IN THE OF THE STATE OF MISSISSIPPI

WILLIAM PRESLEY BROWN, II — APPELLANT

V. — NO. 2007-KA-01330-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. William Presley Brown, II, Appellant
3. Honorable G. Gilmore Martin, District Attorney
4. Honorable Isadore W. Patrick, Circuit Court Judge

This the 29th day of April, 2008.

Respectfully Submitted,

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS I

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES 1

STATEMENT OF INCARCERATION 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 5

ISSUE ONE: WHETHER THE APPELLANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN LAW ENFORCEMENT AGENTS UNLAWFULLY SEIZED APPELLANT'S VEHICLE WITHOUT PROBABLE CAUSE, OR, IN THE ALTERNATIVE, WHETHER THE APPELLANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN LAW ENFORCEMENT AGENTS UNLAWFULLY SEIZED APPELLANT'S VEHICLE FOR INVESTIGATORY PURPOSES WITHOUT ARTICULABLE SUSPICION. 5

ISSUE TWO: WHETHER THE TRIAL COURT ERRED IN NOT GRANTING DEFENSE COUNSEL'S CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION. 19

ISSUE THREE: WHETHER THE TRIAL COURT ERRED IN NOT GRANTING DEFENSE COUNSEL'S ACCESSORY AFTER THE FACT JURY INSTRUCTION. 22

CONCLUSION 25

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

FEDERAL CASES

Adams v. Williams, 407 U.S. 143, 146 (1972) 7, 10

Beck v. Ohio, 379 U.S. 89, 97 (1964) 11

Brinegar v. United States, 388 U.S. 160, 175-76 (1949) 11

Brown v. Illinois, 422 U.S. 590, 603 (1975) 14

Carroll v. United States, 267 U.S. 132 (1925) 10, 11

Florida v. Royer, 460 U.S. 491, 507 (1983) 11

Illinois v. Gates, 462 U.S. 213 (1983) 11

Kaupp v. Texas, 538 U.S. 626, 628 (2003)(per curiam) 14

Mallory v. United States, 354 U.S. 449, 454 (1957) 11

Marron v. United States, 275 U.S. 192, 196 (1927) 7

Maryland v. Pringle, 540 U.S. 366, 371 (2003) 11

Michigan v. Summers, 452 U.S. 692, 698 (1981) 7

Murray v. United States, 487 U.S. 533, 536 (1988) 13

Nardone v. United States, 308 U.S. 338, 341 (1939) 13

Silverthorn Lumber Co. v. United States, 251 U.S. 385 16

Texas v. Brown, 460 U.S. 730 747 (1983) 6

United States v. Crews, 455 U.S. 463, 471 (1980) 16

United States v. Jacobsen, 466 U.S. 109, 113 (1984) 6, 8

United States v. Leon, 468 U.S. 897, 921-24 (1984) 18

United States v. Place, 462 U.S. 696 (1983) 6-9

Wong Sun v. Untied States, 371 U.S. 471 (1963) 13, 14

STATE CASES

Baylor v. State, 246 So. 2d 516, 518 (Miss. 1971) 11

Clark v. State, 503 So. 2d 277, 279 (Miss. 1987) 7

Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991) 11

Dies v. State, 926 So. 2d 910, 917 (Miss. 2006) 7

Dorsey v. State, 761 A.2d 807 (Del. 2000) 13

Ellis v. State, 778 So. 2d 114, 118 (Miss 2000) 13

Gandy v. State, 438 So. 2d 279 16

Harvey v. State, 469 S.E.2d 176 (Ga. 1996) 6

Lynch v. State, 877 So. 2d 1254 (Miss. 2004) 16

Mack v. State, 481 So. 2d 793, 795 (Miss. 1985) 6, 8

Manning v. State, 735 So. 2d 323, 338 (Miss. 1999) 18

Marshall v. State, 584 So. 2d 437, 437 (1991) 6-9

McCray v. State, 486 So. 2d 1247, 1250 (Miss. 1986) 13, 14

People v. Bigelow, 488 N.E.2d 451 (N.Y. 1985) 18

Reynolds v. State, 658 So. 2d 852, 855-56 (Miss. 1995) 23

State v. Canelo, 653 A.2d 1097 (N.H. 1995) 18

State v. Carter, 370 S.E.2d 553 18

State v. Cline, 617 N.W.2d 277 (Iowa 2000) 18

State v. Gutierrez, 863 P.2d 1052 (N.M. 1993) 18

State v. Guzman, 842 P.2d 660 (Idaho 1992) 18

State v. Lascasella, 60 P.3d 975 (Mont. 2002) 18

State v. Marsala, 579 A.2d 58 (Conn. 1990) 18

State v. McKnight, 352 S.E.2d 471 18

State v. Novembrino, 519 A.2d 820 (N.J. 1987) 18

State v. Oakes, 598 A.2d 119 (Vt. 1991) 18

Thames v. State, 73 So. 2d 134, 136 (Miss 1954) 24

White v. State, 735 So. 2d 221 (Miss. 1999) 17

White v. State, 842 So. 2d 565, 575 (Miss. 2003) 18, 22

FEDERAL STATUTES

U.S. Const. amend IV 6

STATE STATUTES

Miss. Code Ann. § 97-1-5 (Rev. 2006) 23

Miss. Const. Art. 3 § 23 6

OTHER AUTHORITIES

Section 146 of the Mississippi Constitution and Miss. Code Ann. 99-35-101 2

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STATEMENT OF ISSUES

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WHETHER THE APPELLANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN LAW ENFORCEMENT AGENTS UNLAWFULLY SEIZED APPELLANT'S VEHICLE WITHOUT PROBABLE CAUSE, OR, IN THE ALTERNATIVE, WHETHER THE APPELLANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN LAW ENFORCEMENT AGENTS UNLAWFULLY SEIZED APPELLANT'S VEHICLE FOR INVESTIGATORY PURPOSES WITHOUT ARTICULABLE SUSPICION.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED IN NOT GRANTING DEFENSE COUNSEL'S CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION.

