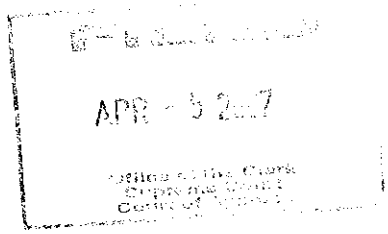
IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARK ALLEN DEBROW — APPELLANT



VS. — NO. 2006-KA-1064-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARK ALLEN DEBROW **APPELLANT**

VS. **NO. 2006-KA-1064-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

In this appeal involving yet another conviction for felony DUI the focus is upon appellant's mis-perception of "plain error."

Appellant finds "plain error" in the trial court's alleged failure to administer to the jury the statutory oath and "plain [evidentiary] error" as well in admitting evidence of his blood-alcohol content in violation of his constitutional right of confrontation.

It is claimed the oath administered to the petit jurors was different from the statutory oath and insufficient to authorize the jury to try the case.

Appellant also argues that no testimony was adduced at trial which established that the person testifying for the State either performed the chemical analysis or reviewed the data confirming the results of the analysis.

We note with interest the oath was administered and the evidence admitted without a specific contemporaneous objection.

MARK ALLEN DEBROW, a thirty-six (36) year old Caucasian male (C.P. at 41) twice previously convicted in the state of Mississippi of driving his motor vehicle while under the influence of intoxicants and thrice previously convicted of a felony, one being a crime of violence, prosecutes a criminal appeal from the Circuit Court of Forrest County, Mississippi, Michael W. McPhail, Special Circuit Judge, presiding.

Following a one (1) day trial by jury conducted on February 7, 2005, Debrow was convicted of felony DUI based upon the commission of a 3rd DUI offense within the past five (5) years. (R. 209-10; C.P. at 35)

After a sentence-enhancement hearing conducted on February 11, 2005, adjudicating the merits of the habitual offender charge, the trial judge found Debrow guilty of recidivism under Miss. Code Ann. §99-19-83 and sentenced him to life imprisonment without the benefit of probation or parole. (R. 215-18; C.P. at 38)

An indictment returned on November 4, 2004, stated, in its non-habitual charging parts

> "[t]hat MARK ALLEN DEBROW . . . on or about September 06, 2004, did unlawfully, wilfully, and feloniously drive or otherwise operate a motor vehicle and/or had eight one-hundredths percent (.08%) or more by weight volume of alcohol in his blood (based upon grams of alcohol per one hundred (100) Milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such persons, breath, blood, or urine), contrary to the form of the state in such cases made and provided . . ." (C.P. at 8)

Two (2) issues are raised by Debrow on appeal to this Court:

ISSUE NO. 1: "Whether the trial court committed 'plain error' by failing to administer the statutory oath when swearing the [petit] jury."

ISSUE NO. 2: "Whether the trial court committed 'plain error' in admitting evidence of [Debrow's] blood alcohol content in violation of appellant's right of confrontation." (Brief of the

Appellant at 1)

Gay Polk-Payton and Jonathan Farris, practicing attorneys with the Public Defender's office in Forrest County, represented Debrow effectively at trial.

W. Daniel Hinchcliff, an attorney for the Mississippi Office of Indigent Appeals, has been substituted on appeal.

STATEMENT OF FACTS

Debrow has articulated in his appellate brief a clear, concise, and accurate "Statement of the Case" and "Statement of the Facts" presenting the relevant facts. We adopt those facts here and add the following:

On September 6, 2004, at "approximately around 8 p.m." (R. 106), Petal police patrol officer Michael Palmer was involved in a traffic enforcement blitz. Other officers were manning a road block and check point 300 yards to Palmer's east. Palmer observed a black Pontiac Grand Am driven by Debrow make a "sudden" and "last minute" turn away from the checkpoint without using his turn indicator. Officer Palmer " . . . stepped out in the road and flagged the Pontiac Grand Am down." (R. 104)

Palmer approached Debrow's motor vehicle and asked to see his driver's license. Debrow told Palmer he didn't have a license. Palmer ran the tag number through dispatch and was informed that Debrow's driver's license had been suspended. (R. 106) Debrow's appearance and demeanor is described by Palmer in the following colloquy:

> Q. [BY PROSECUTOR:] Okay. What happened after you approached this vehicle?
>
> A. [BY OFFICER PALMER:] * * * In talking with Mr. Debrow, I could smell a strong odor of intoxicants from the vehicle. I noticed that his eyes were red and glassy. And in his responses to me, I noticed that his speech was slurred. So I asked him if he had

been drinking. Mr. Debrow stated he had had one beer. I asked Mr. Debrow to step out of the vehicle. When he did, he held on to the vehicle. He was having trouble standing up. He held on to the car for balance. Also I noticed in his crotch area there was a large wet spot. We proceeded to the rear of the vehicle where Mr. Debrow leaned on the car. I asked him if he would submit to a portable intoxilyzer test to determine if he was over the limit of intoxication.

