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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARK ALLEN DEBROW — APPELLANT

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V. — NO. 2006-KA-1064-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Mark Allen Debrow, #26213
3. Honorable John Mark Weathers, District Attorney
4. Honorable Michael W. McPhail, Circuit Court Judge

This the 13th day of February, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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STATEMENT OF THE ISSUES

ISSUE NO. 1 : WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO ADMINISTER THE STATUTORY OATH WHEN SWEARING THE JURY ?

ISSUE NO. 2 : WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR IN ADMITTING EVIDENCE OF BLOOD ALCOHOL CONTENT IN VIOLATION OF APPELLANT'S RIGHT OF CONFRONTATION ?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Forrest County, Mississippi, and a judgement of conviction for the crime of felony driving under the influence, as an habitual offender (Miss Code Ann. § 99-19-83) against Mark Allen Debrow, ["Debrow'], and the resulting mandatory life sentence, following a jury trial held on February 7, 2005, Honorable Michael W. McPhail, Special Circuit Judge, presiding.

FACTS

Michael Palmer, ["Palmer"], a patrolman with the Petal Police Department, was involved in a "traffic enforcement blitz" on December 6, 2004, when he had the occasion to observe a vehicle make a sudden turn away from the check point without using their turn signal. (T. 103-105) Palmer made a traffic stop. As a result of the stop, Palmer testified that Debrow was driving while suspended and that there was an odor of alcohol. Debrow's eyes appeared red. His speach was slurred and he was having trouble with his balance.. Debrow submitted to the portable breath test but refused the intoxilyzer test offered at the police department.(T. 106-111) The usual field sobriety test were not performed. Palmer explained that he later offered them at the Police Department, where he felt it would be safer.

Because Debrow refused the breath test a search warrant was acquired to obtain a blood sample. (T. 113-114) A motion to suppress the warrant was heard before the trial and denied. (C.P. 14-16, T. 2-38, R.E.3-5). After the warrant was issued, Debrow was taken to the hospital, where blood was drawn.

On cross examination, Palmer admitted that his report omitted several key elements to which he testified; that he was working near a checkpoint, that there was a passenger to whom he also administered a "PBT". Palmer did not turn his vehicle towards Debrow's car, thus video of the stop was not made. (T. 122)

A technical assistant at Forrest General Hospital testified to having drawn the blood. She confided that Debrow was concerned about the blood test as he was on medication. (T. 137-141) On cross examination she admitted that the night was "very chaotic", and that she was not sure who actually did the label on the blood kit. (T. 144-145) These admissions were critical, as it was later revealed that the name on the blood sample sent to the lab was not Mark Allen Debrow; but instead,

a " Martin Debrow."

The significance of the "very chaotic" surrounding the drawing and labeling the blood became apparent as the next witness testified. Karla Walker, of MedTox Laboratories, in St. Paul Minnesota, was offered as an expert in toxicology. (T. 147-149) Her lab received a specimen labeled "Martin Debrow." (T. 152-153) A purported "affidavit" was then offered supposedly clearing the issue up as to whose blood was contained in the vial. (C.P. Ex.10, R.E. 6) As can be seen on the exhibit, it is not an affidavit, having not been attested to. Equally as troubling, Dr. Walker consistently describes the testing as having been done by "we' with her only hands on participation being that she "review[s] the final work." (T. 147) She wholly failed to testify to any direct participation in the testing of, or the analysis of, the data on this sample. (T. 147-159)

After two officers in the chain of custody of the blood vial testified, Jennifer Culpepper, vice president of Culpepper Testing, testified (T. 174) The blood vial had been delivered to the lab, but they outsourced it to MedTox. Jennifer Culpepper also testified concerning the aforementioned unattested "affidavit". She admitted that her name appeared nowhere on the "affidavit"; instead, it was signed by Linda Culpepper. She did not claim to have been the person who made the comparison of identification numbers; but rather claimed that the ubiquitous "we" had made the comparison (T. 179-180) It is also important to note that the identification number was generated at Culpepper. No one testified as to who originally assigned that number, nor who actually made the comparison and when.