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED IN NOT GRANTING DEFENSE COUNSEL'S ACCESSORY AFTER THE FACT JURY INSTRUCTION.

STATEMENT OF INCARCERATION

William Presley Brown II, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds form the Circuit Court of Warren County, Mississippi, first a judgment of one count of murder against William Presley Brown II, following a trial on June 4-8, 2007, honorable Isadore W. Patrick, Jr., Circuit Judge, presiding. Mr. Brown was subsequently sentenced to life imprisonment in the custody of the Mississippi Department of Corrections.

STATEMENT OF THE FACTS

On October 15, 2005, Vicksburg Police Department officers responded to the Vicksburg Hotel in Vicksburg, Mississippi. (Supp. T. 68). There they found a mostly nude black female in a decomposing state. (Supp. T. 69). At the scene, they saw what they believed to be drag marks fifteen feet away from the body. (Supp. T. 70).

Later that evening, detectives received a radio call concerning a suspicious vehicle down the street. (T. 71). According to the testimony of the lead detective in the case, "They called out Sargent Woodall who came out. And through his looking at the vehicle he determined that it could possibly be blood." (Supp. T. 71). The police then towed the vehicle to the city impound lot. (Supp. T. 73).

According to the testimony, Officer Daniel Thomas received the report from an individual approaching his patrol unit. (Supp. T. 99). Officer Thomas investigated the vehicle. He testified that the vehicle was legally parked. (Supp. T. 105). He noticed red marks running down the back side of the tailgate and thought that it appeared to be blood. (Supp. T. 100). He also noticed a red spot on the seat as well. (Supp. T. 101). He also saw the seat cover bundled up in the back of the truck. (Supp. T. 101). Officer Thomas notified the Watch Commander, who, in turn, contacted the

investigator, James Hudson. (T. 101). When Investigator Hudson arrived, he looked around and notified Sargent Woodall. (Supp. T 102).

Sargent Woodall photographed the vehicle, notified the tow company and towed the vehicle to the city shop so that it could be "secured for the processing." (Supp T. 102). There were never any tests done that evening by Mr. Woodall to determine whether or not the substance on the back of the vehicle was presumptive for blood. (Supp. T. 114). When asked why he decided to get the vehicle towed, Sargent Woodall replied,

> A. Because at the point that he murder was only a block and a half or two blocks away and it had an amount of blood running down the tailgate and in the bed of the truck and we didn't know whether them, who the owner was at the time. So, I decided to have it towed until we could get a search warrant to proceed further with it."

(Supp T. 132).

The next morning, a group of investigators looked at the vehicle and determined that the streaks were what they thought to be blood. (Supp. T. 74). Officer Brown then went to type up a search warrant for the vehicle. (Supp. T. 74). While typing up the warrant, Officer Brown received a phone call from Sargent Woodall, who had done a presumptive blood test on the vehicle. (Supp. T. 74).

After getting the warrant, police officers searched the inside of the truck, finding a wallet belonging to William Presley Brown II (Supp. T. 77). Also inside the vehicle, police found a phone number. (Supp. T. 77). Through the course of their investigation, officers were able to trace the wallet to William Presley Brown's residence at the Vicksburg Hotel. (Supp. T. 77-79). Police then obtained a search warrant for the apartment. (Supp. T. 79).

Upon searching the room, police officers found blood stains, bloody clothing, bloody pillows and other evidence. (Supp. T. 142). Police then obtained an arrest warrant for William Presley

Brown II. (Supp. T. 81). The Appellant was subsequently arrested at noon on October 17, 2005. (Supp. T. 81).

Upon being arrested, the Appellant made voluntary statements to police officers admitting to moving the body and attempting to clean up the crime scene. (Exib. 4). The Appellant further stated to police that he was in the house smoking crack cocaine with the victim and another individual, a male with a "crooked eye." (Exib. 4). The man with the "crooked eye" and the victim began to argue over crack cocaine, and he hit her over the head with a baseball bat that was owned by the Appellant. (Exib. 4). The Appellant confronted the man, who threatened the Appellant before running out of the apartment. (Exib. 4). This man was never found.

The Appellant also testified that after the night in question, he went to his Percy Lynch's (Lynch) house where the two had a conversation. Lynch testified as follows:

> "And he told me, you know, he might have killed somebody. He said, you know, I said: "What do you mean you might have killed somebody?" HE said: "Well, we was at my house, and me and this guy got into it, and I stabbed him." I said: "Yeah. Did you call the police?" He said: "No." And I said: "Well, that's what you need to do is call the police, if anything happened like that." And then I said: "Man, you are serious?" He said: "Man, Percy, me and a guy and a girl was at the house." And he said the guy and the girl got to arguing. I said: "What do you mean, man?" He said that we was smoking. I said: "Cool." He said the girl had gave the guy some dope, The guy wanted some more. The guy got mad and picked up a bat and hit the girl. He said he jumped up, and the guy turned around and said: "I'll kill you too.""

(T. 335-36).

The Appellant was subsequently indicted for the murder. (C.P. 4, R.E. 3). Trial counsel filed a motion to suppress the evidence obtained against the Appellant, citing violation of the Appellant's Fourth Amendment Rights. (C.P. 62-64). The trial court heard a motion hearing on May 22, 2007. (Supp. T. 64).

