests exclusively in the Governor. Accordingly, because the Four Released Defendants did not apply for a pardon and, therefore, are not "applicants," they are not subject to the 30-day notice provision of Section 124, and their pardons are in no way affected by any purported failure to comply with the 30-day notice provision.

**B. Prudence and Practicality Militate for Reversal of the Trial Court**

Acceptance of General Hood's claimed right to judicial review of the pardon power would result in a cascade of unforeseen consequences and create a list of disastrously open-ended legal problems. In the first instance, there would be some 200 mini-trials on the different facts regarding publication by each of the pardonees. Further, in each such case, the litigants would make, and the Court would be called upon to decide, an interpretation of the application of the publication clause to the facts of that particular case.

The Four Released Defendants can conceive of at least four arguments for interpretation that would be put forth, namely: a) that publication for 30 consecutive days is required; b) that

weekly publication for four – even three -- consecutive weeks is sufficient; c) that a single publication made at least 30 days prior to the pardon is sufficient; and d) that a pardon, whenever signed, becomes effective on the 31st day after first publication. Further, there could be debates regarding the newspaper in which publication was made, i.e. whether publication in a state-wide daily with extensive circulation in a particular county would suffice as opposed to publication in a small community weekly with negligible circulation.

Another quagmire created by application of judicial review would be the effect of such a ruling on pardons issued five or 10 or 100 years ago. Evidence and testimony to defend such actions would be difficult or impossible to obtain. The issue of which plaintiffs would have standing to bring such challenges would have to be addressed. Would standing be restricted to the Attorney General, or could the victim or victim's family bring an action directly? There would likely also be actions brought by or at the prompting of political foes of the Governor who granted the pardons in order to settle old scores. Venue would also be challenged, with individual pardonees demanding to be sued in his or her county of residence.

Finally, the due process clauses of the United State Constitution and the Mississippi Constitution are implicated. Certainly, a putative pardonee could claim a right to jury trial because his or her freedom is at stake. Moreover, with validity of the pardon being an issue, the courts would have to determine whether the burden of proof should be preponderance of the evidence or beyond a reasonable doubt. In short, it would be a nightmare of procedural and substantive legal issues, particularly as it relates to the due process rights of the pardonees. For all of these reasons, the order of the trial court denying the Four Released Defendants' motion to dismiss should be reversed and rendered.

## II. IN THE ALTERNATIVE, WHETHER ANY INSUFFICIENCY OF PUBLICATION UNDER SECTION 124 WOULD CONSTITUTE HARMLESS CONSTITUTIONAL ERROR FOR WHICH NO REMEDY WOULD LIE?

In *Chapman v. California*, 386 U.S. 18, 22 (1967), the United States Supreme Court defined harmless errors as "constitutional errors which in the setting of a particular case are so unimportant and insignificant" that they do not mandate automatic reversal of conviction. The Mississippi Supreme Court applies the *Chapman* analysis when reviewing constitutional error. According to the Court in *Richardson v. State*, 74 So. 3d 317 (Miss. 2011):

> Harmless errors are those which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction. *Williams v. State*, 991 So.2d 593, 599 (Miss. 2008) (quoting *Tran v. State*, 962 So.2d 1237, 1247 (Miss. 2007)). We "have the duty to be fair, not only to the defendant, but to the State as well." *Tran*, 962 So.2d at 1246. "Harmless-error analysis is often necessary to prevent unfair prejudice to the State, and the State is certainly prejudiced where convictions are reversed based on errors which do not affect the substantial rights of the parties." *Id.* (citations omitted).
>
> 74 So. 3d at 327-28.

The harmless error analysis also applies in civil cases. For purposes of harmless error analysis, courts distinguish "structural error" from "harmless error." The distinction between "structural error" and "harmless error" was discussed in *Kindhearts for Charitable Humanitarian Development v. Geithner*, 710 F. Supp. 2d 637 (N.D. Ohio 2010):

> "Structural errors typically arise in the context of criminal trials. A structural error is "a defect in the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Neder v. U.S.*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)(internal citation omitted). Because they "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, "structural **errors** *per se* require setting aside the entire proceeding. *Id.* at 8-9, 119 S. Ct. 1827.
>
> By contrast, trial-type **errors** are subject to **harmless error analysis**, because they "may be quantitatively assessed in the context of other evidence presented ... to determine" the effect of the **error**. *Arizona v. Fulminante*, 499 U.S. 279, 307–08, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Judicial review of agency action under the APA, moreover, contemplates a **harmless error analysis**. 5 U.S.C. § 706 ("[A] court shall review the whole record ... and due account shall be taken of