* * * * * *

Q. And was a result - - did he submit to that test?

A. He submitted to that test and registered over zero eight zero over the limit.

Q. So at that point what did you do next?

A. At that point based on the results of the test and my observations, It appeared to me that he was very intoxicated. I placed Mr. Debrow into custody. And then I proceeded to talk - - he had a female passenger. I talked with her and ascertained that she had a valid driver's license, and she submitted to the test and had not been drinking at all. Mr. Debrow agreed to turn the vehicle over to her to save a wrecker bill, so she got the vehicle, and then I transported Mr. Debrow to the police department. (R. 107)

Officer Palmer made the initial stop at 8:48 p.m. Palmer did not give Debrow a roadside sobriety test " . . . due to him holding on to the car for balance and so forth . . ." (R. 112) He took Debrow to the station house where he gave him his *Miranda* warnings at 8:48 p.m. (R. 110) Debrow refused at this time to take the Intoxilyzer 5000 test as well as refusing to submit to the collection of blood and urine samples. (R. 111) Palmer placed Debrow in a holding cell and procured a search warrant from a city judge authorizing Palmer " . . . to obtain a blood sample from Mr. Debrow to determine his blood alcohol content." (R. 113) Palmer then transported Debrow to Forrest General Hospital where Jacqueline Nye collected the blood sample. "Mr. Debrow refused to do that, so we had to call in the Department of Public Safety from Forrest General and assist in restraining Mr. Debrow so that Ms. Nye could obtain the blood sample." (R. 115) According to

Nye, it took five (5) people to restrain Debrow and three (3) sticks of the needle to collect the specimen authorized by a warrant. (R. 140, 143) The blood was drawn around 10:06 p.m. *See* state's exhibit 5.

Six (6) witnesses testified for the State of Mississippi during its case-in-chief, including **Officer Palmer** who conducted the traffic stop, observed Debrow's appearance and demeanor, and testified that in his opinion Debrow was "very intoxicated." (R. 107)

Debrow's previous convictions, according to his indictment, consisted of a conviction of DUI, first offense, on February 4, 2002, in the Municipal Court of Hattiesburg; a second conviction on October 9, 2002, in the Justice Court of Forrest County, and a third conviction on August 15, 2003, in the Justice Court of Forrest County. (C.P. at 8) Apparently, only two of those convictions were introduced at trial. (R. 181-82; state's exhibits 12 and 13)

Dr. Karla Walker, the director of clinical toxicology at Medtox Laboratories in St. Paul, Minnesota, testified that Debrow's blood alcohol level was 0.243 grams per deciliter or three times the legal limit in Mississippi. (R. 156)

> Q. [BY PROSECUTOR:] And what are your responsibilities just in general in that capacity?
>
> A. I'm essentially responsible for the quality of all of the results that come out of the laboratory - - the portion of the laboratory that I'm responsible for, so I'm responsible for the standard operating procedures by which we run our tests, by which samples are handled, and then also for - - I serve also in the capacity of a certifying scientist where I review the final work before results are released to our clients.
>
> Q. And would that include testing on D.U.I. sample specimens?
>
> A. Yes. (R. 147)

* * * * * *

Q. Okay, Now, what experience do you have with respect to alcohol and chemical test - - testing for alcohol concentration in the blood?

A. I have experience both as an analyst. You know, when I worked as a medical technologist, I would do the analysis for alcohol, and then in directing the laboratory, you know, I've overseen thousands of tests for alcohol. (R. 148)

* * * * * *

Q. Have you over the course of you[r] career actually performed tests on blood to determine alcohol concentration - - yourself performed those tests?

A. Yes, I have.

Q. Okay. Many times?

A. Many times.

Q. Okay. Have you previously been qualified in other courts as an expert witness in toxicology?

A. Yes, I have.

Q. Do you know about how many times?

A. Probably between a dozen and twenty times.

Q. And in what states just generally?

A. State of Minnesota, South Dakota, Iowa, Alaska, Louisiana - - are some of them.

MS. BURCHELL: Your Honor, at this time we would offer Dr. Karla Walker as an expert in toxicology.