After the presentation of witnesses and argument from both sides, the trial court denied

defense counsel's motion to suppress. (Supp. T. 178).

The Appellant was subsequently tried. After deliberating, a jury returned a guilty verdict against the Appellant. (T. 674). The Appellant was subsequently sentenced to life imprisonment in the custody of the Mississippi Department of Corrections. (C.P. 117, R.E. 26).

On June 20, 2007, the Appellant filed a Motion for New Trial and J.N.O.V., claiming that the verdict was contrary to law and to the overwhelming weight of the evidence and that the trial court erred in not granting both a circumstantial and accessory after the fact jury instruction. (C.P. 125-26, R.E.27-28). On July 5, 2007, the trial court denied the motion. (C.P. 143, R.E. 29). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant timely filed a notice of appeal. (C.P. 146, R.E. 30).

SUMMARY OF THE ARGUMENT

The Appellant's Fourth Amendment Right to be protected against unlawful seizure of his personal property was violated when the Vicksburg Police Department unlawfully seized his vehicle without probable cause, or, in the alternative, without articulable suspicion. None of the exceptions to the exclusionary rule created by the United States Supreme Court are applicable under the case *sub judice.* Therefore, under the doctrine of the "fruit of the poisonous tree," the evidence and statements obtained by police officers subsequent to their violation of the Appellant's Fourth Amendment rights should be inadmissible. Furthermore, the trial court erred in denying defense counsel's circumstantial evidence and accessory after the fact jury instructions.

ARGUMENT

ISSUE ONE: WHETHER THE APPELLANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN LAW ENFORCEMENT AGENTS UNLAWFULLY SEIZED APPELLANT'S VEHICLE WITHOUT PROBABLE CAUSE, OR, IN THE ALTERNATIVE, WHETHER THE APPELLANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN LAW ENFORCEMENT AGENTS UNLAWFULLY SEIZED

APPELLANT'S VEHICLE FOR INVESTIGATORY PURPOSES WITHOUT ARTICULABLE SUSPICION.

I. Standard of Review

The analysis of whether there has been an unlawful seizure is guided under a mixed standard of review in that "determination of reasonable suspicion and probable cause should be reviewed *de novo*." ***Dies v. State***, 926 So. 2d 910, 917 (Miss. 2006) (citing ***Ornelas v. United States***, 517 U.S. 690, 699 (1997)). The appellate court, however, is "restricted to a *de novo* review of the trial judge's decision based on historical facts reviewed under the substantial evidence and clearly erroneous standards." ***Dies***, 926 So. 2d at 918.

ii. The Fourth Amendment of the United States and Section 23 of Article 3 of the Mississippi Constitution protects individuals form unreasonable seizures of property.

The Fourth Amendment to the United States Constitution provides:

> "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."

U.S. Const. amend IV.

Section 23 of Article 3 of the Mississippi Constitution provides:

> "The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized."

Miss. Const. Art. 3 § 23.

In contrast to a search, which concerns a person's privacy interest, a seizure of personal property invades a person's possessory interest in that property. ***Texas v. Brown***, 460 U.S. 730 747 (1983)(Stevens J., concurring). Property is seized in terms of the Fourth Amendment "when

there is some meaningful interference with an individual's possessory interest in that property." ***United States v. Jacobsen***, 466 U.S. 109, 113 (1984).

A seizure can occur when an officer exercises control over an individual's property by destroying it. ***Id.*** at 124-25. A seizure may also occur when a police officer removes property from an individual's actual or constructive possession. *See, e.g.*, ***United States v. Place***, 462 U.S. 696 (1983)(holding that the detention of an individual's luggage for ninety minutes in order to take it from La Guardia Airport to JFK Airport for a narcotics dog to smell constituted a seizure.)

Over time, the United States Supreme Court has developed two methods of analyzing, in terms of the Fourth Amendment, the seizure of personal property. In the ordinary case, the United States Supreme Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized. *See, e.g.* ***Marron v. United States***, 275 U.S. 192, 196 (1927).

In ***Terry v. Ohio***, however, the Supreme Court first recognized "the narrow authority of police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on less than probable cause." ***Michigan v. Summers***, 452 U.S. 692, 698 (1981). In ***United States v. Place***, the court explained,

> "In approving the limited search for weapons, or "frisk," of an individual the police reasonably believed to be armed and dangerous, the court implicitly acknowledged the authority of the police to make a forcible stop of a person when the officer has a reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity."

United States v. Place, 462 U.S. 696, 702 (1983)(citations omitted).

Following ***Terry***, the Court has openly embraced that implicit proposition. *See, e.g.* ***Adams v. Williams***, 407 U.S. 143, 146 (1972)(relying on ***Terry*** to validate a police officer's

forcible stop of a suspect to investigate informant's tip); ***Michigan v. Summers***, 452 U.S. 692, 698 (1981) (allowing for the limited detention of occupants while authorities search premises pursuant to valid search warrant).

Before analyzing whether or not the to apply the probable cause or ***Terry***-like analysis, it must first be shown that the taking of the Appellant's vehicle constituted a seizure under the meaning of the Fourth Amendment.

iii. The towing of the Appellant's vehicle constituted a seizure.

There can be little doubt that the Vicksburg Police Department made a seizure of Mr. Brown's vehicle for the purposes of the Fourth Amendment when they towed his vehicle to the city impound lot.

As noted above, property is seized "when there is some meaningful interference with an individual's possessory interest in that property." ***Jacobsen***, 466 U.S. at 113.

In ***Terry***, the court observed, "[t]he manner in which the seizure . . . [was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all." ***Terry***, 392 U.S. at 28.

