

**COPY**

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**ALSTON KING**

**APPELLANT**

**VS:**

**NO. 2004-KA-00688**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**REPLY BRIEF OF APPELLANT**

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**CERTIFICATE OF INTERESTED PARTIES  
PURSUANT TO RULE 28(a)(1)  
MISSISSIPPI RULES OF APPELLATE COURT PROCEDURE**

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 this Court may evaluate possible disqualifications of recusal.

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## **TABLE OF AUTHORITIES**

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## REBUTTAL ARGUMENT

Appellee argues in his Brief that Rose v. State, stands for the proposition that because “a warrantless entry to extinguish a fire and determine its origin is constitutional, then the warrantless seizure of evidence while inspecting the premises for *these* purposes is likewise constitutional.” (Emphasis added) ( Rose v. State, 586 So.2d 746 (Miss. 1991) at 510), The Appellant herein suggests that the Appellee misapprehends and misapplies Rose v. State. Rose stands for the proposition that firefighters have a legitimate purpose in entering a home without a warrant to extinguish a fire and to look for the cause of that fire or evidence of arson, and not for the proposition that firefighters have *carte blanche* to search for evidence of other crimes and seize evidence thereof. The constitutional purpose referred to in the quote above is that of determining the origin of a fire.

The Rose Court stated:

We begin by noting that a fireman cloaked with governmental authority who is present at fire-damaged premises for the purpose of ascertaining the origin of a fire or looking for evidence of a crime is subject to Fourth Amendment standards. “[T]here is no diminution in a person’s reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman....” (Citing Michigan v. Tyler, 436 U.S. 499, 506, 98 S.Ct. 1942, 1948, 56 L.Ed. 2d 486 (1978))

The Rose Court held that “a burning building presents an exigency of compelling gravity making a warrantless entry reasonable. (Citing Michigan v. Tyler, at 509) This Court also held that “Because determining the cause and origin of a fire serves a compelling public interest, the warrant requirement does not apply in such cases.” (Citing Michigan v. Clifford, 464 U.S. 287,

293, 104 S.Ct. 641, 647, 78 L.Ed.2d 477 (1984)) But, the Rose Court went on to add “However, the scope of the search must be limited to its objective.” (Citing Michigan v. Clifford, at 293 n.4) “In other words, such a search cannot ‘grow’ into a fishing expedition or curiosity adventure with its object being the discovery of criminal activity.” Rose at 753.

Clearly Rose does not stand for the proposition that the seizure, by firefighters, of evidence of any crime is permissible because they are allowed warrantless entry into a burning residence in order to extinguish a fire and look for evidence of the origin of the fire. Appellee argues “Because of the necessity of determining with certainty that a fire will not reignite, Johnson was taking prompt action to ensure that there would be no rekindling of the fire. It was therefore constitutional for him to seize the burned-up scales and locked metal box he found on the premises during the exercise of that necessary precaution.” (Appellee’s Brief at page 9) Appellee seems to be arguing that Johnson, a volunteer firefighter, seized the scales and metal box to be sure that the fire did not rekindle. Does this mean that the metal box and burned-up scales might ignite by spontaneous combustion and rekindle the fire? This argument cannot be taken seriously!

Appellee then goes on to state “There is no evidence that Johnson at any time searched for drugs rather than looking for hot spots or that he remained on the premises after the fire was extinguished to conduct a search.” (Appellee’s Brief at page 9)

However, Appellant, in his Brief at page 14, cited from the record in this cause for clear evidence of Johnson’s search for drug or other illegal activity:

During direct examination, Johnson was asked why the burned up scales he retrieved from within the home were of interest to him. Johnson replied: “...they seemed to be suspicious to me, because I know that they can be used to weigh illegal substances, such as drugs, to be sold.” (T 101) As to the metal box,

Johnson stated that he turned it over to law enforcement because he considered it something of value. However, when asked by Defense Counsel if Johnson considered burned up scales “something of value”, Johnson replied “Well, that doesn’t come under actually value. We also receive training as fire fighters to recognize certain objects that may be used for illegal activities...” (T 109) Defense Counsel then continued: “Okay. So now it’s not just things of substantial value, but it’s things that look like it could be used in illegal activity.” (T 109) Johnson replied: “Correct.” (T 109) By Johnson’s own admission, he was searching for evidence of illegal activity, such as drugs, by both training and at the instance of the Moorhead Police Department. As he only turned over two items from the home, the burned up scales and the one padlocked metal box, nothing else must have seemed of value to him.