THE COURT: Any objection?

MS. POLK-PAYTON: No, Your Honor, we stipulate to her expertise.

THE COURT: All right. Let it be stipulated

that Dr. Karla Walker is a toxicologist. (R. 149)

Dr. Walker, a board certified toxicologist with a doctorate in pharmacy, testified that on or about 13 September, [2004], Medtox in Minnesota received a blood sample for blood alcohol testing from Culpepper Laboratories in Hattiesburg, Mississippi. (R. 150-51)

According to Walker, an information recovery affidavit was sent by Medtox to Culpepper after the blood specimen arrived at Medtox with the name "Martin" Debrow as opposed to "Mark" Debrow. The affidavit, which was introduced into evidence without objection, reflects the specimen was taken from Mark A. Debrow. (R. 153-54; State's Exhibit 11)

The test utilized to analyze Debrow's specimen was the gas chromatography test " . . . which is essentially the gold standard test for ethyl alcohol . . . " and " . . . a test that's generally accepted in the scientific community for the testing of blood alcohol concentration." (R. 154)

"Every day the [gas chromatography] instrument is calibrated to known standards and ethyl alcohol." (R. 155) No other substance could have affected the result of the gas chromatography test which " . . . would be accurate of [Debrow's] blood alcohol level." (R. 157)

Exhibit 11, the laboratory report generated by Medtox and reflecting a B.A.C. of 0.243, was introduced into evidence, sans objection, as State's exhibit 11. (R. 157)

> MS. BURCHELL: Your Honor, the State would ask that Exhibit 11 be admitted into evidence.
>
> THE COURT: Any objection?
>
> MS. POLK-PAYTON: No objection. (R. 157)

Jennifer Culpepper, vice president of Culpepper Testing in Hattiesburg, testified she received Debrow's blood specimen from Brian Aust of the Petal Police Department and outsourced the sample to Medtox Laboratories because Culpepper's machine was down at the time. Mark

Debrow's specimen was assigned a number when it got to her lab. (R. 176) Culpepper identified an affidavit verifying and confirming the fact that the sample sent by Airborne Express to Medtox " . . . was Mark A. Debrow and not Martin Debrow." (R. 176)

At the close of the State's case-in-chief, the defendant moved for a directed verdict on the general ground the State had failed to prove beyond a reasonable doubt that Debrow was guilty. (R. 183)

Following a response from the State, the motion was denied. (R. 183-84)

The defendant did not testify in this cause and rested without producing any witnesses in his defense. (R. 193)

Following closing argument, the jury retired to deliberate at 5:05 p.m. and returned twenty-four(24) minutes later at 5:29 with a verdict of ". . . guilty of operating a motor vehicle within the State of Mississippi while under the influence of intoxicating liquor." (R. 207-08; C.P. at 35)

A poll of the jury, individually by name, reflected the verdict was unanimous. (R. 209-210)

On March 8, 2005, Debrow filed his motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. It was apparently overruled on May 22, 2006. (C.P. at 6, 42-43)

On appeal, appellant invites this Court to either reverse and render or, in the alternative, reverse and remand for a new trial.

SUMMARY OF THE ARGUMENT

The judgment entered in the case at bar refers to the jurors as " . . . being duly empaneled, specially sworn and charged to well and truly try the issues." (C.P. at 36-37)

A recital in the judgment and sentence that the jury was specially sworn is conclusive of the fact. **Ratliff v. State,** 201 Miss. 259, 29 So.2d 321 (1947).

Moreover, any failure to administer the proper oath was not the target of objection at any

time during or after trial; rather, this matter has been raised for the first time on appeal. Accordingly, this claim is barred. **Biggs v. State,** 942 So.2d 185 (Ct.App.Miss. 2006). *See also* **Acreman v. State,** 907 So.2d 1005 (Ct. App. Miss. 2005), where the Court of Appeals failed to find harm that would have warranted application of the "plain error doctrine" where the trial record, although failing to expressly reflect a reading of the oath, did reflect the court made two references to an oath during trial.

In like manner, the failure of counsel to object to the admission of the blood-alcohol testimony and evidence on Sixth Amendment grounds bars his claim. There was no specific Sixth Amendment objection, contemporaneous or otherwise, to this evidence at trial.