In ***Place***, the Court rejected the Government's suggestion that seizures of property are generally less intrusive than seizures of the person. ***Place***, 462 U.S. at 708. The ***Place*** Court concluded that the seizure of a respondent's luggage for a ninety minute investigatory period effectively restrained the individual and subjected him to possible disruption of his travel plans. ***Id.*** at 708-09. This disruption and restraint exceeded the permissible limits of a ***Terry***-type investigative stop. ***Id.*** at 709. The Court reasoned, "The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause." ***Id.***

Here, the Appellant's vehicle, while legally parked, was towed from its public parking place and placed in the city of Vicksburg's impound lot. This deprivation by a governmental agency of the Appellant's possession of a property is clearly sufficient to constitute a seizure with regard to the Fourth Amendment.

Furthermore, it cannot be argued that the small distance between the place where the vehicle was parked and the location to which it was towed somehow makes the police's actions less of a seizure. The Appellant was not free to access and remove his vehicle.

Because of the meaningful interference with the Appellant's possessory interest in his vehicle, his property was seized under the Fourth Amendment. However, as noted above, it must be concluded whether or not this seizure was an investigative stop, in accordance with ***Terry***, or if it constituted the type of seizure that must be supported by probable cause.

iv. The seizure of the Appellant's truck exceeded the length allowable to be considered an investigative stop. However, if this honorable Court should find that the seizure was an investigative stop, the seizure, nonetheless, was not supported by articulable suspicion.

The exception to the probable-cause requirement for limited seizures recognized in ***Terry*** and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved. The ***Place*** Court concluded,

> "We must balance the nature and quality of the intrusion of the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause."

Place 462 U.S. at 704.

In ***Place***, the court concluded that when officers have "specific and articulable facts warranting a reasonable belief" that luggage contained narcotics, the "governmental interest in seizing the luggage briefly to pursue further investigation is substantial." ***Id.***

The Appellant concedes that the governmental interest in the instant case was substantial. Police officers were aware that a crime had occurred and were hoping to investigate.

After analyzing the importance of the governmental interest alleged to justify the seizure of evidence, the Court should analyze the nature and quality of the intrusion on the individual's rights under the Fourth Amendment.

"The brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." ***United States v. Place***, p. 710. In ***Place***, the United States Supreme Court concluded that a 90-minute detention of an individuals luggage was sufficient to render a seizure unreasonable. ***Id.***

The Vicksburg Police Department towed the vehicle, and locked it up overnight, longer than the length of time that was held to be too long in ***Place***. This was not a minimally intrusive invasion. Rather, the Appellant was deprived of use of his vehicle for a significant amount of time.

Under the facts *sub judice*, it is clear that the seizure does not constitute the type of investigatory seizure allowed for in ***Terry***. However, should this honorable Court determine that the seizure of the Appellant's vehicle was a ***Terry***-style stop, it still was not supported by the requisite articulable suspicion required.

The only basis for the seizure the Appellant's truck was the perceived blood on the tailgate. This event occurred during deer season. Appellant would contend that, under the facts

of the instant case, there is not enough evidence to constitute the articulable suspicion required for a *Terry*-style seizure.

v. The seizure of the Appellant's truck was not supported by probable cause and was therefore in violation of his Fourth Amendment rights.

When the detention of personal property exceeds the scope of an investigative stop it becomes a seizure. To justify a seizure without a warrant, the State must show probable cause. ***Carroll v. United States***, 267 U.S. 132 (1925).

The standard for a showing of probable cause is something less than the standard of proving a crime beyond a reasonable doubt. ***McCray v. State***, 486 So. 2d 1247, 1250 (Miss. 1986). The United States Supreme Court has concluded that, "Probable cause does not require the same type of specific evidence of each elements of the offense that would be needed to support a conviction. ***Adams v. Williams***, 407 U.S. 143, 149 (1972). It is important to note, however that the police officer at least be able to entertain "a belief rising above mere unfounded suspicion." ***Gandy v. State***, 438 So. 2d 279, 283 (Miss. 1983).

"Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that ' an offense has been or is being committed." ***Brinegar v. United States***, 388 U.S. 160, 175-76 (1949)(quoting ***Carroll v. United States***, 267 U.S. 132, 162 (1925). Moreover, probable cause in an objective concept. A police officer's subjective belief, no matter the degree of its sincerity, that he or she has good cause to effect ana rest on a person or conduct a search does not in and of itself constitute probable cause. ***Beck v. Ohio***, 379 U.S. 89, 97 (1964) *See, contra*, ***Florida v. Royer***, 460 U.S.

491, 507 (1983) (holding that an officer's lack of belief that he or she has probable cause does not foreclose a finding to the contrary).

The United States Supreme Court has never truly quantified probable cause. In fact, the Court has defined probable cause as a "fluid concept." ***Illinois v. Gates***, 462 U.S. 213 (1983). The Court has further concluded that probable cause is "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." ***Maryland v. Pringle***, 540 U.S. 366, 371 (2003). However, there must be something more than "bare," "mere," or even "reasonable suspicion."[1] *See,* ***Brinegar***, 338 U.S. at 175 (holding probable cause is more than "bare suspicion); ***Mallory v. United States***, 354 U.S. 449, 454 (1957)(concluding that probable cause is more than "mere suspicion.").

In the Officer's own words, the only reason that the Appellant's vehicle was towed was based on mere suspicion. When Officer Billy Brown was being investigated, and was asked to articulate the probable cause the Vicksburg police department had to tow the vehicle. Officer Brown answered,

> A. Officer Thomas looked at the vehicle and it appeared to be blood to him on the tailgate of the vehicle. Sargent Woodall arrived on the scene. He is a seasoned investigator and it appeared to be blood to him; the close proximity of the truck to the crime scene and where we found Ms. Young; and the presumptive blood test once we had taken the vehicle to the City shop..."

