IN THE SURPREME COURT OF MISSISSIPPI

No. 2007-KA-00184-COA

JUSTIN BRENT TURNER — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF LEAKE COUNTY

BRIEF OF APPELLANT

JUSTIN BRENT TURNER

ORAL ARGUMENT IS REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. Those representations are made in order that Justice of this Court may evaluate possible disqualifications or recusal.

1. Justin Brent Turner (Defendant/Appellant)
2. Honorable Marcus D. Gordon (Trial Judge)
   P.O. Box 220, Decatur, MS 39327
3. Honorable Mark Duncan (District Attorney)
   P.O. Box 603, Philadelphia, MS 39350
4. Honorable Jim Hood (Attorney General)
   P.O. Box 220, Jackson, MS 39205

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal:

Statement Regarding Oral Argument

Your appellant believes oral argument would be helpful to the Court in this case due to the unusual rulings below and facts herein.

Statement of the Issues

I. **WAS THE APPELLANT "SEIZED" WITHIN THE MEANING OF THE FOURTH AMENDMENT?**

II. **DID THE ALLEGED "CONSENT" CURE THE UNCONSTITUTIONAL SEIZURE?**

III. **WAS THE ALLEGED "CONSENT" VOLUNTARY?**

IV. **WHETHER YOUR APPELLANT WAS DENIED A FAIR TRIAL DUE TO JURY INSTRUCTION?**

Statement of the Case

(Proceedings Below)

Your appellant, Justin Brent Turner, was indicted on June 19, 2006 by the grand jury of Leake County, Mississippi, on two (2) counts of DUI-Manslaughter as a result of a two (2) car collision that occurred on February 19, 2006, in Carthage, Mississippi, resulting in the deaths Bailey A. Trippe and Kathy Krystine Harris. **(R.E. 3).**

Trial began on January 10, 2007 before the Honorable Marcus Gordon in Carthage, Mississippi with the State calling approximately eleven (11) witnesses. According to Judge Gordon's procedure, rather than entertaining a "pre-trial" Motion to Suppress, he addresses these matters as they come up. Therefore, before introduction of the blood-sample, and alleged statements by appellant counsel "objected" and a suppression hearing was conducted. After said hearing, Judge Gordon granted one (1) of the Motions to Suppress, in-part, and denied it, in part. **(T.R. 1/51-54).** After the State rested, the appellant presented his defense and testified himself as to the events that fateful evening. Both sides rested without any rebuttal and the jury was instructed, over objection, of your appellant and thereafter returned verdicts of "Guilty" as to both counts. **(T.R 3/237-305).**

On January 23, 2007, your appellant filed his Motion for a New Trial and Judgment of Acquittal, which was denied by the Court on February 2, 2007. **(T.R. 3/304).**

On January 23, 2007, your appellant was sentenced as follows, to-wit:

COUNT 1: Twenty-five (25) years custody of M.D.O.C., five (5) years suspended, and five (5) years post-conviction release; and

COUNT 2: Ten (10) years custody of M.D.O.C., five (5) years suspended, and five (5) years post-conviction release, consecutive to the sentence in COUNT 1.**(T.R. 3/340-350).**

After sentencing, your appellant filed a Notice of Appeal and Motion for Bond Pending Appeal that was granted and he was thereafter released on bail and remains so to this date. **(T.R. / 350-352).**

It is from this conviction and sentence that your appellant now appeals to this Honorable Court.

FACTS OF THE CASE

Sometime after 1:00 A.M. on February 19th, 2006, a two (2) car automobile accident occurred on Goshen Road near Nazary Lane in Leake County, Mississippi.

One of the vehicles, a 2000 Mercury Mountaineer was up against some trees, on fire, with Bailey A. Trippe and Kathy Krystine Harris trapped inside. The other vehicle, a 1999 pick-up truck, was a little further down the road, on the opposite side, against some trees. (Both vehicles appeared to be headed in the same direction) **(T.R. 1/28).**

Leake County Deputy Jim Moore responded to the scene after several calls having been made to 911. Upon his arrival, he saw the pick-up on his right with a white male (appellant herein) and a female standing outside crying. Dep. Moore went up and spoke to the other officers at the scene, and noticed another vehicle against some trees on fire. **(T.R. 1/30).**

An ambulance arrived and your appellant along with his female friend were told to get checked out by medical personnel. **(T.R. 1/30).**

Deputy Moore then went to the ambulance and engaged you appellant in conversation about what happened. Your appellant told him he was coming onto Goshen Road and the other vehicle came around Nazary Lane, and he couldn't stop, and hit him. **(T.R. 1/30)**

Dep. Moore then testified he "smelled" alcoholic beverages coming from his (appellant's) person, **(T.R. Vol.1/ 35)**. and asked him about it, to which your appellant replied he had one (1) beer.