The trial judge cannot be placed in error absent an objection claiming a Sixth Amendment right to confrontation and invoking that right at trial. To the extent that **Hobgood v. State,** 926 So.2d 847, 852 (Miss.2006), holds otherwise, that holding, we respectfully submit, is wrong and should be overruled.

In the case at bar, no fundamental right is implicated here under the facts. Trial counsel probably made a strategic decision not to object because " . . . our supreme court has held that testimony such as was offered by [Walker] is permissible under M.R.E. 703 and does not violate the confrontation clauses of the United States and Mississippi Constitutions." **Byrd v. State,** 741 So.2d 1028, 1033 (Ct.App.Miss. 1999).

Finally, Confrontation Clause violations are subject to a harmless error analysis. **Hobgood v. State,** 926 So.2d 847, 852 (Miss. 2006); **Young v. State,** 908 So.2d 819 (Ct.App.Miss. 2005); **Raiford v. State,** 907 So.2d 998 (Ct.App.Miss. 2005), reh denied, and the cases cited therein. Evidence of Debrow's blood-alcohol content did not likely affect the outcome of his prosecution for operating a motor vehicle while under the influence of intoxicating liquor.

In other words, any error was harmless beyond a reasonable doubt.

There was a wealth of other evidence from which the jury could have found beyond a reasonable doubt that Debrow was operating a motor vehicle while "under the influence of intoxicating liquor." **Christian v. State,** 859 So.2d 1068 (Ct.App.Miss. 2003); **Harris v. State,** 830 So.2d 681 (Ct.App.Miss. 2002).

First, there were the observations of Debrow's appearance, demeanor and speech made by Officer Palmer at the scene of the traffic stop and fully described by Palmer at trial. (R. 106-07) In addition to Debrow's telltale conduct, he also flunked the roadside "portable intoxilyzer test." (R. 123-24)

Second, Debrow violently resisted the efforts of Jacqueline Nye, a hospital technician, to draw Debrow's blood at the hospital. A reasonable and fairminded juror could have found this behavior strongly indicative of a consciousness of guilt of driving while under the influence. (R. 140)

Third, according to Ms. Nye, Debrow " . . . had wet his pants and reeked of alcohol." (R. 141)

Fourth, Karla Walker testified that Debrow's B.A.C. of .243 would have been even higher if his blood had been drawn two hours earlier. (R. 157)

ARGUMENT

ISSUE NO. 1.

DEBROW, LIKE MANY OTHERS BEFORE HIM, HAS FAILED TO PRESENT SUFFICIENT EVIDENCE TO OVERCOME THE PRESUMPTION THE TRIAL JUDGE ADMINISTERED THE PROPER OATH TO THE PETIT JURY.

Debrow contends, for the first time on appeal, the trial judge failed to administer the proper

oath when swearing the jury and, for this reason, the jury could not legally hear his case. There being no objection at trial to this state of affairs, Debrow relies upon the "plain error" doctrine in support of his position.

A recital in the judgment that the jury was specially sworn and charged to well and truly try the issues is conclusive of this fact. **Ratliff v. State,** 201 Miss. 259, 29 So.2d 321 (1947). Debrow's argument is without appeal on appeal for this reason, if for no other.

We further submit this claim is barred because no complaint was made at trial or in a motion for new trial that the jury was not properly sworn.

First, the facts.

Following voir dire conducted by the court and the litigants, Judge McPhail stated into the record the following:

> THE COURT: Ladies and Gentlemen, now having gone through this process both upstairs and now here, I understand it's been a long morning. Do any of you have any reason - - whatever those reasons may be - - why you feel that you cannot be a fair and impartial juror in this particular case?
>
> (NO RESPONSE)
>
> Okay. Will each one of you promise me on your *oaths* then if you're selected as a juror in this case, that you will follow the evidence as it is presented in this courtroom and render a decision based on that evidence, that proof, and the law that I will instruct you on, and return a fair and impartial verdict in this case? All of you on your *oaths* promise me that?
>
> (JURORS AFFIRMATIVELY RESPOND)
>
> R. 76 [emphasis ours]

It is clear the prospective jurors sitting through the jury selection process in Debrow's prosecution had also sat through the jury selection process in an earlier case and presumably had

been administered an oath at that time. (R. 39, 79-80)

In any event, the record does not affirmatively reflect the jurors were not properly sworn. In extracting certain promises from the jurors available for Debrow's trial, Judge McPhail made two references to "your oath." *Cf.* **Acreman v. State**, *supra,* 907 So.2d 1005 (Ct.App.Miss. 2005), where the trial judge made two references to an oath during trial.