(Supp. T. 89)(emphasis added).

Officer Brown's only articulation of probable cause was that the saw what they believed to be blood on the tailgate of the vehicle. This mere suspicion is not enough to constitute probable cause. Furthermore, the presumptive blood test in no way should be considered in any

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1. "Reasonable suspicion" is a term of art justifying less-intrusive searches and seizures in the lines of ***Terry.***

probable cause analysis regarding the seizure of the Appellant's vehicle, because the test occurred after the seizure.

Other members of the Vicksburg Police Department were equally unable to articulate facts that would meet the standard necessary for a determination of probable cause. When Virgil Woodall was being cross-examined, trial counsel asked;

> Q: And when you seized that truck out there at the time you just had suspicion that this was blood, didn't you?
>
> A. True.

(T. 148).

There was no probable cause to support the seizure of the Appellant's vehicle by the Vicksburg Police Department. The belief that the Appellant's vehicle had something to do with a crime amounts to nothing more than a hunch. There is a wealth of other theories as to what the stain on the back of the Appellant's vehicle could have been, the least of which is the fact that, during the time of the crime, it was bow season.

The officer's own words do not support a finding of probable cause. As noted above, police officers just had a suspicion that this was blood. A suspicion or a hunch is not enough to reach the level of probable cause required to allow for the seizure of personal property. As noted by the Mississippi Supreme Court, "probable cause is not a mere hunch." ***Baylor v. State***, 246 So. 2d 516, 518 (Miss. 1971)(citing ***Lathers v. United States***, 396 F.2d 526, 531, (5th Cir. 1968)).

vi. The subsequent searches and statements made by the Appellant are inadmissible as "fruit of the poisonous tree."

Generally, the Fourth Amendment exclusionary rule extends not simply to the direct products of governmental illegality, but also to the secondary evidence that is the "fruit of the poisonous tree." ***Nardone v. United States***, 308 U.S. 338, 341 (1939).

The "fruit of the poisonous tree" doctrine "prohibits the introduction of derivative evidence, both tangible and testimonial, that is, the product of primary evidence, or that is otherwise acquired as a result of the unlawful search, up to the point at which the connection becomes 'so attenuated as to dissipate the taint.'" ***Murray v. United States***, 487 U.S. 533, 536 (1988) (citing ***Nardone,*** 307 U.S. 338.); *see also* ***Wong Sun v. Untied States***, 371 U.S. 471 (1963).

In ***Wong Sun***, the Court said that not all evidence "is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." ***Wong Sun***, 371 U.S. at 487-88. The ***Wong Sun*** Court instead held that the crucial question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." ***Id.*** at 488. In other words, even if there is a certain causal connection tying evidence to a previous illegality, at some point the "fruit" from the "poisoned tree" is sufficiently untainted so as to allow for its admissibility in a criminal trial.

There are several attenuation factors with regard to a "fruit of the poisonous tree" analysis. First, the short the time lapse between the acquisition of the challenged evidence and the initial Fourth Amendment violation, the higher the likelihood that a court will conclude the evidence is tainted. In ***Wong Sun***, police officer obtained a statement from the defendant immediately after his unlawful arrest. There, the Court suppressed the statement because, critically, it "derive[d] so immediately from the unlawful entry." ***Id.*** at 485.

Courts have also addressed intervening events when determining whether the taint of an unlawful arrest has been attenuated. The United States Supreme Court has consistently held that ***Miranda*** warnings "alone and *per se*, cannot always make the act [of confessing] a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." ***Brown v. Illinois***, 422 U.S. 590, 603 (1975).

For instance, in ***Kaupp v. Texas***, three uniformed and two plainclothes officers, without probable cause, came to the family home of a suspect at 3:00 a.m. saying that they needed to speak with him about a murder. ***Kaupp v. Texas***, 538 U.S. 626, 628 (2003)(per curiam). The suspect was handcuffed and taken to a police station, where they advised him of his ***Miranda*** rights, and shortly thereafter obtained an admission to the murder. ***Id.***

On these facts, the Supreme Court concluded that, except for the ***Miranda*** warnings, all other signs pointed against the dissipation of the taint; it reasoned that, "[u]nless, on remand, the state can point to testimony undisclosed on the record . . ., and weighty enough to carry the state's burden despite the clear force of evidence [of taint] shown here, the confession must be suppressed." ***Id.*** at 633.

Furthermore, derivative evidence is less likely to be ruled free of the taint of a Fourth Amendment Violation if the initial illegality was flagrant rather than accidental. *See,* ***Brown***, 422 U.S. at 604.

Just as the United States Supreme Court, Mississippi Courts have willing to overturn convictions based on the admission of evidence that was procured after a violation of an appellant's Fourth Amendment rights.

In ***Marshall v. State***, the defendant checked into a motel room in McComb, and while the owner/operator of the hotel was cleaning the room, he discovered a plastic bag containing "a

tobacco like substance." ***Marshall v. State*** 584 So. 2d 437, 437 (1991). The owner called the police and they conducted a warrantless search and seized the substance. ***Id.*** Officers then set up surveillance, during which time the defendant and her boyfriend drove into the parking lot followed by another vehicle, after which they were arrested. ***Id.*** The Mississippi Supreme Court concluded,

> Applying the law to the facts, this Court has no choice but to concede that the marijuana seized from the bundle of clothes was derivative of information or leads obtained through the unlawful search of room 107 and, therefore, should have been excluded. Restated, the marijuana (and other evidence) constituted inadmissible "fruit of the poisonous tree." [2]

Id. at 438.