Dep. Moore then stated he talked with appellant about the need to obtain a blood sample and he (appellant) agreed. **(T.R. 1/35-36)**.

Thereafter Dep. Mark Wilcher (accident re-constructionist) arrived and spoke with appellant in the back of the patrol car. **(T.R. 1/36)**.

On cross-examination, Dep. Moore states he didn't write a report nor record exactly what your appellant said and/or when he said it. **(T.R. 1/39)**. He further stated he was unaware of any trauma appellant may have suffered. **(T.R. 1/41-44)**.

At this point, having been previously advised of a suppression issue the Court excused the jury and allowed testimony to continue outside their presence. **(T.R. 1/ 37)**. Dep. Moore claimed your appellant was not "under-arrest" while he was detained in the patrol car and that despite the "smell" and appellants' admission of drinking one (1) beer, he was free to leave and he (Dep. Moore) would not and did not give him a citation **(T.R. 1/ 39-40)**.

Under cross-examination, Dep. Moore admitted inconsistencies in his testimony and reports as to exactly what your appellant told him about the accident. **(T.R. 1/43)**. But, clearly stated no **Miranda** warnings were given. **(T.R.1/44-45)**. The State called no other witnesses.

At this point, counsel for your appellant argued that the testimony of Dep. Moore should be "excluded" (as to any statements or consent your appellant made as violative of the Fourth Amendment). **(T.R. 1/45)**. however, the Court ruled otherwise and said, to-wit:

> **BY THE COURT:** That's not true. This Court is required, and Mr. D.A. is following the procedure correctly; that for the statement to be admissible he must offer up all witnesses who heard the statement, all investigating officers.

So you're in error and you're overruled.

The State then called Deputy Mark Wilcher, criminal investigator with the Leake County Sheriff's Office, who testified that he received a call around 1:30, responded to the scene and listened to what Dep. Moore claimed your appellant told him. **(T.R. 1/46).** Thereafter, Dep. Wilcher spoke with your appellant in the back of the patrol car, and stated he felt appellant had been placed there not because he was under arrest, but, because it was (cold) 19° outside. At this time, Deputy Wilcher did not consider the scene to be a "crime scene", to-wit:

> **A.** No, Sir. At that time all we knew is that a traffic collision had occurred and Mr. Turner was asked what happened. He consented to the Blood Test and then was released. **(T.R. 1/48).**

The State called no further witnesses and your appellant through counsel argued the "suppression" matter.

> The Court stated, a statement of guilt, of course, becomes admissible...and... ...requires that you comply with...**Miranda**. So the decision, then, must be whether or not this Defendant was in custody. And you asked the question whether or not they knew that a crime had been committed...he was in custody...so Miranda...was triggered...and therefore "sustained" the objection **(T.R. 1/54-55).**

The jury now returns, and Dep. Moore continues with his testimony about the accident. **(T.R. 1/54-55).**

On cross-examination, Dep. Moore testified about the temperature that night, the road surface, the lack of any center-line or other marking, and no speed posted signs and related. **(T.R. 1/60-61).**

The State then called a paramedic, Donald Brian Taylor who testified that he and Robert Atkinson (paramedic) responded to the scene that evening, and checked out your

appellant and his female friend. He further stated that both were alert and oriented...were not stumbling or falling down...**(T.R. 1/63-71)**.

After his testimony, both sides stipulated that Bailey A. Trippe and Kathy Krystine Harris died as a result of injuries sustained in the automobile crash on or about February 19th, 2002 **(T.R.1/71)**.

The State then called Michael Alexander who worked for Leake County Communications who stated he'd received three (3) 911 calls the evening in question, one (1) by your appellant and over objection the State played the call to the jury. **(T.R. 1/79).**

The State then called Deputy Cornelius Turner who said he thought Dep. Neely told him to put your appellant in his patrol car **(T.R. 1/80)**, and that he took your appellant to Leake County Memorial Hospital **(T.R. 1/81)**, at which time your appellant's attorney "objected" and requested the Judge to address this matter outside the presence of the jury. **(T.R. 1/81)**.

With the jury out, Dep. Turner testified that he took your appellant to the hospital to get a blood kit done **(T.R.1/81)**. He said he was present when appellant's blood was drawn and that before it was drawn he read the consent form to appellant. **(T.R. 1/82)**. He further stated that the nurses at the hospital witnessed this event.

