IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01178-COA

STATE OF MISSISSIPPI — APPELLEE

VERSUS

FRANCISUS ARNAZ ROBINSON — APPELLANT

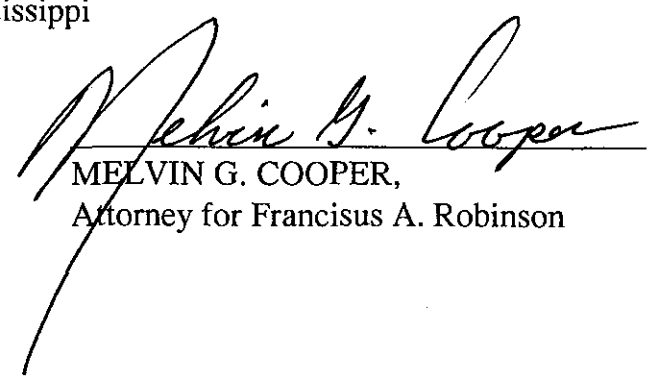
CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following 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 disqualification or recusal.

Appellant: FRANCISUS ARNAZ ROBINSON

Attorney: Melvin G. Cooper, attorney for the Appellant

Appellee: Hon. Larry Bourgeois and Hon. Joel Smith, A.D.As., Harrison County, Mississippi



MELVIN G. COOPER,
Attorney for Francisus A. Robinson

TABLE OF CONTENTS

TABLE OF CASES

Cases: **Page:**

Cases: **Page:**

Other:

STATEMENT OF THE ISSUES

I. THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED THE APPELLANT'S MOTION TO SUPPRESS THE CONSENT FORMS SIGNED BY THE APPELLANT.

II. THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED THE APPELLANT'S MOTION FOR MISTRIAL.

III. THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED THE APPELLANT'S MOTION FOR JNOV as to COUNTS III, IV and V OF THE INDICTMENT.

IV. COURT SHOULD FIND THAT THE CUMULATIVE ERROR COMMITTED BY THE TRIAL COURT MANDATES THE REVERSAL OF THE APPELLANT'S CONVICTION.

STATEMENT OF THE CASE

I. Course of the Proceedings and Disposition in the Court Below

On May 23, 2005, an eleven count Indictment [C.P.13-17] was returned against FRANCISUS ARNAZ ROBINSON in the Circuit Court of Harrison County, Mississippi, First Judicial District charging him with the offenses of sexual battery (3 counts), burglary of a dwelling (6 counts), forcible sexual intercourse, attempted forcible sexual intercourse.

On March 2, 2006, the trial court heard the Appellant's motions (a) to suppress the voluntary consent form; and, (b) to sever counts. On March 23, 2006, the trial court entered an Order which granted the Appellant's motion to sever counts for those counts which involved different victims, and which denied the Appellant's motion to suppress the voluntary consent form. [C.P.7] On December 7, 2006, the trial court entered and Order denying the Appellant's motion to reconsider the Order of March 23, 2006. [R.E.26]

On April 10-11, 2007, trial was held for Francisus A. Robinson on Counts III, IV and V. On April 11, 2007, the trial concluded with a jury verdict and the return of a guilty verdict as to the charges forcible sexual intercourse, sexual battery and burglary of a dwelling. The Final Judgment was entered by the Trial Court on April 11, 2007. [R.E.24]

Following the entry of the Final Judgment, Appellant filed for a Motion for JNOV or in the alternative, a New Trial, on April 19, 2007. This Motion was denied by the Trial Court on June 21, 2007. [R.E.31] Notice of Appeal was filed on July 12, 2007.

II. Statement of Facts:

Motion to Suppress:

The Appellant called up his amended motion to suppress statement and voluntary consent forms. [T.3] As its first witness the State called Sergeant Christopher Parrish of the Gulfport Police Department. Parrish stated that on December 23, 2004, he was a patrol supervisor. On this date he responded to a burglary complaint at about 1:45 a.m. He made his way to the complaint location via the backway. As he approached the location he observed a vehicle sitting on the side of the road, which turned its headlights on and left the general area of the burglary. The car was about three houses away from the complaint location. He described it as a blue 4-door. The vehicle left the area at a high rate of speed and Parrish turned around and got behind it. He then saw the vehicle turn into Bayou View Apartments and pull into a parking spot. Parrish drove past the vehicle and then turned around and came back to it. As he walked up to the vehicle he saw a black male who appeared to be asleep. [T.4-5] Sgt. Parrish identified the Appellant as the person he saw in the vehicle. [T.6] He called for another Officer to assist. When Officer Tommy Payne arrived they had the person get out of the car and they began to question him as to where he was headed, etc. Parrish stated the person in the vehicle was wearing black shorts and a white T-shirt which he thought was odd because it was cold and windy out. [T.6-7] The person stated that he lived in apartment C-7, which was on the opposite of the apartment complex from where he had parked. [T.7] Parrish identified State's Exhibit 1 as being the

voluntary consent to search form which he had used that night. Parrish stated that he basically read the form to the Appellant, had the Appellant sign it, and then Parrish signed it. The time of the consent form was 3:10 a.m., December 23, 2004. [T.7-8] Parrish stated that they then began to check the vehicle for anything that might be suspicious or otherwise. He believed that he saw, he thinks, a screwdriver, a white T-shirt, and a pair of work gloves on the front seat in plain view; he believes this observation was made prior to having the Appellant exit the vehicle. [T.8-9] Parrish stated that Detective Chaix arrived on scene and anything of evidentiary value was turned over to him. [T.9] Parrish stated that he did not loose sight of the vehicle, nor was there any other person in the vehicle when he approached it after it had parked at the apartment complex. [T.14]

Upon cross-examination, Sgt. Parrish stated that he did not interview the victim that night, nor, could he recall the description given of the person who had entered her home unlawfully. He did not recall if the description given fit the description of the Appellant. Parrish stated that the Appellant was not arrested that night. He stated that they had suspicions, but no evidence pinning him, it was just questionable. [T.10] Parrish further stated that the Appellant read the consent form in addition to Parrish's reading the form to him. [T.12] Parrish stated that it was about ten minutes before Officer Payne arrived on the scene. [T.13] Parrish stated that Officer Payne mirandized the Appellant. [T.11] He did not personally observe Payne mirandize the Appellant, but believes that it was done because they log it over the radio. [T.13]

The State then called Officer Tommy Payne who was a patrol officer for the Gulfport Police Department on December 23, 2004. [T.15] He believes that he responded to the burglary complaint at about 1:45. Payne stated that when he arrived at the apartment complex he observed the Appellant in his vehicle. [T.16-17] They had the Appellant exit his vehicle and Payne read him his Miranda warnings from a card which Payne said he carried in his pocket. He stated that he carried the card with him everyday. [T.17-18] Payne stated that he read the Miranda warnings to the Appellant, verbatim, at approximately 2:01. The Appellant was then questioned. Payne said that the Appellant appeared to understand his right, but that, he did not recall if the Appellant appeared intoxicated or under the influence of any drugs. Payne stated that the Appellant's speech was coherent. He further stated that the Appellant did not ask for a lawyer, nor did he invoke his right to remain silent. Payne stated that he did not promise the Appellant anything. [T.19] Payne also stated that he did not use any force, coercion, or intimidation, nor did he see anyone else use any. He did not see anyone promise the Appellant anything. Payne denied striking the Appellant with any object or part of his body. Nor did he observe anyone else strike the Appellant. Payne stated that the Appellant made a statement that he was waiting for a friend who was in apartment C-7. The Appellant then stated that he was at the Wal-Mart Christmas shopping for his wife and mother. That he was returning from the Wal-Mart on Washington, down 35th, and his radiator overheated so he stopped at the tobacco store to get some water. The Appellant stated that he saw the Officer loop around on Washington Ave. and he got scared and headed

westbound on 35th street to Jody Nelson apartments. He then parked his car and laid down and tried to hide. He did not want the police to think that he was out selling dope or doing something wrong. [T.20-21] Payne stated that Building H and Building C were on the opposite ends of the apartments, which Building H being in the southern section and Building C in the northern section. [T.21] Payne stated that he did not observe the Appellant's car to see if it was overheating. [T.30-31]