In the case *sub judice*, there is a close temporal proximity to the derivative evidence and the initial violation of the Appellant's Fourth Amendment rights. The morning after the vehicle was unlawfully seized by the Vicksburg Police Department, a search warrant was executed on the vehicle, which led directly to the evidence allowing for the subsequent search warrant to be executed on the Appellant's apartment. Therefore, this factor weighs heavily in favor of the Appellant.

Lastly, there was nothing accidental about the towing of the Appellant's truck to the city lot. One cannot accidently call a tow truck company, watch the tow truck pick the vehicle up and lock it in a governmental lot through happenstance and accident. This factor weighs heavily in favor of the Appellant.

vii. The subsequent searches and statements made by the Appellant do not fall under the "independent source doctrine."

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2. The ***Marshall*** Court applied the exceptions outlined below and determined that none were applicable.

The threshold concern in any "fruit of the poisonous tree" analysis is whether "the challenged evidence is in some sense the product of illegal governmental activity." ***United States v. Crews***, 455 U.S. 463, 471 (1980). Evidence that bears no causal linkage to government illegality is admissible pursuant to the "independent source doctrine." *See* ***Silverthorn Lumber Co. v. United States***, 251 U.S. 385. In ***Nix v. Williams***, the Supreme Court explained the doctrine:

> "[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the place in the same, not a worse position that they would have been in if no police error or misconduct had occurred... When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation."

467 U.S. 431, 443 (1984).

Under the facts of the case *sub judice* there is no "independent source" to the evidence obtained as a result of the unlawful seizure of the Appellant's vehicle. The police officers were given no knowledge from an independent source. The causal chain from the unlawful seizure of the Appellant's vehicle to his statements to police is unbroken and unconnected. The seizure of the truck led to the search warrant of the truck, which led to the discovery of the Appellant's wallet in the truck, which led to the search warrant for the Appellant's apartment, which led to the arrest warrant being issued for the Appellant, which led to the interview which led to potential inculpating statements being made by the Appellant. No intervening act or independent source exists in the chain linking all evidence to the initial Fourth Amendment violation.

Because there is no evidence that came from or would have an "independent source," the evidence obtained by police derived from its violation of the Appellant's Fourth Amendment rights is inadmissible under the "independent source doctrine" of the exclusionary rule.

viii. The subsequent searches and statements made by the Appellant do not fall under the "inevitable discovery doctrine"

In ***Nix v. Williams***, the United States Supreme Court held that evidence connected to an earlier illegality is admissible if the prosecutor proves by a preponderance of evidence that the challenged evidence "ultimately or inevitably would have been discovered by lawful means." ***Nix v. Williams***, 467 U.S. 431, 443 (1984).[3]

There's no reason to believe that absent the violation of the Appellant's Fourth Amendment rights, this evidence would have been discovered by police officers. First, had the Appellant showed up while police were investigating his vehicle on the street, he may have been subject to a brief interrogation in accordance with ***Terry***, but police would have no justification to prevent him from leaving in his vehicle.

What the police perceived to be blood stains on the back of the Appellant's vehicle could readily be explained through a host of alternative theories, including the fact that it was bow season at the time of the crime. Therefore, police would have been unable to detain the Appellant had he appeared, and, therefore, it is implausible to argue that the blood evidence could have been discovered inevitably.

Secondly, with seemingly no connection between the Appellant and the victim, there would be no way to, given the multitude of people staying in the apartment complex, secure a warrant for the Appellant's apartment. There would not be probable cause to search every single apartment found in the apartment complex. In fact, the presence of what police discerned to be drag marks just away from the scene of the crime support that the body brought to the scene with

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3. The Mississippi Supreme Court has adopted the "inevitable discovery doctrine." *See,* ***White v. State***, 735 So. 2d 221 (Miss. 1999).

a vehicle and dumped. Hence, it would not be reasonable to assume that the vehicle came from someone in that apartment building.

For the above reasons, it is unable to be proven, by a preponderance of the evidence, that the derivative evidence would have been ultimately or inevitably discovered by law enforcement agents. For that reason, the "inevitable discovery doctrine" does not apply in the case *sub judice.*

ix. The "good faith" exception is inapplicable in the case sub judice.

In ***United States v. Leon***, the United States Supreme Court ruled that evidence obtained pursuant to a search warrant that was later declared not to be supported by probable cause, may be introduced by the State at trial, if a reasonably well-trained officer would have believed that the warrant was valid. ***United States v. Leon***, 468 U.S. 897, 921-24 (1984).[4] Regardless, the "good faith exception" in ***Leon*** is of no concern under the facts of the case *sub judice* as it is clearly distinguishable. The facts of ***Leon*** involve a warrant that was issued in the absence of probable cause but in good faith. Then, the alleged Fourth Amendment violation occurred.

In the case *sub judice*, the Appellant's Fourth Amendment Right to be free from unreasonable seizure of his property occurred. Only after, the violation of the Appellant's Fourth Amendment rights did the search warrants exist. Therefore, ***Leon*** is inapplicable when analyzing the current facts before this honorable Court.