First, there was "no response" when the court asked if there was any reason whatever why any of the jurors felt they could not be a fair and impartial juror. (R. 75-76)

Second, all jurors responded affirmatively to a question inviting a promise to follow the evidence and the law and returning a fair and impartial verdict in the case. (R. 75-76)

That's not all.

After the noon recess and upon the return of the jurors selected to hear the case the judge inquired as follows:

> THE COURT: Members of the jury, we've had our noon recess. I trust all of you enjoyed your lunch. Did anyone approach you about this case, or did you do any independent investigation on your own or discuss this with anyone else?
>
> (NO RESPONSE)
>
> All of you promise me *on your oaths* you did not do that?
>
> (NO RESPONSE) [emphasis supplied]

The oath of petit jurors is found in Miss.Code Ann. §13-5-71 which reads as follows:

> Petit jurors shall be sworn in the following form:
>
> "You, and each of you, do solemnly swear (or affirm) that you will well and truly try all issues and execute all writs of inquiry that may be submitted to you, or left to your decision by the court, during the present term, and true verdicts give according to the evidence. So help you God."

Debrow's belated argument is devoid of merit for several reasons.

First, a recital in the "Jury Verdict and Pre-sentencing Order," i.e., the judgment of conviction, named the jurors individually and made reference to each of them as " . . . being duly empaneled, specially sworn and charged to well and truly try the issues [and affirmed that they] joined a true verdict rendered according to the law and the evidence." (C.P. at 36)

Sixty (60) years ago, this Court, in **Ratliff v. State,** 201 Miss. 259, 29 So.2d 321 (1947), held that a recital in the judgment and sentence that the jury was specially sworn is conclusive of the fact. Needless to say, but we say it nevertheless, **Ratliff** is dispositive of the issue.

Second, even if the remarks of the court made to the post-voir dire prospective jurors are considered to constitute the actual oath administered to them, the oath administered and the statutory oath are "substantially equivalent." **Boggans v. State,** 867 So.2d 279, 283 (Ct.App.Miss. 2004) citing **Wilburn v. State,** 608 So.2d 702 (Miss. 1992).

"Will each one of you promise me on your oaths?" is the equivalent of the "solemnly swear or affirm" language found in the statute.

A promise to "follow the evidence . . . and render a decision based on the evidence, that proof, and the law" is the equivalent of the statutory language "well and truly try all issues."

A promise to return "a fair and impartial verdict in this case" is the equivalent of the statutory phrase "true verdicts give according to the evidence."

Third, we find in **Biggs v. State,** *supra,* 942 So.2d 185, 192 (¶15) (Ct.App.Miss. 2006), the following language:

> The record in this case does not indicate that the jury was not sworn. When we look to the final sentencing, it states that the jury was composed of twelve jurors "who were duly sworn, empaneled and accepted by the State and the Defendant . . . . " There was no objection by trial counsel to the failure to administer the oath and there is no indication from the record that the oath was not administered. The sole mention of the oath in the record indicates

that the oath was administered. Finding no evidence to contradict the oath being given, we find no merit to this error.

Same here.

ISSUE NO. 2.

THERE WAS NO OBJECTION ON SIXTH AMENDMENT GROUNDS, CONTEMPORANEOUS OR OTHERWISE, TO EVIDENCE OF DEBROW'S B.A.C. THEREFORE, A REVIEWING COURT SHOULD DECLINE THE INVITATION TO PLACE THE TRIAL JUDGE IN ERROR BY FINDING AN ABUSE OF JUDICIAL DISCRETION IN ADMITTING THIS EVIDENCE.

Blood was drawn from Debrow by virtue of the authority granted in a search warrant. During trial the jury was presented with the results of a chemical analysis performed "[a]t Medtox Laboratories in St. Paul, Minnesota" reflecting that Debrow's " . . . blood alcohol level was 0.243 grams per deciliter," three times the legal limit. (R. 156)

The results of the blood test were objected to at trial but upon entirely different grounds. (R. 89) A motion to suppress this evidence was filed on the day of trial on the ground the blood was illegally seized. (C.P. at 14-16) The motion was overruled following a suppression hearing conducted the morning of trial. (R. 2-36; C.P. at 16)

After the jury was selected but prior to the State's first witness, Debrow renewed his motion to suppress on the ground he had learned for the first time the previous Friday (trial began on Monday, February 7th) the blood sample had been outsourced to Medtox, a Minnesota outfit who actually performed the analysis. (R. 89-90) The renewed motion was also overruled. (R. 89-90)

Now on appeal, Debrow seeks to present, for the first time, yet a third and different ground for the exclusion of this evidence.