Officer Payne reviewed the consent to search form and stated that his name appeared on the form as he was present when Sgt. Parrish read the form to the Appellant. [T.21-22] He further stated that he guessed the Appellant read the form, he looked at it. [T.29] Payne testified that the reading and signing of the consent to search form happened at 3:10 a.m. where the Appellant's car was parked in front of Building H[1]. [T.22] Payne stated that the Appellant did not have any questions about the consent form, and that, he appeared to understand it when Parrish read it to him. Payne stated that he was present when Sgt. Parrish searched the vehicle but he did not recall if Parrish found anything or not. [T.23]

Payne stated that when he arrived at the apartment complex, Sgt. Parrish was outside of his vehicle and he could see the Appellant in the latter's vehicle. [T.25] They had the Appellant exit his vehicle initially to the parking lot right next to his vehicle. Payne stated that he placed the Appellant into his (Payne's) police car, on the back seat. He stated that the Appellant was not in custody, and that, he was not handcuffed. [T.26] Payne stated that the

[1]Det. Chaix stated that he was present for the during the execution of this form by Appellant. [T.79]

Appellant was in the police car by himself; Payne closed the door and was standing there. He did not recall if Sgt. Parrish was in the police car with the Appellant or not. He stated that the Appellant was placed into the police car because the weather was extremely cold and the way in which the Appellant was attired. [T.27,33] Payne stated that the Appellant remained in the police car until he was transported to the police station. [T.31] This would have been about 30 to 45 minutes after they had arrived on scene. [T.34] Appellant was taken to the police station to be questioned by Det. Chaix. [T.32] Payne said that this was about a 5 minute drive. Once at the station, he turned the Appellant over to Det. Chaix. [T.34] Payne further stated that he did not use handcuffs on the Appellant. [T.35]

When questioned as to where he read the Miranda warnings to the Appellant, Payne stated that it was either while he was inside the police car with the Appellant or a brief moment when they had the Appellant out of the vehicle. He just did not remember exactly where he read the Miranda to the Appellant. [T.28] However, he read them at 2:01. Payne testified that he read the Miranda warnings before Sgt. Parrish read the consent to search form. [T.30] Payne stated that he did not know if the Appellant was cited with any traffic violations. [T.28] Payne further testified that he was not aware that the victim had given a different clothing description than what the Appellant was wearing. He did know that the Appellant was not arrested that night, but he did not know why the Appellant had not been arrested. [T.32] Payne did stated that the Appellant was a possible suspect when he arrived on the scene. [T.33]

Det. George Chaix, Gulfport Police Department, was then called as a witness by the State. [T.35] Chaix testified that the burglary complaint came out around 1:45 a.m.; he was at home, off-duty. He responded to 3503 Washington Ave. around 2:00 a.m. Once there he made contact with the victim who explained that someone had come to her window and her cat began to growl. She told the person to go away and they left. [T.36] Chaix testified that he then proceeded to the Bayou View Apartments and made contact with the Appellant who was in the back of one of the marked police cars. Chaix then asked the Officers to get a consent to search the Appellant's vehicle as the victim said that the person was wearing a some type of T-shirt or something over his face. They photographed the vehicle and after searching it, found a T-shirt, screwdriver and a pair of gloves. The Appellant was then asked to come to the police department with them, which he did. Chaix also noted that it was very cold that night and the Appellant was wearing just a pair of shorts and a white T-shirt. [T.37]

When questioned as to the description provided by the victim, Chaix stated that she saw his face, which she described as almost like an olive skin complexion with wavy hair. She said he was wearing something over his face. [T.37-38] After referring to his notes, Chaix said that the victim said he was wearing a white T-shirt with olive-colored skin. His hair was combed to the side and was full; he was somewhat a Spanish individual. From the nose down, he was covered with a white cloth. [T.38] Chaix noted that the Appellant's hair wasn't wavy or full. [T.38]

The Appellant related to Chaix that he had been at the Wal-Mart trying to purchase

some items and that his car was running hot and that he didn't approach the house. [T.38]

Upon cross-examination, Chaix stated that when the Appellant was questioned at the police station that he was not under arrest, nor was he handcuffed in any way. He believed that the Appellant had been given a traffic ticket for no driver's license. Chaix stated that no one else was present when he read the Appellant's rights to him. He stated that the Appellant was wearing a white T-shirt and some shorts. His hair was shorter (than it was on the date of this testimony) and he didn't have a beard or anything. He identified the Appellant in the courtroom as being the person he spoke to that night. [T.40] Chaix further stated that the Appellant's speech was not slurred, his balance was fine, he was fine; Chaix did not detect an odor of alcoholic beverages or anything on him. Further, the Appellant was responsible to the questions asked and he appeared to understand them. [T.40] He further stated that the Appellant did not ask for an attorney; he did not say that he wanted the questioning to cease; nor, did he invoke his right to remain silent. Chaix denied using any force, coercion or intimidation to get the Appellant to speak with him. Chaix stated that he did not make any inducements or promises to the Appellant to get the latter to speak with him. Chaix denied striking the Appellant in any fashion with his hand or an object; nor, did he see anyone else strike the Appellant. [T.41] He further stated that to the best of his knowledge the Appellant's statement was freely and voluntarily given. Chaix testified that the Appellant had been in his company for about 30 minutes. The Appellant had never been placed under arrest, he was just asked to come to the police department so that they could

speak with him. [T.42]

Chaix stated that the Appellant's basic statement was that he stopped because his vehicle was overheating, so he had to stop and put some water in. The Appellant had been at the WalMart looking at items to buy, although he did not purchase anything. He further denied approaching Ms. Witt's home (victim). The Appellant further said that he had took off from the officer because he (Appellant) did not have a driver's license. [T.42]

Det. Chaix went on to state that on January 13, 2005, he was called out (as the on-call detective) to the home of Mary D'Angelo, on 16th Ave., on an attempted rape complaint. Ms. D'Angelo related to Chaix that she could not tell the color of the person; all she could tell was possibly gender. Ms. D'Angelo was 78 years old. (T.43) Chaix stated that it was unusual for there to have been an attempted rape on someone 78 years old so they started looking at other happenings in the City. It was observed that on September 23, 2004, a similar incident had occurred at 2222 29th Street, the home of Ruby Butler. Then on October 30, 2004, a person came through the air conditioning vent at Ms. Butler's home and raped her. [T.44] Chaix stated that the person ejaculated into her hand and she saved it. This evidence was collected by the police department. [T.45]

Then, on November 19th a 73 year old lady reported an attempted break-in by someone who tried to use a screwdriver and gain entry at the front door. This lady and her daughter were able to scare the person off before entry was made. And, on December 8, 2004, someone came through the window of 2301 13th Ave., and began to grab the 51 year old lady

who lived there, but they left after she stated that she had surgery. Det. Chaix testified that the incident involving Ms. Witt was a situation similar to these other occurrences. [T.45] He related that all of these incidents, including Ms. Witt, were within a close area of the Bayou View Area. [T.46,47] Chaix stated that the Appellant lived almost at the center of this area. [T.47]

After the Witt incident, Chaix said that he re-interviewed each of the other victims, took taped statements and did an Identi-Kit likenesses. The information input to the computer results in a picture. Chaix stated that all of the pictures produced by the victims resulted in likenesses that were very similar. [T.46]

Chaix stated that he re-interviewed Ms. Butler and she mentioned seeing a dark blue sedan coming by her house prior to the attacks. He then remembered that the Appellant was driving a dark blue sedan on December 23rd. [T.46] Chaix further stated that while there were some differences in the generated Identi-kit likenesses they all looked similar; and, the Appellant looked very similar to them also. [T.48]

Det. Chaix stated that he and Det. Dailey then went to the Appellant's home to speak with him about some burglaries that were similar to the one that Chaix had encountered him on. Chaix told the Appellant that there had been some evidence collected from some of the burglaries and would the Appellant mind going with them to the hospital so that they could get some blood from him. They traveled in Det. Dailey's car, with the Appellant sitting in the front passenger seat and Det. Chaix in the back. [T.48-49] Chaix reviewed State's