On cross-examination, Dep. Turner said Dep. Wilcher instructed him to take your appellant for the blood test **(T.R. 1/86-87)**, and that he read the consent form to him, but, was unaware if your appellant could read or write. He also said the "witnesses were not in the room with your appellant when he went over the form, but, were outside at the desk. **(T.R.1/89)**

When asked further about this consent form and the nurses signing that they witnessed it, he said, to-wit:

> **Q.** What did you tell the witnesses when they signed the form?
> **A.** I told them I needed somebody to witness this.
> **Q.** Okay. Were they witnessing Justin's signature or witnessing that fact that you read that to him?
> **A.** To my knowledge, they would be witnessing that they did the blood kit. **(TR 1/90).**

Thereafter, the State called Laura Kelly, a lab tech from the hospital who took appellant's blood. When asked by the D.A. if she was actually present when (Deputy) Cornelius Turner...read that to the defendant, she said, to-wit:

> **A.** That part I cannot recall if was or not.
> **Q.** Did you read it to him?
> **A.** No, Sir.
> **(TR 1/93).**

On cross-examination, Ms. Kelly admitted she did not see your appellant sign the consent form, or hear anybody read it to him. **(TR1 /96).**

After intense questioning as to why she signed a document as a witness, when she never witnessed anything, she said, to-wit:

> **A.** Well, when—I mean, I did not see him sign this, but it was presented to me as he had.
> **(TR 1/97).**

After Ms. Kelly testified, the State called Vicky Moody, an R.N. at the hospital who also assisted in taking appellant's blood. She stated she wasn't in the room, but, was about five (5) feet from them and heard Dep. Turner read the form to your appellant **(TR 1/100).** However, on cross-examination she said, to-wit:

> **A.** I didn't have that paper in my hand. I don't know if he read the exact words to him...

Also she couldn't say if your appellant was told he could refuse consent or whether he was advised of other rights.

(TR 1/104).

During this hearing, the defense called the appellant who testified that he was eighteen (18) years at the time, had an eleventh (11^{th}) grade education and no prior problems with law enforcement. **(TR 1/106-107).** He was not given Miranda and had not been advised he could refuse to sign the consent form. and in-fact, stated, to-wit:

> **A.** No, Sir. I believe, you know, the way I was raised, a cop tells you to do something, you do it, no questions about it.
> **(TR 1/107).**

On cross examination, your appellant "denied" telling Dep. Moore he'd agree to take a blood test at the scene **(TR 1/109)**, and did not recall Dep. Turner reading the consent form to him. On re-direct, he said he felt he couldn't refuse and was intimidated, and signed it only so he could go home! **(TR 1/110-112).**

Based on the above, your appellant, argued that his Fourth Amendment Rights were violated by the initial illegal detaining of him and the involuntary "consent" and related. **(TR 1/115).** Despite citing the Court to **Florida vs. Royer**, 460 U.S.491, 103 S.Ct. 1319, 75 L.Ed.2d.229 (1983); **Wong sun v. US**, 371 U.S.471, 9L.Ed.441, 83 S.Ct.407 (1963); and **Miranda v. Arizona**, 384 U.S. 436 (1966), the Court "denied" the request to suppress all statements and blood drawn.(He earlier ruled the statements were inadmissible.)

The Court inquired whether **Miranda** was necessary before a person consents to the drawing of blood. Counsel cited **US v. Villareal**,963 F. 2d.770 (5^{th} Cir. 1992), **Pennick v. State**, 440 So. 2d.547 (Miss. 1983), **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct.

1868, 20 L.Ed. 2d.908 (1966), **Fourth Amendment of the United States Constitution, Brown v. Illinois**, 422 U.S. 590 (1975), and **Richardson v. U.S.**, 949 F.2d.851 (6th Cir. 1991), to no avail. **(TR 1/116-119).**

The Sate argued that Dep. Moore had "probable cause" due to the "smell" he claimed, and the admission of appellant to having one (1) beer, plus his consent **(TR 1/119)**, and even said, "They could have gone and got a search warrant had he refused." You appellant responded by citing **Shaw v. State**, 938 So. 2d. 853 (Miss. 2005) to no avail. Finally, the Court said, to-wit:

> **BY THE COURT:** No, Sir...I don't buy your argument. The statement that was given at the scene by this Defendant was quashed because of the violation of the Miranda rule. But yet, if that right was violated, was it then cured by his later consent...It's evident before this Court regarding what occurred there at the hospital that the consent to draw blood was granted in the presence of two (2) witnesses. I can't see where that's a violation of his constitutional rights. You know,...but we can waive that right. And the fact that the defendant ....was 18 years old does not mean that he cannot knowingly...consent, so your objection is overruled. **(TR 1/122).** (emphasis added).