Debrow contends it was "plain error" to allow into evidence the results of the blood-alcohol

analysis. Specifically, he claims his constitutional right to confront his accusers is a fundamental right that was denied him during the trial of this cause. Relying primarily on **Crawford v. Washington,** 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), he contends "[t]he lab evidence against Debrow is precisely what **Crawford** condemns."

We disagree. The evidence complained about here does not pass muster under **Crawford's** definition of "testimonial statements."

The Supreme Court of Mississippi has said time and again that it " . . . reviews the admission or exclusion of evidence for abuse of discretion." **Hobgood v. State,** *supra,* 926 So.2d 847, 852 (Miss. 2006). It will not reverse an erroneous admission or exclusion of evidence unless the error adversely affects a substantial right of a party. **Stephens v. State,** 911 So.2d 424 (Miss. 2005), reh denied. Stated somewhat differently, reversal is proper only where the court's judicial discretion has been abused and a substantial right of a party has been affected. **McGowan v. State,** 706 So.2d 231, 243 (Miss. 1997).

Such is not the case here.

Debrow's B.A.C. content was not the target of a Sixth Amendment objection, contemporaneous or otherwise. Stated differently, Debrow's right to confront witnesses was not properly invoked at trial. This observation precludes appellate review.

"[A]n appellant is not entitled to raise new issues on appeal that he has not first presented to the trial court for determination." **Bush v. State,** 895 So.2d 836, 842 (Miss. 2005).

Moreover, "[t]he statement of one or more specific grounds of objection to the introduction of evidence is a waiver of all other grounds of objection." **Stringer v. State**, 279 So.2d 156, 158 (Miss. 1973). *See also* **Kolberg v. State,** 829 So.2d 29 (Miss. 2002) ["Objection on one ground at trial waives all other grounds for objection on appeal."]; **Morgan v. State,** 741 So.2d 246, 253, ¶

15 (Miss. 1999), citing **Stringer v. State,** *supra*, and **McGarrh v. State,** 249 Miss. 247, 276, 148 So.2d 494, 506 (1963) [Objection cannot be enlarged in reviewing court to embrace omission not complained of at trial.]; **Townsend v. State**, 681 So.2d 497 (Miss. 1996); **Thomas v. State,** 812 So.2d 1010 (Ct.App.Miss. 2001).

In **Ballenger v. State**, 667 So.2d 1242, 1256 (Miss. 1995), this Court opined:

> * * * "The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal." [citations omitted] * * * "A trial judge will not be found in error on a matter not presented to him for decision." [citations omitted]

The trial judge is not *clairvoyant.* How in the world could he have specifically ruled on this specific matter when it was never specifically presented to him for decision? A defendant should not be permitted to ambush the trial judge by raising in the appellate court a matter the judge had no opportunity to address in the court below.

With respect to the present issue, a trial judge cannot be placed in error absent an invocation of a defendant's Sixth Amendment right to confrontation. Here the matter was never presented to Judge McPhail for a decision.

It is elementary that a contemporaneous objection is required in order to preserve an error for appellate review. **Caston v. State,** 823 So.2d 473 (Miss. 2002), reh denied; **Logan v. State,** 773 So.2d 338 (Miss. 2000); **Florence v. State,** 755 So.2d 1065 (Miss. 2000); **Jackson v. State,** 766 So.2d 795 (Ct.App.Miss. 2000); **Goree v. State,** 750 So.2d 1260 (Ct.App.Miss. 1999).

Otherwise the error, if any, is waived for appeal purposes. **Caston v. State,** *supra*, 823 So.2d 473 (Miss. 2002), reh denied.

The contemporaneous objection rule is in place in order to enable the trial judge to correct error with proper instructions to the jury whenever possible. **Slaughter v. State,** 815 So.2d 1122

(Miss. 2002), reh denied.