After the stipulation to reports of Debrow's prior convictions for DUI, the State rested.

The defense called no witnesses. The jury then returned a verdict of guilty.

Certified copies of Debrow's "penpack" were presented at sentencing, and Debrow was thereafter sentenced to life without the hope of parole as an habitual offender.

SUMMARY OF THE ARGUMENT

The statute prescribes a specific oath to be administered to the jury. The promise extracted from the jurors failed to conform to the statutory dictate and should be considered as if no oath at all head been administered to the jurors.

Evidence, including the report, of Debrow's blood alcohol content was admitted without objection[1]. As no testimony was adduced which showed that the person testifying either performed the testing, or reviewed the data to confirm the results, Debrow's fundamental right to confront witnesses against him was violated. This should be particularly so where, the evidence produced was suspect, given the false affidavit which attempted to confirm the mislabeled specimen was actually from Debrow.

ISSUE NO. 1 : WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO ADMINISTER THE STATUTORY OATH WHEN SWEARING THE JURY?

An oath was administered to the jury before the trial. The oath administered is as follows:

> THE COURT : 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 ? (T. 75-76)

The oath administered did not conform to the statutorily mandated form.

> 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."

---

[1]A motion to suppress was heard prior to trial and denied, which did not argue the grounds that are the basis of this issue.

> The oath shall authorize the jury to try all issues and execute all writs of inquiry which may be submitted to it during that term of the court. Talesmen, if any be summoned or retained, shall in like manner be sworn to try all issues and execute all writs of inquiry which may be submitted to them during the day for which they are summoned or the time for which they are retained.

Miss. Code Ann. § 13-5-71 The foregoing statute commands that the oath administered be in the form set forth in the statute. Without that specific oath the jurors are not authorized to try a case. The usual instance of the jury oath is not one of an improper oath, but instead an instance of a silent record as to the actual administration of the oath. But as shown in just such a case, the requirement is that the proper oath be given:

> The record says the jury for the trial were "sworn," and the presumption is, **the legal oath was administered**. So held, repeatedly in this state. Dyson v. the State, 26 Miss. 362; Chase v. the State, 46 ib. 683. This assignment is not well taken.

Edwards v. State, 47 Miss. 581, 1872 WL 4324, 4 (Miss. 1873) here the record unequivocally reflects a different oath from the statutory oath was administered. The presumption favoring the jury being properly sworn must be affirmatively rebutted. *McMillan v. State*, 2 So.2d 823, 824 (Miss. 1941) It is hereby submitted that an improper oath readily leaps this hurdle. The question then, is whether such an improper oath rises to the level of a "plain error" where, as here, no objection was made at the trial level to the improper oath.

"Plain error" is error so fundamental that it affects a substantive right , thus giving rise to a question of the fairness of the trial. *Hubbard v. State,* 886 So. 2d 12, 16 (Miss. App 2004) (certiorari denied Nov. 18, 2004) It is long established precedent that failure to swear a jury violates a fundamental right.

> In Miller, jurors were administered a preliminary oath for the purpose of ascertaining their qualifications to serve as jurors, but were not administered a subsequent oath until after the State and defense had

> concluded their case. Id. at 161. As a result, the supreme court reversed the defendant's murder conviction and held that because the jury had not been properly sworn, the jurors were unable to legally hear and consider the testimony. Id. at 162- 63.

Acreman v. State, 907 So.2d 1005, 1008 (Miss. App. 2005) While there are distinguishing factors, the primary issue, that a jury not properly sworn cannot legally hear a case remains.

It might then be argued that, pursuant to *Boggans v. State* the oath given is similar to the statutorily mandated oath. However, that case is distinguishable:

> The supreme court found, as fact, that the two oaths [Miss. Code Ann. § 13-5-71 and Miss. Code § 13-5-73] were "substantially equivalent," and that "[t]o suggest otherwise is to exalt form over substance."