> the rule of prejudicial **error**."); *see also Shinseki v. Sanders,* — U.S. ——, 129 S.Ct. 1696, 1704, 173 L.Ed.2d 532 (2009) (noting that "the APA's reference to 'prejudicial **error**' is intended to sum up in succinct fashion the 'harmless **error**' rule" (internal quotation and citation omitted)).
>
> An analogy may assist to clarify the distinction between structural **errors** and those amenable to **harmless error analysis**. If the proceedings before OFAC were a house, and termites represented OFAC's **constitutional violations**, the question of whether the violations rise to the "structural" level is whether the termites' damage to the structural integrity of the house is so significant as to require demolishing and completely rebuilding the house, or whether repairs can return the house to a safe and stable condition. In other words, I must determine whether what was done was irreparably destructive, or simply damaging, even seriously damaging.
>
> 710 F. Supp. 2d at 653-54.

The analogy in *Kindhearts* is instructive in the instant case. The Attorney General seeks to have this Court "demolish" the pardons in this case because of an alleged constitutional violation that undisputedly would not have affected the outcome, i.e., the issuance of the pardons. The publication provision is for the benefit of the Governor as the chief executive officer. The only logical purpose for publication is so the Governor may have an opportunity to consider public comment during his personal deliberations regarding whether to grant the pardon. In order to find "structural error" this Court must find that the failure to comply with the publication provision resulted in actual prejudice.

To show actual prejudice or "structural error," the Attorney General must show that if the subjects of the pardon had published the notice, the publication would have resulted in a different outcome. The only individual who can attest to whether or not the failure to publish would have resulted in the consequence of a different outcome is the Governor who issued the pardons. In order to make such a finding, this Court must impermissibly delve into the deliberative process of the Governor when granting a pardon. Without delving into the deliberative process of the Governor, this Court cannot find structural error, and it must therefore conclude that any constitutional error resulting from the failure to publish notice was harmless constitutional error.

## III. IN THE FURTHER ALTERNATIVE, WHETHER THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE MATTER FOR LACK OF STANDING AND/OR IMPROPER JOINDER UNDER RULE 20 OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE

The Mississippi Supreme Court in *City of Picayune v. Southern Regional Corp.*, 916 So. 2d 510 (Miss. 2005), defined standing as whether "the particular plaintiff had a right to judicial enforcement of a legal duty of the defendant ...." As recently set forth in *Hall v. City of Ridgeland*, 37 So. 3d 25 (Miss. 2010), "[T]o 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." The State, acting herein through the office of the Attorney General, has not suffered a particular harm which gives rise to an actionable interest. The Attorney General's office has neither plead nor demonstrated a particular harm different than that experienced by the general public. In fact, the nature of the Complaint filed in this matter is that it purports to enforce the very generalized interest of the public which the *Hall* decision describes as being insufficient to establish standing. For this reason, the Attorney General lacks standing to seek the requested relief, and the Order of the trial court should be reversed.

Rule 20 of the Mississippi Rules of Civil Procedure also requires reversal. The instant Complaint includes causes of action against disparate defendants, which are premised on different facts. In addition to claims made against the Four Released Defendants represented by undersigned counsel, the Complaint names five other individual defendants who have not yet been released from custody. The facts underlying each of the individual defendant's pardon are different, including the facts related to the sufficiency of complying with Section 124's publication provision. Each individual was pardoned by a separate executive order. (R. 308-315, R.E. 112-119). The mere fact that these individuals were pardoned by the same Governor is

not sufficient basis under the law to join those claims. Pursuant to Rule 20 of the Mississippi Rules of Civil Procedure, multiple defendants may be joined in a single action only where the claims against them arise out of the same transaction or occurrence. There are too many factual variations to permit joinder, and Plaintiff cannot proceed with a de facto class suit in the Circuit Court of Hinds County. Therefore, in the alternative, this matter should be remanded with instructions that Plaintiff re-file separate actions against the individual defendants in the appropriate venue for each.