Exhibit 3 and testified that it was a consent to search form which he filled out and presented to the Appellant. [T.49] Upon cross-examination Chaix stated that he read the consent form to the Appellant, but that, the Appellant did not read it himself. After reading it to him, Chaix testified that he advised the Appellant that they just wanted some of his blood; the Appellant said yeah, I'll agree to that and signed the form. Chaix did not advise the Appellant of his Miranda rights prior to the latter's execution of the consent form. [T.84-85] Chaix stated that he advised the Appellant that he did not have to agree to the blood being drawn; the Appellant agreed anyway. The blood was then drawn. [T.49] He further stated that the Appellant was told that the blood would be used against the Appellant as evidence if he did something; however, if the Appellant had not done anything, he had nothing to fear. The Appellant executed the consent form on January 28, 2005, at approximately 11:10 a.m. [T.50] Chaix stated that the Appellant was a suspect at the time he was asked to execute the consent form. [T.86]

Chaix testified that he did not detect any alcoholic beverage on the Appellant; that he was stable on his feet, and that, there was no indication of alcohol or any other drug. Further, the Appellant's responses were responsive to the questions and he appeared to understand what was on the form. Chaix further said that the Appellant was cooperative; and that, he never indicated that he did not want to give his blood, or, that he wanted a lawyer. [T.51]

When they returned to the police station, Chaix stated that the Appellant was not under arrest. That prior to questioning he was advised of his Miranda rights and Appellant

executed the advice of right form at approximately 11:59 a.m. At this time the Appellant was not under the influence of alcohol or drugs; his speech was coherent; he did not ask for an a lawyer; he did not ask for the interrogation to cease; and, he did not invoke his right to remain silent. [T.52-53] Chaix testified that the Appellant spoke with them. Furthermore, that neither he [Chaix] or anyone else used any force, coercion or intimidation to have the Appellant speak. There were no promises or inducements made to the Appellant by Chaix or anyone else. The Appellant was not struck by any body part and/or object. Chaix stated that during the course of the interview that Dets. Dailey and Peterson were present at various times. [T.53] He did not see either of these officers (Dailey or Peterson) use any force, coercion, intimidation, promises, or inducements to have the Appellant speak to him. Nor, did he witness either of them strike the Appellant with a hand or object. [T.53-54] Chaix stated that the Appellant responded to the questions and did not say that he wanted the interrogation to end. [T.54] Chaix stated that the interview was a lengthy one, lasting several hours. He testified that the initial interview was approximately 42 minutes and the second interview (on the same day) was about an hour and 42 minutes. He then clarified that the first interview never really ended; they stopped to and asked if they could pull some arm hairs because one of the victims had pulled some arm hairs. [55] Chaix then identified State's Exhibit 6 which was the consent for body search form that he asked the Appellant to sign to get his body hairs. He read the form verbatim to the Appellant. The Appellant was also advised the whole time that he had the right to refuse all of this. After a bathroom break the

Appellant was asked to give consent to search his residence. [T.55-56] Chaix stated that the initial interview ended at 12:46, which was when they traveled to the Appellant's home to search his residence. The consent to search form (State's Exhibit 7) was executed by the Appellant on January 28, 2005, at approximately 1:30 p.m. Chaix stated that the Appellant appeared to understand the form. They even advised the Appellant what they were looking for.[2] [T.57-58] The Appellant had said at the police station that he did not have any Nike Shox, but a pair was found in one of his closets. [T.58,59] They also found a blue jersey that was similar to one reported by Claudia Davenport, and a knit hat that was similar to one described by one of the victims. Chaix said that they had traveled to the Appellant's house in his police car. While they were at his house, they advised the Appellant's wife that they would like to continue questioning him and asked if he would come back to the police station. The Appellant's wife drove him there. Chaix stated that the Appellant still was not in custody. [T.59]

The second interview began at approximately 2:45 p.m. They refreshed the Appellant's memory of his rights - they verbally advised him of his rights and asked if he still wanted to continue talking to them and the Appellant said yes. Chaix stated that when the Appellant returned for the second statement he did not seem impaired in any way and he appeared to understand his rights when they were read to him. [T.60] Chaix further stated that neither he or Lt. Peterson struck the Appellant, made no promises or inducements to him.

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[2]They were looking for a Nike Shox, a mask and some clothing articles. [T.57-58]

He was responsive to the questions; and, in Chaix's opinion the Appellant's statement was freely and voluntarily given. He did not invoke a right to remain silent, he did not ask for a lawyer, nor did he ask for the interview to end. [T.61][3] Upon cross-examination, Chaix was questioned about the Appellant's statement "I ain't -- I ain't -- I ain't got nothing to say." Chaix's explanation was that this was said by the Appellant after Chaix told him that the floor was his. The interview continued after this point. [T.89] Chaix said that he did not take this statement by the Appellant to mean that he did not want to talk. [T.90]

When questioned by the trial court if the Appellant had been told that he was under suspicion for, Det. Chaix stated that the Appellant had been advised that he was under suspicion for burglaries. After the Appellant had allowed his blood to be drawn for DNA purposes, he was advised that in some of the burglaries the victims were raped. [T.56]

There was a discussion about the identi-kit drawings made pursuant to descriptions given to Det. Chaix by three of the victims which had been shown to the Appellant during the course of the questioning. [T.65-77]

Chaix stated that they also asked the Appellant to execute a consent form to obtain his fingerprints and photograph. The Appellant executed the form (State's Exhibit 4) on January 28, 2005, at 11:55. [T.77-78] Chaix stated that he read the document to the Appellant and Det. Dailey had filled it out. [T.78]

Upon recross-examination Det. Chaix stated that the Appellant was not in custody

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[3]At this time in the proceedings the trial court listened to the first of taped recordings of the two interviews (S-9). He opted to read the transcript of the second interview [T.63-64]

during the time they were questioning him. However, while Chaix said that the Appellant could have left at any time, he did not think that he had told the Appellant this. [T.102] Chaix further stated that he believed someone was in custody after they have been charged; after handcuffs had been placed on them. [T.103] Chaix said that custodial interrogation means he's not free to go. But agreed that he had never advised the Appellant that he was free to go during his questioning. [T.104]

The State then called Det. Heather Dailey. [T.105] She went to the Appellant's home with Det. Chaix on January 28, 2005. She also traveled to the hospital with Chaix and the Appellant for the drawing of his blood. When questioned as to why the consent to search form was executed at the hospital as opposed to going to the police station to do it, Dailey replied that it just seemed normal to do it there because that's where they were at. [T.109] Dailey stated that once they were at the police station and the Appellant was given the advice of rights that he did not appear to be intoxicated or under the influence of any drugs. He appeared to understand his rights; he did not have any questions; his speech coherent; he did not say that he wanted a lawyer; he did not say that he wanted to cease the statement; nor, did he say that he didn't want to proceed without a lawyer. [T.111-112]

Dailey stated that when she went to the Appellant's home with Det. Chaix that the Appellant was a suspect in some burglaries. [T.114-115] Upon questioning by the trial court, Dailey stated that they told the Appellant (at his house) that they were there to investigate some crimes that occurred. [T.122]

Motion to Suppress - Reconsideration:

On September 21, 2006, testimony was presented in support of the Appellant's motion to reconsider the trial court's denial of his motion to suppress.