Dep. Turner continued his testimony and the State introduced the blood kit and consent form, over objection. **(TR 1/126-128).**

Chance Wiskus next testified for the State and told the Court he was appellant's third cousin and had been with him that evening. Chance testified about getting in the pick-up truck with your appellant and his girlfriend and going after Bailey Trippe who had just driven by appellant's house after a series of phone calls about his sister. **(T.R.2/144).**

While in the vehicle chasing Bailey, your appellant told him to buckle up he was about to stop him. The vehicles collided, but, both kept going in the same direction,

within minutes, he saw Bailey's brake lights and your appellant ran into the back of him. Bailey's vehicle skidded off the road, hit a tree and started on fire. **(T.R. 2/147-149).**

The State then called Deputy Mark Wilcher, the accident re-constructionist from the Leake County Sheriff's Office and he testified about getting a call that evening around 1:30 and arriving at the scene of the accident around 2:05/2:10 A.M. When he arrived, he testified that your appellant was already in the back seat of Deputy Turner's patrol car and asked if Deputy Turner had been instructed to take the appellant to have his blood drawn, and said, to-wit:

> **A.** Yes, Sir—I had taken command...Deputy Moore spoke to (appellant) Turner, and said he'd consent to a blood sample.
> **(T.R. 2/167-168)**

Deputy Wilcher further testified about taking photographs and measurements at the scene. **(T.R. 2/170).** He concluded his testimony by stating that the collision was caused by appellant's vehicle running into the back of Trippe's vehicle and that...Bailey didn't contribute anything to the collision. **(T.R. 2/194-195).**

Mrs. Wendy Harthcock, a forensic toxicologist from the Mississippi Crime Lab testified next and went over the blood test kit and lab analysis **(T.R.2/228),** and indicated appellant's BAC was .10 **(T.R.2/231).** She further testified about the significance of the different color blood-tube tops **(T.R.2/234-235),** and acknowledgment that blood-analysis of Bailey Trippe contained a high amount of "methamphetamine" in it. She was the State's last witness.

The State "rested" and your appellant renewed all earlier Motions, especially the Motion to Suppress **(T.R.2/237-238)** the blood sample and the Court "denied" same. The Court said, to-wit:

BY THE COURT: I'm going to overrule that Motion...there is a difference in these two cases (referring to Comby appellant cited)...But in this case what we have, in addition to the smell of alcohol, we have the...debris in the road—location of the vehicles which are corroborating facts...that a persons ability to drive was impaired, suggesting that he could have some influence caused by alcohol or drugs. So rather than revisit what we've already gone through, that's going to be the ruling by the Court. Your motion is overruled. **(T.R.2/238-239).**

After that, your appellant made his Motion for a Directed Verdict which was denied. **(T.R. 2/239-240).**

The defense then began its case by calling Dr. David T. Stafford who testified that he had been the Director of Forensic Toxicology, at the University of Tennessee and that he reviewed the lab reports from the Mississippi Crime Lab.**(T.R. 2/243).** He stated that with regard to the extremely high level of "methamphetamine" in Bailey Trippe's system, he would have been greatly impaired! **(T.R. 2/296).** Also, he testified at length as to the proper color tubes used in the blood test kit and that if both were "red", it'd raise the B.A.C. reading due to the addition. **(T.R. 2/296).**

Brett Alexander was then called as the appellant's accident re-constructionist and went over the photographs, sketch of measurements of Deputy Wilcher.

(T.R. 2/247)(T.R. 2/248-272).

Appellant's sister, Brandi Turner was called and she explained the reason for the chase and problems they had with Bailey Trippe. She said she was 16 and had been seeing Bailey Trippe, who was a lot older. She attempted suicide after being told they couldn't see each other and Bailey kept calling her. **(T.R.3/272-278).**

Your appellant then testified. He stated he was eighteen (18) years old at the time of the accident and had completed the eleventh (11^{th}) grade. He stated he had some beer

earlier that evening and went home. At some point, Bailey called looking for Brandi, and Justin answered the phone. About that time, Bailey went driving by Justin, who was parked in his driveway. Justin, Chase, and Tori followed Bailey. At some point, he attempted to pass Bailey and bumped him—then up by Mrs. Farrell's house he saw brake lights, swerved and remembers hitting a tree. **(T.R.3/289).**

Dr. Howard C. McMillan was the last witness the defense called and testified about the character of your appellant. **(T.R. 3/300-302).**

The defense rested and the State finally rested.