## IV. IN THE FURTHER ALTERNATIVE, WHETHER THE TRIAL COURT ERRED IN RE-ASSIGNING THIS MATTER AWAY FROM THE JUDGE TO WHOM IT WAS ORIGINALLY RANDOMLY ASSIGNED

Rule 1.05A of the Uniform Circuit and County Court Rules requires random assignment of civil actions filed with the Clerk of Court. This civil action was filed on January 11, 2012, and randomly assigned to the Honorable Jeff Weill. However, an order was entered on January 12, 2012, transferring the case to the docket of the Honorable Tomie T. Green, Senior Circuit Judge. (R. 62, R.E. 24). Rule 1.05A lists two instances in which a judge other than the one originally assigned may hear portions of a case: 1) to handle preliminary procedural matters if the district has a policy of setting motion dates set in advance with judges being pre-assigned to certain dates; and 2) if the district has established local rules governing re-assignment for reasons of judicial economy and efficiency.

The local rules for the Seventh Circuit Court District have no provisions for reassignment of cases, even in the event of a request for emergency relief. Further, there are no provisions for reassigning the ultimate disposition of the merits of a case to a different judge. The order entered re-assigning the instant cause violates the requirement of random assignment of cases. Therefore, if this matter is not reversed and rendered on the Four Released Defendants' Motion to Dismiss, it should be remanded, transferred to Judge Weill, and all prior Orders set aside.

Trial on the merits has not taken place, and the Four Released Defendants are entitled to pursue affirmative defenses not ripe in the Motion to Dismiss. The Four Released Defendants' answer raises numerous affirmative defenses, including among them that the office of the Attorney General is stopped from challenging the very mode and manner of publication when that mode and manner was decided and effected under the direction of Special Assistant Attorney General David K. Scott. (R. 560, *et seq.*). In addition, the Four Released Defendants should be permitted to urge disqualification of the Office of the State Attorney General from representing the State in this proceeding.[7]

## CONCLUSION

This appeal implicates nothing less than the fundamental structure of our Constitutional Government. The separation of powers enshrined in the first two sections of our State Constitution precludes judicial review of the exclusive authority of the executive to grant clemency. Respect for that authority, as absolute, has been a consistent theme in every decision this Court has rendered in the history of the current Constitution. General Hood has asked that precedent be ignored and the State be allowed to pursue judicial review and judicial remedies not authorized by the text of the Constitution and never before permitted by a Court of this State.

The law contemplates only three potential areas of review of a clemency order by the Governor. It is undisputed that the Governor issued and signed the relevant pardons to persons convicted of a felony under the laws of Mississippi. It is undisputed that the pardons do not involve a conviction for impeachment. It is undisputed that the pardons do not involve a conviction for treason. Absent an allegation in one of those three categories, there is no judicial

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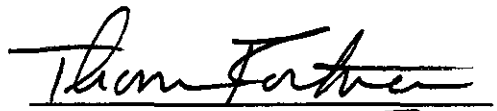
[7] The Four Released Defendants have asserted that, having provided advice and actually undertaken the publication of notice on behalf of the Four Released Defendants, the Office of the Attorney General should be disqualified from acting as counsel for Plaintiff, directly adverse to the interests of the Four Released Defendants. *See* the Four Released Defendants' Motion to Disqualify. (R. 184).

remedy. The available remedies are constitutional. Therefore, for all of the reasons set forth herein, the Four Released Defendants pray that the decision of the trial court be reversed and rendered, and the matter dismissed with prejudice at Appellee's costs.

This, the 7th day of February, 2012.

Respectfully submitted,



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## CERTIFICATE OF SERVICE AND FILING

I, Thomas M. Fortner, do hereby certify that he has this delivered a copy of the foregoing instrument to the following, via hand delivery, First Class United States Mail, postage prepaid and/or e-mail:

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THIS, the 7th day of February, 2012.