The Appellant testified that the detectives came to this house and said to come for a ride. However, he stated that he did not feel compelled to go with them. [T.151] When they got to the hospital he said the detectives put him in a room and told him that they were going to take blood. [T.152] Appellant said that he told them he didn't want to. Det. Chaix's comment to him was that he was going to take him to jail either way it went. The Appellant also stated that he did not remember signing a consent form. [T.153] The Appellant was shown S-3 and asked if it bore his signature. He said that it did. He read the heading on the form - it was Consent to Search. [T.154] When asked if he felt he had the freedom to leave the hospital by himself, the Appellant said no. [T.154-55] This was because they had put him under pressure. When he told them that he wanted to leave, they wouldn't let him. [T.155] On cross-examination the Appellant said he became threatened when they would not let him leave the hospital when he wanted to. He did try to go. He stated that he went with the detectives to the hospital in the first place because they told him to come. [T.156] When asked on re-direct what the word "threat" meant to the Appellant, he stated "that they're going to do something to me." [T.158] Appellant also stated that when they left the hospital they took him back to his house and did the search of his house then. [T.158-59] He said that he did not know that they had a search warrant at that time and they did not ask if they could

search. [T.159-160] When asked by the trial court if he protested the search, the Appellant replied that he did; he told them that he didn't want them searching his house if they ain't got not warrant. He said it took them about 30 to 35 minutes to do the search. [T.160-61] When Appellant was asked to review S-7 he acknowledged that he had signed the form; that the heading on the form said "Consent to Search Premises." He stated that they did not read the form to him; he signed it because they told him to. [T.162] When questioned, the Appellant said that he was not handcuffed while the search was being done; nor did the detectives tell him that he could not leave - and he did not. Further, there was just he and the two detectives there at this time. [T.163]

The Appellant also called Mark L. Zimmerman, a psychologist from Baton Rouge, Louisiana, to testify. [T.165] Dr. Zimmerman was accepted by the trial court as an expert witness. [T.171] He testified that he met with the Appellant on March 10th (2006) and at that time he administered six tests and a clinical interaction. [T.172] Based upon his testing, Dr. Zimmerman stated that the Appellant met the criteria for mental retardation. [T.180] Prior to this conclusion he had stated that the testing indicated that the Appellant's reading ability was at the third-grade level and that his spelling was at the fourth-grade level [T.177,191]. He stated that the Appellant's total score on the Adult Intelligence Test was 68. [T.175,190] Zimmerman also spoke with Ms. Gillum, a former employer of the Appellant, in an effort to assess his adaptive behaviors, how he functioned in the real world. [T.179-180] Zimmerman stated that he learned that the Appellant had worked as a janitor for Ms. Gillum.

She related that he could perform basic cleaning tasks; that he took longer to learn these tasks that her average employee; that he was slower in functioning than most; and that, his job skills were below average. [T.180] Dr. Zimmerman stated that he did not believe that the Appellant understood what he was signing. [T.181] He further stated that he did not ask the Appellant about signing the form, but it appeared to him from the Appellant's testimony on this date that he didn't think he had a choice but to sign it. [T.182]

On cross-examination, Dr. Zimmerman stated that he had examined the Appellant at the Harrison County jail in the medical department. He had spent three to four hours with him. [T.182] When asked what symptoms the Appellant had exhibited, Zimmerman replied that he was cognitively slow; he had some problems with understanding. [T.183] He stated that it was a possibility that with the standard error of measurement, which is 5, that theoretically one could be between 65 and 75 and not really be retarded. [T.190] Zimmerman stated that the Appellant would fall in the mildly retarded range. [T.196]

The State called Dr. William Gasparrini who is a clinical psychologist licensed to practice in the State of Mississippi. [T.202-03] He was also accepted by the trial court as an expert witness. [T.203-04] He stated that he had met with the Appellant on September 8, 2004, at his office in Biloxi. [T.204-05] Gasparrini stated that while he did not see in the Appellant's school records that the latter had been officially diagnosed as retarded, he did feel that the records were consistent with it, even though the Appellant had never been tested for it or diagnosed. He further stated that the records seemed to indicate to him that they

were consistent with mild mental retardation. [T.207]

Gasparrini stated that when he administered the Wechsler Adult Intelligence Scales that the Appellant scored somewhat higher than the prior testing, but that could be explained partly on the basis of the practice effect. The Appellant achieved a full scale IQ of 76, which is in the borderline mental retardation range. [T.210] Gasparrini stated that Zimmerman's score would be the more accurate and it should be used in determining the diagnosis. [T.217] Gasparrine concluded after all of his tests, a review of the prior records and the prior test report that a diagnosis of mild mental retardation would be appropriate. When queried about the language contained in S-3 as to whether or not the Appellant would have understood it, Gasparrini stated that there were a few big words, but he guessed that the Appellant could understand the basics, that they were going to take his things. [T.211] He thought that if the Appellant was told that he did not have to consent to this that he would understand. [T.211-12] When questioned by the trial court as to whether or not Gasparrini agreed with Zimmerman's finding of mildly retarded, Gasparrini stated that he did. However, Gasparrini felt that the Appellant would be able to understand. [T.224-25]

The State also called Det. Chaix. He stated that he did not tell the Appellant that he would take him to jail whether he gave the blood or not in order to make him sign the consent form. Nor did he tell the Appellant that he couldn't leave the hospital, or try and stop him from leaving. He said that Det. Dailey did not do any of these things either. [T.228] Chaix stated that the Appellant was free to leave the hospital if he wanted to, but he never told him

that. [T.229]

Trial Testimony:

The State called Ruby Butler as its first witness. She stated that she was 63 years old and lived at 2222 29th St., Gulfport. When asked if she recalled October 30, 2004, she replied that she did because a guy broke into her house and raped her. She stated that she had gone to the bathroom and when she returned to the living room where her bed was she sat down to smoke a cigarette. She then began to hear a weird noise at her air-conditioner and when she looked at it a towel which had been stuffed in the side of it landed on the bed. She tried to call 911, but didn't have her glasses on and couldn't see the numbers. He was in the house and on her before she could do anything. She stated that she had a big knife in her hand and tried to cut the guy, but he grabbed it from her and threw it on the floor and then threw her on the floor and raped her. This was about 3:00 a.m. [T.360-61].

She described this person as a black man, about six foot, maybe six foot three tall, his weight was about 220 to 250 pounds. [T.361] She did not get a good look at his face. He had a bandanna over his head. All she could see were his eyes and the top of his head. [T.362,368] When asked if she knew the gentleman in the striped shirt, her response was no, not really. She further stated that she did not invite him into her home on October 30, 2004. [T.363] Upon cross-examination, Ms. Butler stated that she didn't know whether or not the Appellant was in her house on October 30, 2004. She didn't know who the person was in her house that night. [T.367]

When asked to give graphic details about the rape by the State, Ms. Butler stated that he threw her down on the floor, pulled her shorts and underwear off and the proceeded to rape her. That he put his penis into her vagina; but then, took it out and told her to suck his dick, and then he put it in her mouth. Then, when he went to ejaculate, he pulled it out of her mouth and he ejaculated right there in the palm of her hand. She had a kleenex in her left hand so she cleaned it out of the palm of her right hand. Then he got up and tore her phone apart and went back out the window. She then went to her neighbor's house to call the police. [T.362] Ms. Butler stated that the sexual acts committed with her were not voluntary on her part. She couldn't fight him off because he had her hands held together. [T.363] After the police came, her daughter took her to the hospital to do the rape kit. She also stated that her back was all scratched up. [T.365]

When questioned about suspicious incidents, Ms. Butler stated that before all that started happening there was a dark, big car, like maybe an old Ford - like the big old older model cars, that kept coming by her house, and they would stop right in front of her house. She said they did this about 15-20 times in one night and they did not do it at anyone else's place. She was sitting on her porch. [T.364] Upon cross-examination she stated that this car would stop for a minute or two and then take off and go around the block and come back again. She did not see the person driving the car, it was nighttime. She doesn't know if it was a male or female. This was probably a week or so before October 30, 2004. [T.366]

The State then called Officer Ryan Frazier, a Gulfport Police Officer. At the time of

the trial, Officer Frazier stated that he was an investigator with the Criminal Investigations Division as a detective. [T.370-71] On October 30, 2004, he had been a uniformed patrol officer. As such he was dispatched to 2222 29th Street at about 5:00 a.m. regarding a residential burglary and rape complaint. He stated that this address was within the First Judicial District of Harrison County. [T.371] He stated that when he first arrived Ms. Butler appeared shaken and nervous and she pointed out a point of entrance made by the suspect into her home. This was a window on the west side of the house where an air-conditioning unit had been. The description that she gave of the suspect was of a black male, approximately 25 to 30 years of age, about six foot-six three in height, and about 220 to 250 pounds in weight. [T.372] She also gave a limited description of a blue shirt and a multi-colored bandanna. He did not recall if she had also given a description of a gray shirt, or if the attacker had a beard. [T.377]