Your appellant, now at the close of all evidence, renewed all previous Motions and argued same, specifically citing Miss Code Ann. § 63-11-8, **McDuff v. State, 763 So. 2d 850 (Miss. 2000),** and **Shaw, 938 So. 2d. 853 (Miss. 2005)**. The Court "overruled" same and said, to-wit:

> **BY THE COURT:** And you are overruled. I think there is probable cause in this case. Jim Moore,...testified he approached the defendant he smelled alcohol on his breath, and the defendant without being questioned, stated he drank one beer. Now that's probable cause...and then again, this statement was in evidence. Then later there was another—some statement was made again, but after questioning, the Miranda warning not being given, and I would not allow it to be admitted. But, I think that was sufficient probable cause...
> (T.R. 3/304).

The Court went over the jury instructions, charged the jury and after arguments they retired to deliberate. **(T.R. 3/305-336)**.

They later returned verdicts of guilty as to both Counts and your appellant was thereafter sentenced.

Rulings of the Trial Court

In an effort to simplify the procedure and rulings of the trial court below your appellant submits a brief summary of that Court's rulings on his various motions.

Your appellant first makes an objection regarding a statement he made about the accident while being questioned by law enforcement officers. At the time of the statement your appellant was in the back seat of a patrol car. The trial court ruled that your appellant was in custody and subjected to interrogation, and therefore, these statements were suppressed as a violation of **Miranda**. **(T.R. 1/51-54)**.

The next issue argued by your appellant, in response to the court's question, was whether the consent he gave to draw his blood cured the **Miranda** violation. Your appellant argued and cited **Florida v. Royer**, 460 U.S. 491 (1983), **Wong Sun v. United States**, 371 U.S. 471 (1963), and **Brown v. Illinois**, 422 U.S. 590 (1975) stating that his consent was not voluntarily given and that it was not sufficiently attenuated from the Miranda violation. The trial court disagreed and allowed for the blood test to be admitted. **(T.R. 1/115-122)**.

The third objection concerned a motion for judgment of acquittal and a renewal of all previous motions. Specifically, your appellant again objected to the admissibility of the blood test and argued that it should have been suppressed because no probable cause existed at the time of the search. The trial court stated that there were enough facts present to establish probable cause, a ruling made on facts, such as debris on the road, that were not known or mentioned by officers, and therefore the trial court denied the motion. **(T.R. 1/237)**.

Finally, you defendant made a motion to renew all motions. Again your appellant argued that there was an absence of probable cause and that the drawing of his blood was unconstitutional. The trial Court held that after hearing the testimony of witnesses and

seeing the evidence probable cause was present. As a result the motion was denied. **(T.R.1/303)**.

Your appellant submits that his appeal is based on the court rulings of the above motions. Your appellant feels as though the trial court was absolutely correct in finding that a Miranda violation had occurred. However, the trial court continuously erred by admitting the blood sample even after three (3) objections. From the record it appears that the trial judge added statements and comments each time he ruled. Some of these statements seem to be extraneous, (i.e. Stating that your appellant, "without being questioned, stated he had one beer"**(T.R. 3/305))** and other comments were not based on the evidence. (i.e. Consent was granted in the presence of two witnesses **T.R.1/122**).

Therefore because of these errors your defendant's rights were violated and he was substantially prejudiced at trial.

SUMMARY OF THE ARGUMENT

Your appellant submits that Deputy Moore did not have "probable-cause" to seize him and require a blood test. Furthermore, he was questioned and asked if he'd "consult", despite the trial judge's ruling that he "volunteered" to take the test.

In addition, the "consent" at the hospital was invalid due to the facts occurring up to and including the drawing of his blood, and especially in light of the alleged witnesses, signing a forum claiming they witnessed same, when both testified they did not!

Lastly, any alleged "consent" somehow found by the trial judge was not freely and voluntarily given, and more importantly, was not freely and voluntarily given, and

more importantly, was not free from "Taint" from the original activities herein and due to same, the conviction below must be reversed.

ARGUMENT

I. WAS THE APPELLANT "SEIZED" WITHIN THE MEANING OF THE FOURTH AMENDMENT?

A "seizure" of a person occurs" only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen...**Terry v. Ohio**, 392 U.S.1, 88 S. Ct.1868, 20 L.Ed 2d.889(1968). In the case below, applying the objective standard for determining whether there has been a "seizure", it's clear that placing appellant in the back of a patrol car qualifies!

Furthermore, this initial Terry-type encounter escalated almost immediately to an "arrest" without "probable-cause".