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4. The exception in ***Leon*** has been adopted by the Mississippi Supreme Court. *See,* ***White v. State,*** 842 So. 2d 565 (Miss 2003). It should, however, be noted that many courts nationwide have rejected the good-faith exception to the exclusionary rule announced in ***Leon***; *See, e.g.,* ***State v. Marsala,*** 579 A.2d 58 (Conn. 1990); ***Dorsey v. State***, 761 A.2d 807 (Del. 2000); ***Harvey v. State***, 469 S.E.2d 176 (Ga. 1996); ***State v. Guzman***, 842 P.2d 660 (Idaho 1992); ***State v. Cline***, 617 N.W.2d 277 (Iowa 2000); ***State v. Lascasella***, 60 P.3d 975 (Mont. 2002); ***State v. Canelo***, 653 A.2d 1097 (N.H. 1995); ***State v. Novembrino***, 519 A.2d 820 (N.J. 1987); ***State v. Gutierrez***, 863 P.2d 1052 (N.M. 1993); ***People v. Bigelow***, 488 N.E.2d 451 (N.Y. 1985); ***State v. Carter***, 370 S.E.2d 553 (N.C. 1988); ***Commonwealth v. Edmunds***, 586 A.2d 887 (Pa. 1991); ***State v. McKnight***, 352 S.E.2d 471 (S.C. 1987); ***State v. Oakes***, 598 A.2d 119 (Vt. 1991).

x. Conclusion

The Appellant's Fourth Amendment rights were violated when the Vicksburg Police Department towed his vehicle to the city lot. This towing constituted a seizure. The seizure was supported by neither probable cause and exceeded the allowable time limit to be an investigatory seizure.

The subsequent searches and statements obtained by the police constitute "fruit of the poisonous" tree and are inadmissible. Moreover, the evidence obtained is not admissible under any of the exceptions to the exclusionary rule noted above. For the reasons stated above, this Honorable Court should reverse and remand the Appellant's convictions on the basis of the admission, at trial, of unlawfully obtained evidence in violation of the Appellant's Fourth Amendment rights.

ISSUE TWO: WHETHER THE TRIAL COURT ERRED IN NOT GRANTING DEFENSE COUNSEL'S CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION.

I. Standard of Review.

"[I]f the [jury] instructions fairly announce the law of the case and create no injustice, no reversible error will be found." ***Williams v. State***, 803 So. 2d 1159, 1161 (Miss. 2001) (citing ***Hickombottom v. State***, 409 So. 2d 1337, 1339 (Miss. 1982)). "If all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." ***Milano v.*** *State*, 790 So. 2d 179, 1984 (Miss. 2001).

ii. A circumstantial evidence instruction was appropriate.

During jury instruction deliberations, defense counsel offered D-3, a circumstantial evidence jury instruction. D-3 provided,

> "The Court instructs the jury that if the State has relied on circumstantial evidence to establish its theory of guilt of the defendant, then the evidence for the State must be so strong as to establish the guilt of the defendant, not only beyond a reasonable doubt, but the evidence must be so strong as to exclude every other reasonable hypothesis other than that of guilt."

(C.P. 107, R. E. 20)

After arguments from both defense counsel and the State regarding the appropriateness of the instruction, the trial court concluded that a circumstantial jury instruction was inappropriate. The trial court reasoned,

> "BY THE COURT: Well, I will admit that a lot of the State's case is circumstantial evidence. What the case law, after I looked at your instruction, I went back and did a little research on the case law. And basically, any statements by the defendant that goes to the issue of guilt or the issue of proving the elements of the crime, which he has been charged in this case with murder, is direct evidence. Testimony as to Mr. Lynch was that he asked him: "What's wrong with you?" He said: "I think I just killed somebody." Now he later on went and said, I think I killed a man or stabbed a man. But there is no evidence of that. There is no credible evidence that would give rise to that statement being a credible statement."

(T. 615).

When all of the evidence tending to prove the guilt of a defendant is circumstantial, the trial court must grant a jury instruction that every reasonable hypothesis other than guilt must be excluded in order to convict. ***Manning v. State***, 735 So. 2d 323, 338 (Miss. 1999). Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to logical inference that such fact does exist. ***Id.***

A circumstantial evidence instruction must be given only when the prosecution can produce neither an eyewitness nor a confession/statement by the defendant. ***Clark v. State***, 503 So. 2d 277, 279 (Miss. 1987). A confession which constitutes direct evidence of a crime is not

limited to a confession to a law enforcement officer but also includes an admission made to a person other than a law enforcement officer. ***Mack v. State***, 481 So. 2d 793, 795 (Miss. 1985).

According to Percy Lynch's testimony, the Appellant came to his home early one morning and the two had a conversation. Lynch testified to the following;

> "And he told me, you know, he might have killed somebody. He said, you know, I said: "What do you mean you might have killed somebody?" HE said: "Well, we was at my house, and me and this guy got into it, and I stabbed him." I said: "Yeah. Did you call the police?" He said: "No." And I said: "Well, that's what you need to do is call the police, if anything happened like that." And then I said: "Man, you are serious?" He said: "Man, Percy, me and a guy and a girl was at the house." And he said the guy and the girl got to arguing. I said: "What do you mean, man?" He said that we was smoking. I said: "Cool." He said the girl had gave the guy some dope, The guy wanted some more. The guy got mad and picked up a bat and hit the girl. He said he jumped up, and the guy turned around and said: "I'll kill you too.""

(T. 335-36).

The Appellant never made "an admission on a significant element of the offense." The Appellant, while having a conversation with the witness said that he believed that he had killed someone. After a brief response from the other side of the conversation, the Appellant continued his story saying that he believed that he had stabbed a man with a knife.

Respectfully, Appellant contends that the trial court's attempt to micro-analyze the statements made by the Appellant is in error.

The trial court further relied on ***Lynch v. State***, 877 So. 2d 1254 (Miss. 2004) as its basis for denying a circumstantial evidence jury instruction. ***Lynch***, however, is extremely distinguishable from the case *sub judice*. The Appellant in ***Lynch*** had been charged with capital murder, with the underlying predicate felony being robbery. ***Lynch***, 877 So. 2d at 1260. When the Lynch was being questioned, the following dialogue occurred:

Q: And uh, what was he going to carjack somebody and take there [sic] car or what?