Officer Fraizer identified State's Exhibit 1 as the paper towel which he collected from Ms. Butler. [T.373] He stated that he placed the towel in the evidence bag, sealed the top and then placed it in the refrigerator in their evidence area. [T.374] Upon cross-examination Frazier stated that he also collected some fingerprints found on the air-conditioning unit and on an interior piece of glass on the window that utilized by the suspect to gain entry into the house. [T.375] He stated that he was not trained to identify fingerprints, just to extract them. The prints that he collected that night were placed in a bin and then placed into the filing cabinet. [T.376] He did not know if a comparison had been made or not. [T.377]

The State then called Gerry Parker, a registered nurse who worked in the emergency room as a staff nurse at Memorial Hospital. She was also trained as a sexual assault nurse examiner. [T.379] Parker stated that she conducted a sexual assault examination of Ms. Butler at about 6:17 when the latter arrived at the emergency room. As part of this examination she also completed a sexual assault kit, and obtained a history from Ms. Butler. She stated that Ms. Butler was upset when she came in; she held her head down, her heart rate was very fast and her blood pressure was elevated. [T.383]

Parker stated that she and Dr. Levens examined Ms. Butler's genital areas and observed two small tears on the labia minora and bruises on the outer lip area. She also had abrasions on her mid-back are and her left knee. [T.384] A blood sample for DNA testing was also obtained; this was drawn by Cheryl Evans in Parker's presence. [T.385-86]

The State then called Cheryl Evans, who was a register nurse at Memorial Hospital on October 30, 2004. [T.395] She stated that Gerry Parker was present when she [Evans] drew the blood of Ruby Butler on that date. [T.397] The State then called Rachel Walker, a registered nurse who was employed at Memorial Hospital on October 30, 2004. She testified that she was involved in the chain of custody for the blood drawn from Ms. Butler that night. [T.400] The State also called William Riddle, a Gulfport Police Officer. He testified that he retrieved the sexual assault kit from Memorial Hospital that was performed on Ruby Butler on October 30, 2004. [T.404, 405]

The State then called Tommy Payne, a Gulfport Police Officer, who was a patrolman

on December 23, 2004. It was on this date that he made contact with the Appellant. [T.412] Payne stated that the contact was a result of a call that he had been dispatched on at 1:45 a.m. He made contact with the Appellant at the Bayou View Apartments [T.413], which was a couple of blocks away from the call. [T.418] Sergeant Chris Parrish was the Officer that Payne was called as back-up for. He stated that the Appellant was in a '96 blue Chevy Lumina with the seat leaned back in the driver's side; the latter was wearing shorts and a short sleeve shirt; it was freezing outside. [T.414] Payne identified State's Exhibit 4 as a photograph of the vehicle the Appellant was in that night. He also identified the Appellant as being the person he saw that night. [T.415]

Payne stated that he advised the Appellant of his Miranda warnings at approximately 2:01. Prior to reading the Miranda warnings, the Appellant stated that he was waiting for a friend who was in Building C. After Miranda, the Appellant stated that he had been to the Wal-Mart, about 1:00 in the morning, to do some Christmas shopping for his wife and mother and he was coming home the back way down Washington Ave. He stated that his vehicle was overheating and he stopped at the Tobacco/Beer Mart at 35th and Washington to put some water in the radiator. Payne stated that the Tobacco/Beer Mart was across the street from the call-out. [T.416] After Det. Chaix arrived on the scene the Appellant was placed into Payne's car as it was extremely cold out. [T.417]

Upon cross-examination Payne stated that he did not see the Appellant turn his vehicle off as he (Payne) had arrived after the Appellant had positioned his vehicle. Payne was

advised of the vehicle's travel to the Bayou View Apartments by Sgt. Parrish who had also responded to the call-out and had observed a suspicious vehicle leaving the area as he approached. [T.419] Payne further stated that he did not observe any water container in the Appellant's vehicle, but that he wouldn't dispute that there was one. He just didn't recall seeing one. [T.420-21] The nature of the call was a burglary of a residence; however, Payne did not interview the person who called. [T.421]

Payne testified that he had been advised by Sgt. Parrish that the Appellant did not have a valid driver's license. He was further advised by Parrish that the Appellant stated that he was hiding because he thought the police would think he was selling dope or doing something wrong. [T.423]

The State then called Judy McFaddin, a phlebotomist with the Memorial Hospital. [T.424] She stated that on January 25, 2005, she drew blood from the Appellant. She also identified the Appellant in court. [T.425] McFaddin stated that she recalled drawing the Appellant's blood on that date because he was brought into the lab; usually she went to the rooms to draw blood. [T.428] She stated that she would look for identification of a particular patient. The Appellant did not present I.D., he just said his name and she saw his name on the paperwork which was given to her by the police. She was not present when the Appellant gave consent to have his blood drawn. She only knew that consent appeared on the paperwork she was given which had the Appellant's signature. She placed her name on the form indicating that she had drawn the blood. [T.430-31] McFaddin identified Defendant's

Exhibit 1 as the form that was handed to her when the Appellant was brought in. [T.431] After reviewing D-1, McFaddin stated that it did not bear her signature - that the form was not the one that she had signed. She further stated that the signature was not her's and she did not know who had signed her name. [T.432] She said that she signed another piece of paper that the Officer had; she had spelled her name for him. She thought the Officer's name was George; she knew him because he came to the hospital all the time, but it was hard to remember everybody's name. [T.433] On re-direct, McFaddin said that her name was printed on D-1, but that she did not print it. [T.434]

George Chaix, a detective with the Gulfport Police Department was then called. He stated that he investigated the charge of burglary, sexual battery and forcible intercourse on Ruby Butler on October 30, 2004. When asked how he had developed the Appellant as a suspect, Chaix responded that he had had a previous contact with the Appellant on December 23, 2004, in the same type of vehicle. [T.436]

Chaix stated that when he went to the scene he observed the Appellant's vehicle. He identified the vehicle in State's Exhibit 4 as being the same vehicle that the Appellant had on December 23rd. He stated that it matched a vehicle description given to him by Ms. Butler on October 30, 2004. [T.436-37] Chaix said that on December 23rd he just spoke with the Appellant; took some photographs and let him go. [T.437] Chaix further stated on cross-examination that he had looked into the Appellant's vehicle and saw an empty water container. In addition, he stated that the Appellant had made a statement to him that

Appellant's car was running hot. [T.451]

Chaix did not pick the case back up until January 27th; he came into contact with the Appellant on January 28th. [T.437] He identified the Appellant as being the same person he had contacted on that date. [T.436-37]

Chaix stated that he contacted the Appellant at his residence at 2018 29th Street and advised him that he was suspected in a series of crimes — in a crime, rather. [T.438] When Chaix's testimony resumed the State asked him to review D-1. He identified the document as the consent to search form, dated 1/28/05, time - 11:10 a.m. Chaix testified that the Appellant signed the form in his [Chaix's] presence; that Chaix signed the document; and that, it was witnessed by Det. Heather Dailey. [T.441-42] The execution of the form happened at Memorial Hospital in the phlebotomy lab. He further stated that he wrote the word "phlebotomist" and "Judy McFaddin" on the bottom of the form. [T.442] He did this because she was the one who drew the blood. [T.443] Chaix stated that he took the Appellant in to have his blood drawn, and that, he (Chaix) was present when it was drawn. [T.443-444]

Det. Chaix stated that based upon the personal history obtained from the Appellant, the latter was 23 years of age, five foot eleven in height and weighed 225 pounds; his address was 2018 29th Street. [T.444-45] Chaix stated that Ms. Butler was five foot nine in height and that the Appellant was five foot eleven. [T.451-52]

Upon cross-examination Det. Chaix stated that the vehicle described by Ms. Butler

was that a large blue car was coming by her house about 15 to 20 times and stopping around 2:00 a.m. during the months prior to the incident. This was the only description that she gave of the car; she did not give the year; she did not even state whether it was a late or early model vehicle. [T.446-47] When questioned as to whether or not he had any empirical knowledge based upon Ms. Butler's statement or descriptions of the vehicle she had seen if he could tell it was the vehicle shown in S-4, Det. Chaix responded "no". [T.447-48]

Charles Bodie, the detective sergeant assigned to the Crime Scene Unit was then called by the State. He stated that the fingerprints obtained on October 30, 2004, were lifted from a glass from the scene and from an air-conditioning unit. He further stated that he inspected these prints and was not able to obtain anything of any value from them; they could not be identified with the Appellant or anyone else. [T.454] He stated that he then forwarded the prints to the Crime Lab. [T.461] Bodie also testified that the towel marked as State's Exhibit 1 was sent to Reliagene, Inc., a DNA testing lab in New Orleans on January 19, 2005. [T.455] He also stated that he sent the Butler sexual assault evidence collection kit (S-3) to Reliagene on January 5, 2006. [T.456]

Bodie read part of the Reliagene report on the towel (S-1) concerning the DNA testing. On re-direct, Bodie stated that this testing was just to reveal if there was anything present. [T.460,462] Upon additional testing, Reliagene reported that it was their opinion that the Appellant was the source of the DNA in the sample submitted. [T.463,464] Bodie also stated that he did not have a final report on the hairs which were submitted for testing.