Boggans v. State, 867 So.2d 279, 283 -284 (Miss. App. 2004) None-the-less *Boggans* makes the form over substance distinction only over oaths that were written and enacted by the legislature. In this matter, to allow a homespun oath would override the legislatures authority altogether. This Court regularly defers to the Legislature to write and define law. *Bennett v. State*, 933 So. 2d (Miss. 2006); *Kelly v. International Games Technologies*, 874 So. 2d 977 (Miss. 2004), *Wooldridge v. Wooldridge*, 856 So. 2d 446 (Miss,. App. 2004) Similarly, the legislature has defined and mandated the jury oath. It's stated oath is the oath that is required and not an oath created by the trial court.

It is the same as the jurors not being sworn at all. Thus this case should be reversed and rendered.

<u>ISSUE NO. 2 :</u> WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR IN ADMITTING EVIDENCE OF BLOOD ALCOHOL CONTENT IN VIOLATION OF APPELLANT'S RIGHT OF CONFRONTATION ?

Plain error is defined as error "of sufficient constitutional importance [it is] likely to affect the outcome of a case..." *Conerly v. State*, 760 So. 2d 737,740 (Miss. 2000) As will be manifested

in the following argument, the admission of the blood alcohol tests against Debrow were unconstitutional and, by their very nature, so damning as to clearly not only have affected the outcome of the case, but to have decided it. The jury was presented evidence, expert testimony, that Debrow had consumed alcohol amounting to three times the legal limit. Otherwise, the proofs were certainly debatable. Testimony showed the police officer had failed to perform any field sobriety test, except the "PBT." Such evidence has traditionally been deemed as unreliable and admissible only to show probable cause. The usual field test were not offered until after Debrow was arrested. The officer testified that he noticed nothing in Debrow's driving to indicate impairment. (T. 120) Debrow had tried to explain he took certain medications. Curiously the officer did not "aim" his squad car so as to video record the incident. The officer smelled a strong odor of alcohol, which might easily be one spilt beer in the lap of Debrow. In short, without the damning blood test, there was evidence that may or may not been enough for the jury to convict. The test is however, the evidence that was admitted improperly "likely to [have affected] the outcome." It would seem foolish to argue that the expert testimony and reports were not likely to have knocked any fence sitting juror off the fence and well into the guilty side of the field. It would seem self evident then that the admission of constitutionally barred evidence of such a nature would impact the outcome of Debrow's case. The question is then, was the evidence improper.

Blood was drawn from Appellant Debrow pursuant to a search warrant. As set forth above, the scene at the hospital was "very chaotic." The witness testifying could not testify with certainty as to who labeled the blood, and thus by logical inference, the exact time it was done. A specimen labeled "Martin Debrow" was sent for analysis to Culpepper Testing, a private business. Culpepper forwarded the specimen to MedTox, who noticed that the name on the specimen was not the name provided in the request for testing. Seeking guidance, an "affidavit" form was faxed to Culpepper,

who faxed back an unattested document, signed by "Linda Culpepper" At trial, Jennifer Culpepper testified that the affidavit was signed by Linda Culpepper. There was no testimony that Linda actually made the comparison or that Jennifer had any first hand knowledge of the comparison of identification numbers being made.

Q. This is Linda Culpepper's signature ?

A. Yes.

Accordingly, we have an ersatz affidavit, void at its inception,[2] that was used to authenticate the identification of the blood. The person who had direct knowledge of affidavit never testified, yet based on this document the blood was " confirmed" to be that of Mark Allen Debrow.