At best, all Dep. Moore had was (A) his later testimony (because he clearly admitted filing no report, nor recording anything he saw or heard that night) that he smelled alcohol from appellants person (yet, none of the medical personnel at the scene nor at the hospital ever mention this, nor does any other law enforcement officer); and (B) appellant's statement that he had one (1) beer. That's It!!

Deputy Moore clearly stated that he got up in the ambulance while your appellant was being checked out and "asked" him what happened and if he'd been drinking. **(T.R.1/30-35)** (Emphasis added).

Immediately, he placed him in the back of the patrol car to be taken for a blood test. No "**Miranda**", no advice of rights or related was read to him! Also, he was not given a traffic citation nor ever received one.

The subsequent taking of blood and/or request to do so occurred simply as a matter of procedure, not based on "probable cause" and due to same the blood-alcohol tests should have been suppressed. This is especially true, after the trial Judge found a Fourth Amendment violation, but, then somehow felt that despite this clear violation of appellant's rights, appellant's later "consent" cured it and/or evidenced a "waiver" of these rights which was error and a clear abuse of discretion.

The State can't have it's cake and eat it! On the one (1) hand, they argued your appellant wasn't "seized" or "under-arrest", (despite clearly having his liberty restricted by being placed in the back of a patrol car) and that his "detention" was simply because it was cold outside! On the other hand, they attempt to come up with alleged probable cause after the fact by stating Deputy Moore smelled alcohol.

The trial judge almost got it right when he found that your appellant was, in-fact, seized and in-custody, when placed in the back of the patrol car, with no door handles for him to exit from, and he continued under same until the blood test was performed.

The record below, unlike numerous other cases decided by this Court, afforded Deputy Moore who actually instructed Deputy Turner to take your appellant for the "blood-sample" based entirely on what Deputy Moore allegedly told him! (i.e. that the appellant consented) **(T.R.1/48).**

Contrary to the Court's numerous rulings on this matter, Deputy Moore had no idea how the accident occurred; both vehicles were headed in the same direction; no debris were discovered before the decision to take appellant's blood was made, nor did either Deputy Moore or Deputy Wilcher believe that a crime had been committed. **(T.R1/48.).**

Furthermore, while Judge Gordon somehow found that your appellant, without questioning, volunteered he had one (1) beer, that is not what the testimony showed and he was in error.

Clearly, the Mississippi Supreme Court is still committed to the proposition that an illegal arrest renders a subsequent search inadmissible. **Pollard v. State**, 233 So.2d.792(Miss. 1970), **Pennick v. State**; 440So.2d547(Miss 1983); **Ashley v. State,** 423 So.2d,1311 (Miss.1983); **Cole v. State**, 493 So.2d.133(Miss. 1986); **Longstreet v. State**, 592So.2d.16(Miss.1991);**Floridav.Royer**,460 U.S.491,103S.Ct.1319,75L.Ed. 2d.229 (1983), **Brown v. Illinois**, 982 U.S. 540 (1978), **Dunaway v. New York**, 982 U.S. 200 (1979) ,**McDuff v. State**,763 So.2d.850 (Miss. 2000), **Shaw v. State**, 938 So.2d.853 (Miss. 2005), **Comby v. State**, 901 So.2d.1282 (Miss. 2004). Therefore, your appellant was seized without probable cause and the search of your appellant's blood was unreasonable and should have been inadmissible at trial.

II. DID THE ALLEGED "CONSENT" CURE THE UNCONSTITUTIONAL SEIZURE?

As argued and cited to the Court, the case law is clear that a search based upon consent may be undertaken without a warrant or probable cause. **Schneckloth v.Bustmonte**, 412 U.S. 218, 36L.Ed.2d.854,93S.Ct.2041(1973). However, if, like we have here, the consent is given after an illegal seizure, that prior illegality taints the consent to search. **Florida v. Royer**, 460U.S.491, 75L.Ed.2d.229, 103S.Ct.1319(1983); **Wong Sun v. United States**, 371 U.S. 471, 9L. Ed. 2d. 441, 83.5.CT.407(1963). There are some instances although (not like below) whereby notwithstanding the taint of an illegal arrest/seizure, the consent can be valid, if, the consent was given at a time

sufficiently attenuated from the illegal arrest/seizure so that the taint may be considered dissipated. This did not occur below!

Factors to consider in determining whether the consent is sufficiently removed from the taint of the illegal arrest/seizure, include the length of time between the illegal seizure and subsequent search (here about 20 minutes), the presence of intervening circumstances (none) and the purpose and flagrancy of the misconduct.

Brown v. Illinois, 422 U.S.590, 45L.Ed.2d.416. 955.Ct.2254 (1975).