The Appellee then goes on to state: “Whether the items were seized due to their apparent value or due to their possible evidentiary value is not relevant to the inquiry, since the entry and inspection of the premises to prevent potential rekindling of the fire was constitutional..”

(Appellee’s Brief at page 10) As support for this assertion, the Appellee then goes on to cite Rose again for the proposition that “if a warrantless entry to extinguish a fire and determine its origin is constitutional, then the warrantless seizure of evidence while inspecting the premises for *these* purposes is likewise constitutional.” (Emphasis added) (Appellee’s Brief at page 10)

Appellant respectfully suggests that the use of the term “*these*” cited above particularizes and limits the exceptions to the protections of the Fourth Amendment of the United States

Constitution that the Court granted in Rose et al. Appellant argued likewise in his Brief: a warrantless search of a residence to extinguish a fire and to determine its origin, or evidence of arson, is constitutional. However, that is not what happened in the case *sub judice*. Firefighters went beyond the constitutional purpose referred to above. As Rose went on to add: “... the scope of the search must be limited to its objective... and ...cannot grow into a fishing expedition or a curiosity adventure with its objective being the discovery of criminal activity.” (Rose at 16) As

Appellant stated in his Brief, a “fishing expedition” is exactly what happened here!

Appellee attempts to make the argument that because King denied ownership of the unlawfully seized items from his home (after being escorted by law enforcement to the police station for questioning by the Chief) that he lost standing to object to the search of the interior of the metal box.

Appellant asserts that these items should never have been in the custody of law enforcement as they were not evidence of arson. Nor were they items of obvious value that law enforcement should have simply been safe-guarding for the Appellant, not prying open to search for evidence of illegal activity. The items that clearly appeared to have value ( furniture, appliances, clothing, personal belongings, etc) were left in King’s home to be ransacked and taken by onlookers. The burned-up scales and metal box were unlawfully seized evidence and should never have been in the possession of law enforcement, let alone before the jury. Neither the firefighters nor the Moorhead Police Department had any lawful authority to seize these items from King’s home and the Trial Court erred in allowing them to be introduced at trial. Whether King denied ownership of these items following their unlawful seizure from his home is irrelevant to this argument.

### **CONCLUSION**

King contends that the Trial Court erred in allowing the introduction of the burned-up scales and locked metal box, together with its contents, at his trial. These items were unlawfully seized by firefighters, at the instance of law enforcement, and, as Johnson admitted, as part of his

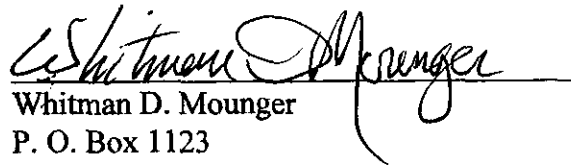



training to search for evidence of illegal drug activity. The firefighters went beyond their legitimate scope, that is extinguishing the fire of King's home and making certain that it did not reignite, when they seized a set of burned-up scales and a locked metal box from his home, under the guise of protecting his valuable property. This unlawful search and seizure of the evidence obtained from his home was in violation of the Fourth Amendment of the United States Constitution and Article III, Section 23 of the Mississippi Constitution. In fact, King asserts, these firefighters were acting as surrogates for the Moorhead Police Department by attempting to locate evidence of illegal activity, evidence which law enforcement would not have been able to obtain in a lawful manner.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true and correct copy of the above and foregoing copy of Appellant's Reply Brief by United States mail, postage prepaid, to the persons named below.

This the 30<sup>th</sup> day of January, 2008.

  
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