[T.460-61]

Huma Nasir, with Reliagene Technologies was then called by the State. [T.465] After voir dire, she was accepted as an expert witness. [T.469] She stated that PCR - polymerase chain reaction was employed for the DNA analysis of the submitted sample. [T.471,475] In this particular case, they tested for a total of 15 markers. [T.476] Nasir stated that the towel in question was first tested to see if there was any kind of biological material on it, and if so, was there enough to obtain a DNA profile. In this case there was the presence of seminal fluid and they were able to obtain a profile from the sample. [T.477] Nasir stated that based upon their testing, it was their conclusion to a reasonable degree of scientific certainty that as long as the Appellant did not have an identical twin, that he was the DNA donor in the sperm fraction of the towel sample. They also determined that the profile for the major DNA donor of the skin cell fraction was consistent with the Appellant. [T.481] Upon cross-examination, Nasir agreed that the proper language to be used when speaking of the skin cell fraction would be that the profile was consistent with the Appellant being the major donor profile. [T.491]

It was stipulated by the parties, and read to the Jury, that the Appellant did not have an identical twin. [T.503]

SUMMARY OF LEGAL ARGUMENT

1. The trial court committed error when it denied the Appellant's motion to suppress the consent to forms which law enforcement had him execute. Testimony was presented at the suppression hearings that the Appellant is mildly mentally retarded. In addition, law enforcement failed to read the Appellant his Miranda warnings each time they presented a consent to search form for execution. Miranda warnings were required as the Appellant was detention status. *Jones v. State Ex Rel. Mississippi DPS*, 607 So.2d 23 (Miss.1991)

2. The trial court committed error when it failed to grant the Appellant a mistrial after Det. Chaix stated at trial that the Appellant was a suspect in a "series of offenses." There was no viable instruction which the trial court could have given the jury which would have corrected, and blocked from their consideration, the fact that the Appellant was a suspect in more crimes that those for which he was on trial for. *Hoops v. State*, 681 So.2d 521(Miss.1996)

3. The trial court was in error when it denied the Appellant's motion for a JNOV or in the alternative, a new trial.

4. The totality of the cumulative errors committed by the trial Court necessitate a reversal by this Court of the Appellant's conviction.

LEGAL ARGUMENT

In the case at hand, Francisus A. Robinson, the Appellant, was indicted in a multi-count indictment for offenses involving different victims and different dates. The trial of the matter proceeded as to Counts III, IV, and V. Following a jury verdict of guilty, Mr. Robinson was sentenced in Count III, forcible sexual intercourse, to a term of 25 years; in Count IV, sexual battery, to a term of 25 years; and, in Count V, burglary of a dwelling to a term of 15 years, all to run consecutive for a total of 65 years.

I. THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED THE APPELLANT'S MOTION TO SUPPRESS THE CONSENT FORMS SIGNED BY THE APPELLANT.

Prior to the trial of this matter the Appellant filed a motion to suppress requesting that the trial court enter an order suppressing the consent to search forms which he had signed, more particularly, the consent to have blood drawn which was introduced as State's Exhibit 3 during the trial of this matter. Extensive testimony was heard during this hearing. After the trial court denied the Appellant's motion to suppress, the Appellant filed a motion to reconsider. Testimony was presented at this hearing by the Appellant and two psychologists.

The Appellant's testimony[4] was that once the detectives had placed him into a room at the hospital and they told him that they were going to draw blood; he stated that he told

[4]At the hearing on his motion to reconsider.

them that he did not want to do that. [T.152-53] The Appellant also stated that he wanted to leave the hospital but that the detectives would not let him go [T.154-55]; this was denied by Det. Chaix. When shown the consent to search form (to draw the blood) the Appellant did agree that his signature was on it.

Also during the course of the hearing on the motion to reconsider, the Appellant presented testimony by Dr. Mark L. Zimmerman, a psychologist from Baton Rouge. Dr. Zimmerman was accepted by the trial court as an expert witness. He testified as to the various tests that he administered to the Appellant, and the reason why he chose to interview a former employer of the Appellant as opposed to a friend or family member. Based upon his review of the Appellant's school records, Zimmerman's test results and the interview with the employer it was Dr. Zimmerman's opinion that the Appellant read at the third-grade level and that his spelling corresponded to a fourth-grade level. The results recorded for the adult intelligence test indicated that the Appellant had an IQ of 68. Zimmerman further stated that the Appellant met the criteria for mental retardation. [T.172-180] The information that Dr. Zimmerman obtained from the Appellant's former employer indicated that the Appellant could perform basic cleaning tasks, although he took longer to learn these tasks than other employees. The employer further related to Dr. Zimmerman that the Appellant's job skills were below average and that he was slower in functioning than most. [T.180] Dr. Zimmerman also stated that the Appellant was cognitively slow; that he had some problems with learning. [T.183] When questioned about the consent to search forms, Dr. Zimmerman

stated that based upon his evaluation of the Appellant and his observation of his testimony at the hearing, that the Appellant did not understand what he was signing. [T.181]

In response to the testimony provided by Dr. Zimmerman, the State called Dr. William Gasparrini[5], a clinical psychologist from Biloxi, Mississippi who conducted testing of the Appellant some months after the Zimmerman evaluation. Dr. Gasparrini stated that when he administered the Wechsler Adult Intelligence Scales that the Appellant scored at an IQ level of 76. Gasparrini stated that this score was higher than the one recorded by Dr. Zimmerman, however, the higher score could be explained partly on the basis of the practice effect and he believed that the score obtained by Dr. Zimmerman was the more accurate one and it should be used in determining the diagnosis. Dr. Gasparinni also stated that the Appellant met the criteria for mild mental retardation. He further stated that while the Appellant's school records did not indicate a diagnosis of mental retardation, the information contained within the records were consistent with mental retardation. [T.203-211]

The only disagreement that either of the psychologists had was their respective opinions on the Appellant's ability to understand the consent to search forms which had been presented to the Appellant by law enforcement. Dr. Zimmerman did not believe that the Appellant understand the consent form [T.181-82]; Dr. Gasparrini stated that while there were a few big words, he "guessed" that the Appellant could understand the basics. He felt like the Appellant would be able to understand. [T.211,224-25]

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[5]Gasparrini was also accepted by the trial court as an expert witness. [T.204]

Consent - Knowing and Voluntary?:

The U.S. Supreme Court has held "that the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement." *Ferrell v. State*, 649 So.2d 831,833 *citing* to *Cupp v. Murphy*, 412 U.S. 291,295, 93 S.Ct. 2000,2003, 36 L.Ed.2d 900 (1973) In addition, the Fourth Amendment to the U.S. Constitution dictates:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Thus, the general rule has always been that warrantless searches of private property are *per se* unreasonable. *McNeal v. State*, 617 So.2d 999 (Miss.1993), *see Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) "The rule against warrantless searches is subject to a few specifically established and well-delineated exceptions." *Graves v. State*, 708 So.2d 858,862 (¶22) (Miss.1997); *Smith v. State*, 419 So.2d 563,569 (Miss.1982) *citing Katz v. United States*, 389 U.S. 347,357, 88 S.Ct. 507,514, 19 L.Ed.2d 576 (1967) These exceptions include:

1. Search incident to arrest;
2. Search of a vehicle (*i.e., Exigent Circumstances*);
3. Plain view;
4. Stop and frisk;

5. Hot pursuit and emergency search;

6. Administrative search; and,

7. Consent to a search;

8. Good faith exception.

Gazaway v. State, 708 So.2d 1385,1388 (¶8) (Miss.App.1998); *Graves v. State*, 708 So.2d 858,862-63 (¶22) (Miss.1997); *White v. State*, 842 So.2d 565,572 (¶20) (Miss.2003) - (*adopting good faith exception from United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984))

"The burden of showing that [a] case fits into such an exception to the exclusionary rule and advancing proof thereon is on the State." *White v. State*, 735 So.2d 221,224 (¶9) (Miss.1999); See, *Cummings v. State*, 219 So.2d 673,678 (Miss.1969)

In addressing the issue of voluntary consent the United States Supreme Court has directed the courts to look to:

1. Whether the circumstances:

   - Were coercive;
   - Occurred while in the custody of law enforcement; or,
   - Occurred in the course of a station house investigation.