Put another way, a trial court cannot be put in error unless it had an opportunity to first pass on the question. **Palm v. State,** 748 So.2d 135 (Miss. 1999); **Fulgham v. State,** 770 So.2d 1021 (Ct.App.Miss. 2000). *See also* **Mallard v. State,** 798 So.2d 539, 542 (Miss. 2001), where this Court held that Mallard's complaint that she was tried in her absence was waived, for the purposes of appeal, since she failed to object to her trial *in absentia.*

Miss.Code Ann. § 99-35-143 is precisely in point. It reads, in its pertinent parts, that

> [a] judgment in a criminal case **shall not be reversed** because the transcript of the record does not show a proper organization of the court below or of the grand jury, or where the court was held, or that the prisoner was present in court during the trial or any part of it, or that the court asked him if he had anything to say why judgment should not be pronounced against him upon the verdict, **or because of any error or omission in the case in the court below, except where the errors or omission are jurisdictional in their character, unless the record show that the errors complained of were made ground of special exception in that court.** [emphasis added]

The underlying bases for the existence of a contemporaneous objection rule are contained in **Oates v. State,** 421 So.2d 1025, 1030 (Miss. 1982), where we find the following:

> There are three basic considerations which underlie the rule requiring specific objections. It avoids costly new trials. Boring v. State, 253 So.2d 251 (Miss. 1971). It allows the offering party an opportunity to obviate the objection. Heard v. State, 59 Miss. 545 (Miss. 1882). Lastly, a trial court is not put in error unless it had an opportunity to pass on the question. Boutwell v. State, 165 Miss. 16, 143 So. 479 (1932). These rules apply with equal force in the instant case; accordingly, we hold that appellant did not properly preserve the question for appellate review.

In **Leverett v. State,** 197 So.2d 889, 890 (Miss. 1967), this Court, quoting from **Collins v. State,** 173 Miss. 179, 180, 159 So. 865 (1935), penned the following language:

> The Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed

> upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.

In **Sumner v. State,** 316 So.2d 926, 927 (Miss. 1975), we find the following language concerning the time for making an objection:

> The rule governing the time of objection to evidence is that it must be made as soon as it appears that the evidence is objectionable, or as soon as it could reasonably have been known to the objecting party, unless some special reason makes a postponement desirable for him which is not unfair to the proponent of the evidence. *Williams v. State*, 171 Miss. 324, 157 So. 717 (1934) and cases cited therein. See also cases in Mississippi Digest under Criminal Law at 693.

We reiterate. "A trial judge will not be found in error on a matter not presented to him for decision." **Ballenger v. State**, 667 So.2d 1242, 1256 (Miss. 1995) citing numerous cases. Given the facts found in this case, no violation of fundamental rights is involved here, and the procedural bar/waiver/forfeiture rule is applicable to Mark Debrow.

In several, if not all, of the cases cited and relied upon by Debrow there was an objection at trial on Sixth Amendment grounds. *See* **Lenoir v. State,** 845 So.2d 845, 849 (Ct.App.Miss. 2003); **Kettle v. State,** 641 So.2d 746, 749 (Miss. 1994) [Sixth Amendment confrontation Issue sufficiently preserved where claim raised in a motion *in limine.*]

In any event, the evidence of Debrow's B.A.C. was admissible anyway.

Karla Walker was qualified and accepted as an expert witness in the field of toxicology. (R. 149) Indeed, defense counsel stipulated as to her expertise. (R. 149)

Moreover, during closing argument counsel told the jury the following:

> CLOSING ARGUMENT BY MS. POLK-PAYTON:
>
> * * * And I don't have a problem with the testing that was done. I don't have any doubt that she did her job. Dr. Walker did her job and tested the blood right, and she did everything right. But what good

> does that do if she was testing somebody's else's blood? * * * (R. 199)

Dr. Walker testified she was responsible for the quality of *all of the results* that come out of the Medtox laboratory and that she served as " . . . certifying scientist where I review the final work before results are released to our clients." This certification included " . . . testing on D.U.I. sample specimens." (R. 147)

Walker had " . . . overseen thousands of tests for alcohol. (R. 148) She explained in great detail the quality control procedures in effect at Medtox and attested to the reliability of the gas chromatography test. (R. 155-56)

The following language found in **Byrd v. State,** *supra*, 741 So.2d 1028, 1033 (1999), summarizes, in a nutshell, our position on the merits.

> Although Lindsey may not have performed the actual tests on the various D.N.A. samples collected from Byrd and R. R, she did perform the scientific analysis of the data obtained. Byrd was able to confront and cross-examine Lindsey on her analysis. Our supreme court has held that testimony such as was offered by Lindsey is permissible under M.R.E. 703 and does not violate the confrontation clauses of the United States and Mississippi Constitutions. *Gray v. State*, 728 So.2d 36, 56-57 (Miss. 1998). Accordingly, this issue is without merit.