As in the case of **Richardson v. United States**, 949 F2d.851(6th Cir.1991), placing the appellant in a patrol car, then after about twenty (20) minutes he consents...was improper and violative of his Fourth Amendment Rights, and due to same, the trial Judge abused his discretion in not suppressing the blood-test as requested.

The "timing" between the initial encounter, illegal seizure/arrest (i.e. placing appellant in patrol car) was almost immediate. Then, from the patrol car, he was taken directly to the hospital, still in custody and presented with consent/waiver form...in a matter of minutes. There was no attenuation here.

III. WAS THE ALLEGED CONSENT VOLUNTARY?

In order to determine if consent was validly given, a court asks (1) whether the consent was voluntary, and (2) whether it was an independent act of free will. See **U.S. v.Santiago**, 310 F.3d at 342 (citing **Chavez-Villareal**, 3F.3d at 127.).

To determine whether Turner's consent was voluntary, the court must consider the following factors: (1) the voluntariness of his custodial status;(2) the presence of coercive police procedures; (3) the extent and level of his cooperation with the police; (4) his awareness of his right to refuse consent; (5) his education and intelligence; and (6) his

belief that no incriminating evidence would be found. **U.S. v. Jones**, 234 F.3d 234, 242 (5th Cir. 2000)(citing **United States v. Shabazz**, 993 F.2d 431,438 (5th Cir.1993). To determine whether Turner's consent was an independent act of free will, the Court considers "(1) the temporal proximity of the illegal conduct and consent; (2) the presence of intervening circumstance; and (3) the purpose and flagrancy of the initial misconduct." **Jones**, 234 F.3d at 243. (The Government bears the burden of proving both that the consent was voluntary and that it was independent.) **U.S. vs.Jenson**,462 F.3d 399, 407-08.

In making a reasonable suspicion inquiry, a court "must look at the 'totality of the circumstance' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." **United States v. Arvizu**, 534 U.S. 266,273 (2002); **United States v. Cortez**, 449 U.S. 411, 417 (1981). Reasonable suspicion exists when the officer can point to specific and articulate facts which, taken together with rational inferences from this facts, reasonably warrant the search and seizure. See, e.g., **UnitedStates v. Santiago**, 310 F.3d 336, 340 (5th Cir. 2002). In evaluating the totality of the circumstances. a court may not consider the relevant factors in isolation from each other. **Arvizu**, 543 U.S. at 274. However, it is clear that reasonable suspicion need not rise to the level of probable cause. **Arvizu**, 534 U.S. at 274. (Citing **Florida v. Royer**, 460 U.S. 491,500 (1983)(explaining that an officer should use "the least intrusive means reasonably available to verify or dispel the intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time")).

In addition, you appellant submits that the alleged "consent" at the hospital was defective for several reasons, to-wit:

A. it was not the product of an intervening act of free will; and

B. it was not sufficiently attenuated from the initial illegal seizure/arrest; and

C. it was a flagrant disregard of his rights; and

D. it was done as a routine procedure, not based on probable cause, and

E. it was done improperly by having witnesses sign same WITHOUT actually witnessing the act and/or hearing the rights read to your appellant.

Again, despite the unrefuted testimony by both nurses at the hospital that (A) they did not see your appellant sign the consent-form, and (B) one (1) clearly never heard anything and the other claimed she heard some parts, but, couldn't say for sure he was read all of his rights and/or the actual wording on the consent form—Judge Gordon found the consent valid, and contrary to case law, without additional inquiry; found that the consent "waived" any/all Fourth Amendment violations he found to have occurred, which is a clear abuse of discretion and contrary to the laws of the State and due to same, the conviction below must be reversed.

IV. WHETHER YOUR APPELLANT WAS DENIED A FAIR TRIAL DUE TO THE JURY INSTRUCTIONS?

Jury Instructions

The standard of review applicable when considering challenges to jury instructions requires that the appellate court avoid considering instructions in isolation, but rather consider them as a whole for determining whether the jury was properly instructed. **Burton ExRel. Bradford v. Barnett**, 615 So. 2d580,583 (Miss. 1993); **Comby v. State**, 901 So.2d 1273 (Miss. Ct.App.2004)

Your Appellant submits that the jury was not properly instructed. This Court has held in **Wilkerson v. State** that a defendant is entitled to a jury instruction on proximate cause. **731 So. 2d. 1173. (Miss. 1999).**

Wilkerson's holding was reaffirmed two (2) years later by the Mississippi Court of Appeals in **Ware v. State,** 790 So.2d.201 (Miss. Ct. App. 2001). Although, Turner may have been entitled to an instruction, the mere lack of one is not necessarily reversible error. In **Wilkerson v. State**, the Court held that the absence of a proximate cause instruction did not rise to reversible error because:

A. Defense counsel made no specific reference to proximate cause.

B. Defense failed to attack the State's instruction for the absence of a requirement that proximate cause be found.

C. Proffered instruction was confusing.

Wilkerson, 731 So. 2d.1173, 1180.