THOMAS M. FORTNER

# APPENDIX "A"

STATE OF MISSISSIPPI

JIM HOOD
ATTORNEY GENERAL

Via Hand-delivery

February 1, 2012

Honorable Tomie T. Green
Senior Circuit Court Judge
Hinds County Courthouse
Jackson, MS 39205

RE: Hood v. Epps, Cause No. 251-12-00033

Dear Judge Green:

This Court's January 26, 2012, Order requires the State of Mississippi to "amend the Complaint to add the specific names of Defendants that Plaintiff Attorney General contends have sufficiently complied with the constitutional mandate for publication" and to submit evidence to this Court pertaining to those publications on February 3, 2012. There are 22 people known to date who were pardoned by Governor Haley Barbour and who have satisfied the thirty-day publication requirement contained in Section 124 of the Constitution. We are concerned that by amending the Complaint to add these 22 persons and by submitting evidence pertaining to their pardons on February 3 we will be placing these persons in the position of incurring legal expenses. As an alternative, we would like to respectfully propose that the State file the attached Stipulation which lists the 22 persons, indicates that the State is not contesting the validity of their pardons, and seeks an order of dismissal as to those persons. If this is acceptable, we would be grateful if the Court would clarify its January 26 order to permit the State to submit the attached Stipulation in lieu of the amendment.

Separately, the State is in the process of preparing an amended complaint consistent with the Court's direction to "amend the Complaint [on or before February 3] to add any identified Doe Defendants that Plaintiff contends failed or inadequately complied with the constitutional mandate for publication."

Finally, this Court has set a hearing on the State's motion for preliminary injunction for February 3. The State seeks preliminary injunctive relief pertaining to the

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pardons issued to Nathan Kern, David Gatlin, Charles Hooker, Anthony McCray, Katherine Robertson, Kirby Glenn Tate, Aaron Brown, Joshua L. Howard, Azikiwe Kambule, and Joseph Ozment. The State is not seeking preliminary injunctive relief on February 3 as to pardons issued to any other person.

Thank you for your attention to this matter.

Sincerely yours,

Jim Hood
Attorney General

enclosure

cc: Thomas M. Fortner, Esq.
Richard A. Filce, Esq.
Cynthia Stewart, Esq.
Edward Blackmon, Jr., Esq.
Sylvia Owen, Esq.
David K. Scott, Esq.
Robert G. Waites, Esq.
Jack L. Wilson, Esq.
John M. Colette, Esq.
Charles E. Griffin, Esq.
Luther T. Munford, Esq.
Joshua L. Howard

IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

**JIM HOOD, ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI, EX REL. THE STATE OF MISSISSIPPI** — **PLAINTIFF**

**VS.** — **CAUSE NO. 251-12-00033**

**CHRISTOPHER EPPS, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS; ET AL.** — **DEFENDANTS**

## STIPULATION

COMES NOW Jim Hood, Attorney General for the State of Mississippi, ex rel. the State of Mississippi, and files this stipulation.

The Attorney General believes that the thirty-day publication requirement contained in Section 124 of the Mississippi Constitution was satisfied with respect to the pardons issued on January 10, 2012, to the following twenty-two (22) persons:

1. Mark Hubbard Allen
2. Thomas Beasley
3. Bobby Ray Camp
4. Ryan Jeremiah "Jeremy" Cooper
5. Carol Foster (Pinkston)
6. Chris (Mabrie) Gilmer
7. John D. Jackson
8. Jerome Francis Jackson
9. Barbara Ann Hamilton
10. Emily Rebecca (Whatley) Hentz
11. Perry Tyson Owen
12. Herbert Lowery
13. Kevin McCullough
14. Zachary Kane Polk
15. Norman Lee Redo
16. Barry Sanderson
17. Dawn Renee (Hewitt) Schaefer
18. Jason Shivers
19. Scott McLean Smith
20. Justin O'Keith (O'Keefe) Smith
21. Alice Steed Triplett
22. Joel Vann

Therefore, the Attorney General is not contesting the validity of the pardons issued to the aforementioned. The Attorney General hereby stipulates that these persons are excluded from consideration as "John or Jane Doe" defendants in this matter.

In the event that the aforementioned individuals were considered to already be parties to this action, the Attorney General respectfully requests that this Court issue an order dismissing them as defendants in this lawsuit.

RESPECTFULLY SUBMITTED, this the _____ day of _____, 2012.

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

_____

JIM HOOD, MSB No. [redacted]
ATTORNEY GENERAL
BRIDGETTE W. WIGGINS, MSB NO. [redacted]
ALEXANDER KASSOFF, MSB NO. [redacted]
SPECIAL ASSISTANT ATTORNEYS GENERAL