Debrow was free to cross-examine Walker as to her qualitative review of the results obtained during the gas chromatography test performed on Debrow's blood specimen. Debrow was also free to cross-examine both Walker and Jennifer Culpepper as to any discrepancy in the name that appeared on the label of the specimen as well as the affidavit proffered and introduced into evidence as a redeeming circumstance.

Finally, Confrontation Clause violations are subject to a harmless error analysis. **Young v. State,** 908 So.2d 819 (Ct.App.Miss. 2005); **Raiford v. State,** 907 So.2d 998 (Ct.App.Miss. 2005),

reh denied, and the cases cited therein. Any error in admitting Debrow's B.A.C. may be deemed harmless beyond a reasonable doubt because the jury had a wealth of other information before it demonstrating that Debrow was driving under the influence.

First, the jury heard the testimony of Officer Palmer concerning Debrow's appearance and demeanor. Debrow admitted to Officer Palmer he had consumed at least one beer. (R. 107) Palmer detected a strong odor of intoxicants inside Debrow's vehicle. Debrow's eyes were red and glassy, and Debrow speech was slurred. When Debrow stepped out of the vehicle he had trouble standing up and held on to the car to shore up his balance. There was a large wet spot in Debrow's crotch, and in Palmer's opinion Debrow was very intoxicated. (R. 107)

Second, Debrow violently resisted the efforts of Jacqueline Nye, a hospital technician, when she attempted to draw Debrow's blood at the hospital. This is strongly indicative of a consciousness of guilt of driving while under the influence. (R. 140)

Third, according to Ms. Nye, Debrow " . . . had wet his pants and reeked of alcohol." (R. 141)

Fourth, Karla Walker testified that Debrow's B.A.C. of .243 would have been even higher if his blood had been drawn two hours earlier. (R. 157)

Debrow's complaint is devoid of merit for all of the reasons stated. *See* **McCool v. State,** 930 So.2d 465 (Ct.App.Miss. 2006) [Evidence that defendant had slurred speech, bloodshot eyes, smelled of alcohol, had trouble standing, was loud and belligerent, coupled with testimony that defendant was drunk, was sufficient to support McCool's conviction for driving under the influence.]

Under the circumstances, we fail to find harm that would warrant application of the "plain error" doctrine. "Plain error" is the exception, not the rule.

CONCLUSION

Debrow has failed to meet his burden of demonstrating any fundamental error in the trial of this. "Plain error" is neither "plain" nor "error."

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgments of conviction of felony DUI and recidivism and the life sentence without probation or parole imposed in their wake should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

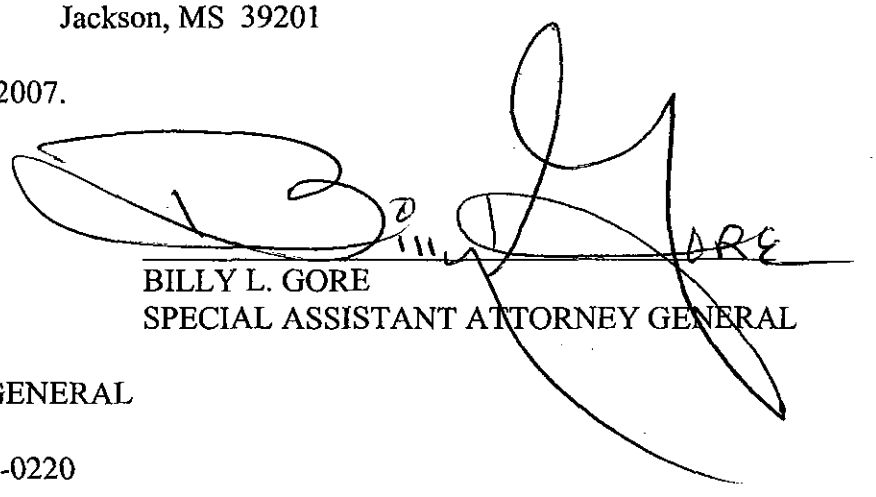
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Michael W. McPhail
Special
Circuit Court Judge
Post Office Box 190
Hattiesburg, MS 39403-0190

Honorable John Mark Weathers
District Attorney
Post Office Box 166
Hattiesburg, MS 39403-0166

W. Dan Hinchcliff, Esquire
Attorney At Law
301 North Lamar St., Ste. 210
Jackson, MS 39201

This the 5th day of April, 2007.



BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680