In **Ware**, the Court further held that the instruction did not correctly state the law and the trial judge gave S-1 instruction which safe-guarded against Ware being found guilty in the absence of finding of proximate cause. **Ware,** 790, So. 2d.201.

In **Ware**, the instruction told the jury that it could convict the defendant if it believed from the evidence that Floyd Ware, JR., did willfully, unlawfully, and feloniously operate a motor vehicle while under the influence of intoxicating liquor having ten one-hundredths percent (.10%) or more weight volume of alcohol in his blood, and in a negligent manner caused the death of Tommy E. Sawyer and Glenda Sawyer. **Id**. at 215.

In the case at hand, your appellant submits that he objected to the trial court's failure to give a proximate cause instruction and that the instruction given did not safeguard the defendant of being found guilty in the absence of a proximate cause instruction. First, the record clearly shows that your appellant objected to the giving of jury instruction **(T.R. 1-313)**. Your appellant clearly and specifically requests that a different version [of instruction] in a negligent manner be given **(T.R. 1-313)**. By this objection your appellant intimated that the Court's failure to give a proximate cause instruction is prejudicial to your appellant and is grounds for reversal.

Furthermore, your appellant submits that the instruction given did not safeguard your defendant from being found guilty in the absence of a proximate cause instruction,. Instruction S-1 which was given by the Court is as follows:

> The Court instructs the Jury that if you believe from the evidence in this case beyond a reasonable doubt that at the time and place changes in Count One (1) of the Indictment and testified about that, the Defendant, Justin Brent Turner, did willfully, unlawfully, and feloniously operate a motor vehicle while under the influence of intoxicating liquor, having, eight one-hundredths percent (.08%) or more by weight volume of alcohol in his blood, and in a negligent manner caused the death of Bailey Trippe, then it is your duty to find that the defendant is guilty as charged in Count One (1). **(R.E.8)**.
> (The Court instructed the jury exactly the same for Count Two (2), with the

exception of replacing Bailey Trippe's name with Katherine Harris's). **(R.E. 8)**.

Nowhere in either of these instructions is proximate cause mentioned. This instruction does not safeguard your defendant, because a jury could find your appellant guilty irregardless of proximate cause. According to this instruction all they need to be shown is that your defendant acted negligently.

Therefore, because you appellant objected to the giving of instruction S-1 and because this instruction doe NOT safeguard the appellant a reversal of your appellant's conviction is required.

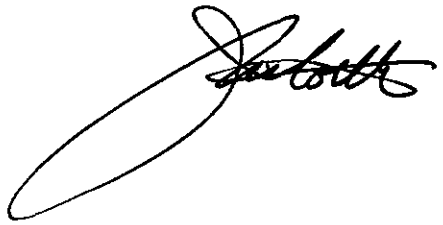
Conclusion

Your appellant submits that his rights under the Fourth Amendment of the United States Constitution and Article 3, Section 22 of the Mississippi Constitution were violated below and due to same his conviction and sentence should be set aside.

Neither Deputy Moore nor Deputy Wilcher had "probable cause" to seize/arrest and compel the taking of blood from your appellant before he was placed in the back of the patrol car and nothing "intervened" to cure this taint that required the trial judge to "suppress" the blood sample.

In addition, the consent was invalid especially in light of the testimony of the two (2) alleged witnesses—who "witnessed" nothing.

Based upon the foregoing, the conviction below must be reversed



CERTIFICATE OF SERVICE

I, JOHN M. COLETTE, attorney for and on behalf of defendant/ appellant herein, do hereby certify that I have this day caused to be mailed, U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to the following interested parties at their usual mailing address, to-wit:

Justin Brent Turner, Appellant
1975 North Jordan Street
Carthage, Mississippi 39051

Honorable Marcus D. Gordon, Trial Judge
Post Office Drawer 220
Decatur, Mississippi 39237

Honorable Mark Duncan, District Attorney
Post Office Box 603
Philadelphia, Mississippi 39350

Honorable Jim Hood, Attorney General
Post Office Box 220
Jackson, Mississippi 39205

THIS, the 30th day of July, 2007.

JOHN M. COLETTE, Attorney for and on behalf of Defendant/Appellant, Justin Brent Turner