2. The individual's:

   - Maturity;
   - Impressionability;
   - Experience; and,
   - Education.

3. Whether the person was:

- Excited;
- Under the influence of drugs or alcohol;
- Mentally incompetent.

Graves v. State, 708 So.2d 858,863 (¶24) (Miss.1997); *Jones v. State Ex Rel. Mississippi DPS*, 607 So.2d 23,27 (Miss.1991), *citing*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041,2047-48, 36 L.Ed.2d 854 (1973)

The Circumstances: In the case at hand, the execution of the various consent to search forms were requested after Detectives Chaix and Dailey had gone to the Appellant's home and asked him to come for a ride with them to the hospital to take blood. The Detectives drove the Appellant to the hospital in one of their vehicles and once there they presented the Appellant with the consent to search form for the blood that was ultimately drawn. The consent to search forms for the Appellant's fingerprints and photograph, and the extraction of body hairs were presented to the Appellant at the police station where the Appellant had been taken after his blood was drawn at the hospital. This form was presented to him during the course of the first interview which lasted approximately 42 minutes. Then the Detectives[6] advised the Appellant that they wanted to search his home and presented him with yet another consent to search form. After the search of the Appellant's home he was asked to return to the police station where the interview continued for almost another 42 minutes. All of these events occurred on the same day.

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[6]At this time Lt. Peterson had also become involved in the interrogation process with Det. Dailey in and out of the process.

The Individual: The Appellant left school while in the nine grade [T.183]; he failed four times in school and was in special education for four years [T.207]. At the time of the alleged offense the Appellant was approximately 23 years of age [T.444]; Dr. Zimmerman stated that the Appellant was 25 years of age at the time of his evaluation. [T.183] He read at the third-grade level and his spelling ability was fourth-grade level. Testimony was presented by Dr. Mark Zimmerman concerning one of the Appellant's former employers revealed that he had done janitorial work for her - and not very competently.

The Person: Both Dr. Zimmerman Dr. Gasparrini, the experts called by the Appellant and the State respectively, agree that the Appellant's IQ was 68 and that he met the criteria for mild mental retardation. In fact, when the State queried Dr. Gasparrini about the lack of a mental retardation diagnosis in the Appellant's school records, he replied that the information contained within the records was consistent with such a diagnosis.

"Consent is not valid where the consenter is impaired or has a diminished capacity; otherwise the court applies the same test for valid consent as the federal standard and places the burden on the defendant to show impaired consent or some diminished capacity." *Jones v. State Ex Rel. Mississippi DPS*, 607 So.2d 23,28 (Miss.1991); *Gilbreath v. State*, 783 So.2d 720,723 (¶7) (Miss.App.2000) "Consent must be valid and absent diminished capacity in order to be valid." *Jones*, 607 So.2d at 28

In addition to the above considerations concerning the issue of whether or not the Appellant executed a knowing and voluntary waiver, the following question and answer

burglaries and the Appellant's blood was needed to compare to this evidence. The only physical evidence which had been collected by law enforcement regarding the "burglaries" were the fingerprints listed from the air-conditioner and glass at Ms. Butler's home. The identification of fingerprints is made by comparing lifted prints to known fingerprints, not by the analysis of blood drawn from a person. In reality, Det. Chaix wanted the blood evidence to do a DNA comparison with the semen saved by Ms. Butler after the rape. However, it was not until after Det. Chaix had obtained an executed consent form from the Appellant and the blood had been drawn that Chax advised the Appellant that he was a suspect for a rape offense.

Was Miranda Required?:

The Mississippi Supreme Court has found that Miranda warnings are not normally required prior to a consent search. *Jones v. State Ex Rel. Mississippi DPS*, 607 So.2d 23,29 (Miss.1991); see, *Logan v. State*, 773 So.2d 338,343 (¶14) (Miss.2000) However, when the "consent is given after a detention, illegal or otherwise, such as being taken to the police station," Miranda warnings must be given. *Jones v. State Ex Rel. Mississippi DPS*, 607 So.2d 23,29 (Miss.1991), *see Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) In addition, "[t]he consent must be shown to be voluntary and not coerced, by explicit or implicit means, and not a mere acquiescence to the claim of lawful authority. *Stokes v. State*, 548 So.2d 118,123 (Miss.1989); *Brown v. State*, 358 So.2d 1004,1005 (Miss.1978),

citing, Bumper v. State of North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968)

Except for those Officers who were called and questioned regarding the chain of custody for various items of evidence, all of the Officers who encountered the Appellant were repeatedly asked if the Appellant was under arrest or handcuffed at various times. Specifically, on January 28, 2005, the Appellant would submit that he was detained by Officers of the Gulfport Police Department. They came to his home and asked him to come along with them. These Officers drove him to the hospital where blood was drawn. These Officers drove him to the police station where they questioned the Appellant for almost three quarters of an hour. These Officers drove him back to his home where they conducted a search of the Appellant's residence. They then requested that he return to the police station for further questioning. Notwithstanding the fact that the Appellant's wife drove him to the police station for the second round of questioning, which lasted almost two hours, the Appellant would submit that he had been detained by law enforcement for the greater part of the day; he was a suspect in criminal offenses and evidence had been collected from her person and his home. Consequently, Miranda warnings were required to be read to the Appellant prior to each of the consent to search forms he was requested to sign by law enforcement. Det. Chaix repeatedly stated during the course of his testimony at the hearings and trial that the Appellant was not Mirandized prior to the execution of the consent to search forms.

Standard of Review:

"Mississippi has long recognized that a defendant can waive his or her rights under the warrant requirement by consenting to a search." *Graves v. State*, 708 So.2d 858,863 (¶23) (Miss.1997); see, *Penick v. State*, 440 So.2d 547,549-50 (Miss.1983) "The question whether a consent to a search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." *Graves*, 708 So.2d at 863 (¶24); *Jones v. State Ex Rel. Mississippi DPS*, 607 So.2d 23,27 (Miss.1991), *citing*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041,2047-48, 36 L.Ed.2d 854 (1973) "Consent is valid if there was knowledgeable as well as voluntary waiver of a party's constitutional right not to be searched." *Jones,* 607 So.2d at 28; See, *Logan v. State*, 773 So.2d 338,343 (¶14) (Miss.2000); see, *Penick*, 440 So.2d at 551

The Appellant would submit that under the totality of the circumstances, (a) his execution of S-3, the consent to search form for the drawing of his blood was obtained by law enforcement while he was being detained by them and therefore Miranda was required before there can be a finding of consent; (b) that his consent could not have been either knowing and/or voluntary as Det. Chaix expressly did not advise Appellant that he was a suspect in a rape offense - "he was just a suspect in some burglaries" - until **after** his blood had been drawn; and, (c) that any consent allegedly given by the Appellant was not valid due to his mental retardation.

This Court should find that the trial court was in error when it denied the Appellant's request to suppress S-3, the consent to search form for the drawing of the Appellant's blood. And further, that since the DNA analysis of the Appellant's blood was the only evidence linking the Appellant to the charged offenses, that the error committed by the trial court was not harmless error.

II. THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED THE APPELLANT'S MOTION FOR MISTRIAL.

During the State's case-in chief, Detective Chaix with the Gulfport Police Department was called to testify. While he was on direct examination the State queried Det. Chaix about his contact with the Appellant on January 28, 2005. Det. Chaix responded as follows:

> Q: In the course of – Tell me about the contact on January 28 of 2005 with Mr. Robinson.
>
> A: Contact him at his residence at 2018 29th Street. Told him he was suspected in a series of crimes – in a crime, rather. I'm sorry, a crime. (T.438)

An immediate objection was made by Appellant's counsel which was sustained by the trial court. The trial court then stated:

> **The Court:** Jury will disregard "a series." Proceed. [T.439]

Subsequent to the trial court's instruction to the jury, Appellant's counsel moved for a mistrial arguing that the testimony which had been heard about another crime on December 23, 2004, in conjunction with Det. Chaix's comment about investigating other crimes was

prejudicial to the Appellant and he (counsel) did not believe that the jury could block the Chaix statement. Consequently, it would be too prejudicial to proceed. [T.439] The trial court ruled that it would not declare a mistrial at that time based upon the statement made, his ruling on the objection and the instruction of the jury to disregard "a series of crimes." The trial court further cautioned Det. Chaix not to cross over that line again. [T.440]

"Upon motion of any party, the court may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct by the party, the party's attorneys, or someone acting at the behest of the party or the party's attorneys, resulting in irreparable prejudice to the movant's case." *Shelton v. State*, 853 So.2d 1171,1183 (¶41) (Miss.2003); URCCC 3.12. "A mistrial is reserved for those instances where a trial court cannot take any action which would correct improper occurrences inside or outside the courtroom." *Howard v. State*, 853 So.2d 781,790 (¶30) (Miss.2003); *Smith v. State*, 835 So.2d 927,946 (¶52) (Miss.2002)

Standard of Review:

"Whether to grant a motion for mistrial is within the sound discretion of the trial court. The standard of review for denial of a motion for mistrial is abuse of discretion." *Shelton v. State*, 853 So.2d 1171,1183 (¶41) (Miss.2003); *Illinois Cent. R. Co. v. Hawkins*, 830 So.2d 1162,1181 (¶54) (Miss.2002)

The Appellant would submit that the Trial Court abused its discretion when it failed to grant the Appellant's motion for mistrial. A mistrial should be granted "if the inadmissible

testimony is so damaging that its effect upon the jury could not be adequately tempered by admonition or instruction." *Hoops v. State*, 681 So.2d 521,528 (Miss.1996); *Baine v. State*, 604 So.2d 249,257 (Miss.1992) In the case at hand, the Appellant was being tried for one count each of burglary of a dwelling, forcible sexual intercourse and sexual battery. Det. Chaix's statement regarding a "series of crimes" in addition to the following testimony: (a) Officer Payne's prior testimony that he and Sgt. Parrish encountered the Appellant while they were on a call-out for a burglary complaint on December 23, 2004 (T.414-18); (b) Det. Chaix's subsequent testimony that on December 23rd he just spoke with the Appellant; took some photographs and let him go. Chaix did not pick the case back up until January 27th. He then came into contact with the Appellant on January 28th. (T.436-37); (c) Det. Chaix's subsequent testimony that after he made contact with the Appellant at his home on January 28th, the Appellant was asked to go to the hospital to have his blood drawn for evidentiary purposes; and (d) the matter before the jury involved an offense date which occurred before the Appellant's first contact with law enforcement on December 23, 2004, could only infer to the jury that the Appellant had committed similar crimes to those for which he was on trial for. The Appellant would submit that there was no instruction which the trial court could have given to the jury which would cure or otherwise correct Det. Chaix's testimony regarding a "series" of crime.

III. THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED THE APPELLANT'S MOTION FOR JNOV as to COUNTS III, IV and V OF THE INDICTMENT.

JNOV - The Motion for:

A defendant's motion for a judgment notwithstanding the verdict (JNOV) tests the legal sufficiency of the jury verdict. *Hamilton v. Hammons*, 792 So.2d 956,964 (¶¶39-40) (Miss.2001); *Hart v. State*, 637 So.2d 1329,1340 (Miss.1994) The motion for JNOV asks the court to find, as a matter of law, that the verdict of guilt may not stand and the defendant must be finally discharged. *May v. State*, 460 So.2d 778,780-81 (Miss.1984) "In judging the sufficiency of the evidence on a motion for a directed verdict, peremptory instruction, or judgment notwithstanding the verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant." *Fleming v. State*, 732 So.2d 172,182 (¶33) (Miss.1999); See, *Hart*, 637 So.2d at 1340 (Miss.1994).

Standard of Review:

"The standard of review for a denial of a directed verdict, peremptory instructions and a motion for a judgment notwithstanding the verdict (JNOV) is the same." *Jernigan v. Humphrey*, 815 So.2d 1149,1152 (¶12) (Miss.2002); *Steele v. Inn of Vicksburg, Inc.*, 697 So.2d 373,376 (Miss.1997) "Just as the trial court is required to do, (the appellate) court must consider the motion in light most favorable to the party opposing the motion." *Garner v.*

Hickman, 733 So.2d 191,194 (¶13) (Miss.1999); *Benjamin v. Hooper Electronic Supply Co.*, 568 So.2d 1182,1187 (Miss.1990) "The (appellate) court must, with respect to each element of the offense, consider all of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the verdict." *Fleming v. State*, 732 So.2d 172,182 (¶34) (Miss.1999); *Wetz v. State*, 503 So.2d 803,808 (Miss.1987)

"The standards of review, however, are predicated on the fact that the trial judge applied the correct law." *Jernigan v. Humphrey*, 815 So.2d 1149,1152 (¶12) (Miss.2002); *Sperry-New Holland v. Prestage*, 617 So.2d 248,252 (Miss.1993)

"If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt." *Shields v. State*, 702 So.2d 380,382 (Miss.1997)(*cite to, Clark v. Procunier*, 755 F.2d 394,396 (5thCir.1985)) "It is fundamental that convictions of crime cannot be sustained by proof which amounts to no more than a possibility or even when it amounts to a probability, but it must rise to that height which will exclude every reasonable doubt." *Kolberg v. State*, 829 So.2d 29,39 (¶7) (Miss.2002); *Westbrook v. State*, 202 Miss. 426, 32 So.2d 251,252 (1947)

The Appellant would submit that the trial court was in error when it denied the Appellant's motion for a Judgment Notwithstanding the Verdict, or in the alternative, a New Trial.

IV. COURT SHOULD FIND THAT THE CUMULATIVE ERROR COMMITTED BY THE TRIAL COURT MANDATES THE REVERSAL OF THE APPELLANT'S CONVICTION.

This Court has stated that while individual errors which may not be reversible in and of themselves, may become reversible error when combined with other errors. *Caston v. State*, 823 So.2d 473,509 (¶134) (Miss.2002); *Weeks v. State*, 804 So.2d 980,998 (¶70) (Miss.2001) "The question that must be asked in these instances is whether the defendant was deprived of a fundamentally fair and impartial trial as a result of the cumulative effect of all errors at trial." *Caston,* 823 So.2d 473,509 (¶134) (Miss.2002); *Weeks*, 804 So.2d 980,998 (¶70) (Miss.2001)

The Appellant would submit that this Court should find that the totality of the errors committed by the trial court denied him the right to a "fundamentally fair and impartial trial," and mandate the reversal of his conviction for forcible sexual intercourse, sexual battery and burglary of a dwelling

CONCLUSION

Appellant believes that this Court should reverse Appellant's convictions for forcible sexual intercourse, sexual battery and burglary of a dwelling.

RESPECTFULLY SUBMITTED this the 31st day of January, 2008.

FRANCISUS A. ROBINSON, APPELLANT

BY: Melvin G. Cooper
MELVIN G. COOPER,
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, Melvin G. Cooper, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing *Appellant's Brief*, to the office of Jim Hood, Attorney General, P. O. Box 220, Jackson, MS 39205; to the Office of the District Attorney, Harrison County, at his usual office located within the Harrison County Courthouse, Gulfport, MS; and to Judge Jerry Terry, at his usual office address located within the Harrison County Courthouse, Gulfport, MS 39501.

This the 31st day of January, 2008.

Melvin G. Cooper
MELVIN G. COOPER