A. I think so. I really don't know.

Id. at 1265.

In the case *sub judice*, the trial court refused to grant a circumstantial evidence instruction based on the conversation with Percy Lynch. In this conversation, the Appellant said that he had thought that he had killed an individual. He, upon further discussion with Lynch, revealed that his "thinking he killed somebody" regarded the man with the deformed eye.

In ***Lynch***, the defendant made an "admission on a significant element of the offense." – the underlying felony in the murder. Here, the Appellant told Mr. Lynch that he killed a completely separate person.

iii. Conclusion

Because the Appellant did not make an "admission on a significant element of the offense," the trial court erred when it refused to grant the circumstantial evidence jury instruction. For this reason this honorable Court should reverse the Appellant's conviction and remand for a new trial consistent with the findings of this Court.

ISSUE THREE: WHETHER THE TRIAL COURT ERRED IN NOT GRANTING DEFENSE COUNSEL'S ACCESSORY AFTER THE FACT JURY INSTRUCTION.

I. Standard of Review.

"[I]f the [jury] instructions fairly announce the law of the case and create no injustice, no reversible error will be found." ***Williams v. State***, 803 So. 2d 1159, 1161 (Miss. 2001) (citing ***Hickombottom v. State***, 409 So. 2d 1337, 1339 (Miss. 1982)). "If all instructions taken as a

whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." ***Milano v. State***, 790 So. 2d 179, 1984 (Miss. 2001).

ii. An accessory after the fact jury instruction was appropriate.

Mississippi Courts have consistently held that a defendant is entitled to have his or her theory of the case presented to the jury. *See, e.g.,* ***White v. State***, 842 So. 2d 565, 575 (Miss. 2003). A lesser-included offense instruction should be given only where the evidence supports the instructions. ***Reynolds v. State***, 658 So. 2d 852, 855-56 (Miss. 1995). However, a lesser-related offense instruction should be granted unless the trial judge can say, taking the evidence in the light most favorably to the accused, that no reasonable jury could find the defendant guilty of the lesser-related offense. ***Ellis v. State***, 778 So. 2d 114, 118 (Miss 2000).

One is an accessory after the fact when he or she has, "concealed, received, or relieved any felon, or having aided or assisted any felon, knowing that such person had committed a felony, with intent to enable such felon to escape or to avoid arrest, trial, conviction or punishment, after the commission of such felony..." **Miss. Code Ann. § 97-1-5 (Rev. 2006).**

Defense counsel's D-17 jury instruction provided;

> "The Court instructs the Jury that if you are unable to arrive at a verdict on the charge of Murder, you may consider whether or not William Presley Brown, II, committed the crime of accessory after the fact to Murder.
>
> If you believe, beyond a reasonable doubt, that William Presley Brown, II did on or about October 14, 2005, in Warren County, Mississippi, conceal or aid an (sic) assist another who did Murder, Chenara Young, in an effort for said person to a avoid arrest, trial conviction or punishment, you may find him guilty of accessory after the fact to murder."

(C.P. 112, R.E. 22).

The trial court refused the instruction, however, concluding,

> BY THE COURT: [H]e never said he was doing this to help the crooked-eye guy. It may be some fall out that the crooked-eye guy received some benefit from what he did, but that was not his intent. Accessory after the fact means you intend to help someone. . . .
>
> BY MR. ELMORE: I guess, if you break it down into objective and subjective parts here, what he was doing he knew what the guy with the crooked eye had done, and he knew that what he was doing objectively would aid the crooked-eye guy in never getting discovered.
>
> BY THE COURT: If I had testimony to that effect, I might agree with you. If I heard him say that, I might agree with you. . . .
>
> BY THE COURT: We don't have Mr. Brown stating that he did it to help. That would be surmise on the party (sic) of the jury that he said he did ti because he was scared for himself that he might get arrested.

(T. 627-29).

The trial court based its refusal of D-17 on the lack of intent of the Appellant in enabling the so-called "crooked-eye guy." As has long been held by Mississippi Courts, "Intent, being a state of mind is rarely susceptible of direct proof, but ordinarily must be inferred from the acts and conduct of the party and the facts and circumstances attending them..." ***Thames v. State***, 73 So. 2d 134, 136 (Miss 1954).

In the instant case, there is ample evidence to support the theory that the Appellant merely attempted to conceal evidence of the murder of the victim. The Appellant maintained the same story since the genesis of the State's case against him – that it was not him, but, rather, a "crooked-eye guy."

When assessing the Appellant's actions after the crime occurred, it becomes clear that intent may be inferred. When the Appellant disposed of the body, cleaned the crime scene, and disposed of the evidence of the crime, there can be little doubt that the "crooked eye guy" was to benefit from those actions.

Had "crooked eye guy" been caught, the Appellant stood to face criminal charges himself based upon his purchase and consumption of crack cocaine that night. If one's actions in helping shade themselves from the threat of criminal prosecution directly involve the aiding of a third party, it reasonablely follows that one's self-benefitting actions can have an ancillary intent with respect to the third party. Therefore, the Appellant's intent can be reasonably inferred from his actions.

iii. Conclusion

Because it can be inferred that the Appellant intended to help the "crooked eye guy" by cleaning up the crime scene and dumping the victim's body, the trial court erred in denying the Appellant the accessory after the fact jury instruction.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on a charges of murder, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for William Presley Brown, II, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 29th day of April, 2008.

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