Testing was apparently done at MedTox, but nowhere in the testimony of Karla Walker does she confirm she did the actual testing, nor that she reviewed the data produced, nor that she supervised and oversaw the actual testing. It cannot be ascertained who did the test, other than the ambiguous "we." Walker only testified that she reviewed the "final work." (T. 148) An unsigned report was admitted into evidence.(T. 155-156, R.E. 7)

The report of a scientific analysis should not be admitted into evidence, if it is not introduced by the person who performed the test. *Kettle v. State*, 641 So. 2d 746, 750 (Miss. 1994). An exception is made where the evidence is introduced by a qualified expert who reviewed the data obtained during the testing. *Byrd v. State,* 741 So. 2d 1028, 1033 (Miss. App. 1999) The process of the scientific analysis is thus subject to the scrutiny of cross examination. Nowhere in this matter did Karla Walker saw she reviewed actual data, only results. A wider exception has been carved out of

[2]An affidavit is a written declaration, made voluntarily and confirmed by oath which must be taken by a party having authority to administer an oath. *Cox v. Stern*, 170 Ill. 442, 48 N.E. 906, 62 Am St. Rep. 385.

the general requirement on this kind of evidence. A supervisor is allowed to give an opinion as to the results of testing where, the person testifying trained the person conducting the test, supervised their work on a regular basis and the ultimate testimony was based on the results of a "machine's reading and the notes of the analyst.'" *Lenoir v. State*, 853 So. 2d 845 , 849 (Miss. App. 2003) Again, in the instant matter, no testimony directly showed who did the actual testing, how they were trained and whether or not Karla Walker reviewed their notes or just the final report.

As a result, there could be no effective cross examination of Karla Walker. Questions such as the qualifications of the analyst, the procedures followed in this particular instance, and even did they test the correct specimen could not be examined. Debrow thus was deprived of a fundamental Constitutional guarantee, the right to confront the witnesses against him. Instead, he is condemned by an anonymous specter, the vague but ever present "we" who examined the evidence.

However, as pointed out, no objection was made during trial to this highly questionable hearsay being admitted. Thus, shouldn't this issue be viewed as waived? The answer is no:

> The standard of review for constitutional issues is de novo. Baker v. State, 802 So.2d 77, 80 (Miss.2001). In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. U.S. Const. amend. VI; Miss. Const. art. 3, § 26. This right applies to in-court testimony as well as out-of-court statements. Crawford v. Washington, 541 U.S. 36, 50-51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The right to confront and cross-examine a witness is a fundamental right, which is not waived for failure to object. Hobgood v. State, 926 So.2d 847, 852(¶ 11) (Miss.2006).

Turner v. State, 945 So. 2d 992, (Miss. App. 2007)

Debrow was confronted with hearsay evidence, which had been "authenticated" by an affidavit which, itself was not only unattested, but was also hearsay. This violation of the right of confrontation is thus compounded. The use of documents as evidence in a trial where the actual maker is not present is precisely the evil condemned by the United States Supreme Court in

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004)

> The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, **Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter**. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." 1 D. Jardine, Criminal Trials 435 (1832). Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face ····" 2 How. St. Tr., at 15-16. The judges refused, id., at 24, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," id., at 15, the jury convicted, and Raleigh was sentenced to death.

Crawford, Id., at p.44.

The Court in *Crawford* has mandated that where an out of court statement or document is sought to be used as evidence against an accused, and if that evidence is testimonial in nature, having been procured or generated as the result of some state action, then such evidence violates the Sixth Amendments right to confront witnesses. Certainly an "affidavit" and a laboratory report generated at the request of law enforcement fit into the proscribed "testimonial" evidence, and is thus constitutionally barred where the right to cross examine has not been afforded a defendant. The lab evidence against Debrow is precisely what *Crawford* condemns.

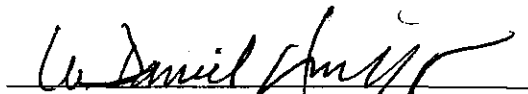
It would appear therefore inarguable that Debrow was confronted with inadmissible evidence, affecting a substantial constitutional right, which clearly not only deprived him of an important right, but more than likely affected the outcome of this trial.

CONCLUSION

Mark Debrow was denied a fundamentally fair trial and is therefore entitled to have his conviction for driving under the influence as an habitual offender reversed and rendered or, in the

alternative, reversed and remanded for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Mark Allen Debrow, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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