IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01415-COA

JAISON HARNESS — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT
OF
HINDS COUNTY, MISSISSIPPI

BRIEF ON THE MERITS BY APPELLANT

Appellant Will Seek Oral Argument

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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 the Supreme Court and the judges of the Supreme Court may evaluate possible disqualification or recusal.

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STATEMENT OF THE ISSUES

I. **The trial court erred when it admitted the testimony of Joseph Cotten as an accident reconstructionist because Cotten failed to qualify as an expert under MISSISSIPPI RULE OF EVIDENCE 702; thus, the substantial right of Mr. Harness to a fundamentally fair trial was fatally compromised;**

II. **The trial court abused its discretion when it admitted into evidence a diagram by Joseph Cotten as it was an incorrect and incomplete depiction of the accident scene, irrelevant, confusing to the jury and prejudicial to a fair hearing of the cause against Mr. Harness;**

III. **The trial court erred in denial of the *Motion to Dismiss* and *Motion to Suppress* due to the destruction of blood drawn from Mr. Harness; destruction of this crucial evidence deprived him of his fundamental rights to due process of law and to confront evidence mounted against him under AMENDS. V, VI, XIV, U.S. CONST. and ART. III, §§ 14, 26, MISS. CONST;**

IV. **The State failed to establish an adequate evidentiary foundation to admit evidence of a blood sample allegedly drawn from Mr. Harness. The trial court further erred when it held MISS.R.EVID. 803.5 applied to permit presentation of otherwise inadmissible evidence to the jury, and**

V. **The trial court violated the fundamental right of Mr. Harness to mount a defense when it denied admission of the release and settlement he received from Hampton's insurer and evidence of a complaint filed against him alleging the negligence of a second, unknown individual.**

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS BELOW

Jaison Harness was indicted for negligently driving under the influence of intoxicating substances (Miss. Code Ann. 63-11-30(5) (1972)) resulting in the death of Clyde Hampton under Cause Number 04-0-335 by a grand jury of the First Judicial District of Hinds County, Mississippi. CP 5. Mr. Harness stood trial May 1, 2007 and was found guilty on May 3, 2007. CP 57; 58; T. 688; RE 18; 32. The trial court sentenced Mr. Harness to imprisonment for twenty-five (25) years, with ten (10) years suspended and five (5) years probation on to be served all in the custody of the Mississippi Department of Corrections. CP 60; 61; T. 730-731; RE 19; 20; 33-34.

Mr. Harness pursued all post-trial avenues open to him and all were denied. CP 67; RE 21. Mr. Harness then sought timely appeal of his conviction, now before this honorable Court. CP 70.

B. STATEMENT OF FACTS

The morning of August 22, 2003, Jaison Harness called his mother, Juanita Harness, for a routine "swap;" his pick-up truck for the 1975 blue Mercury Marquis his father had purchased when Mr. Harness was in elementary school. T. 616; 621. Mr. Harness, a truck driver, drove over to the home of this mother at 1646 Cox Street and remained there the rest of the day and into the early evening, performing basic maintenance on the vehicle, leaving only to purchase car parts or visit with friends living on the street. T. 592; 593; 616-617; 620; 622.

Sometime after dark, having worked on the car, washed it and put away all his tools, Harness left the home of his mother, near the intersection of Valley Street and U.S. Highway 80, and headed to his apartment at Windsor Park Apartments. T. 593; 610-611. Mr. Harness remembers he pulled into a church parking lot for a time, then went down Westhaven Boulevard toward the intersection with Clinton Boulevard when he saw the nieces of his girlfriend and thought he would turn back around to see them. T 594.

Mr. Harness testified that was the last thing he remembered before awakening at Central Mississippi Medical Center (CMMC) with an oxygen mask on his face, neck brace about his neck, tubes in his arm and his left leg hanging off a stretcher. T. 595. His teeth were knocked out and his chest was torn open from impact with the steering wheel; he had gashes on his face and elbow and CMMC was stabilizing him for transfer to the University of Mississippi Medical Center (UMMC), which ultimately put two metal screws and a metal rod in the leg broken in three places. T. 595-597. Juanita Harness, his mother, testified she was told by Officer Natyyo Gray calling her home that first responders were trying to cut Mr. Harness from the car. T. 625. When she arrived at the CMMC emergency room, she recalled for the jury summoning a nurse because it appeared Mr. Harness was swallowing blood and broken teeth and one of his physicians said her son would be transferred to the University hospital because CMMC lacked the facilities to handle his internal bleeding. T. 625;626.

After Mr. Harness passed his girlfriend's nieces on Westhaven that fateful evening, he also passed Bobbie Moore, an Olive Garden restaurant hostess on her

way home from work. Moore testified she had to brake and veer off the road by the front passenger tire onto the narrow shoulder of Westhaven because the blue Mercury drifted across the center line into her lane. T. 333; 334. Moore testified she got her car back on the road and glanced back in her rear view mirror and saw the Mercury collide with a white pick-up about six car lengths behind her. T. 334. Moore could not and did not identify the occupants of either vehicle; she remembered only the blue car headed north toward Clinton Boulevard and the pick-up she first noticed at the Westhaven- Clinton boulevard stoplight. T. 328; 333.

The white 1992 GMC pick-up was driven by Clyde Hampton, 52, who was en route to pick up his grandson for the night. T. 317-318; 337.

Thelma Hampton testified she fell asleep after husband left, until their grandson called about midnight, concerned because Hampton never arrived. T. 321-322. Mrs. Hampton went looking for her husband; after a fruitless search, she began calling area hospitals and located him at Mississippi Baptist Medical Center (MBMC). T. 322. She arrived at MBMC shortly after 1 A.M.; her husband died shortly after daybreak. T. 322. Dr. Steven Hayne testified that an autopsy showed Hampton died of craniocerebral trauma and massive internal bleeding. T. 523. An individual of Hampton's size, 240 lbs, has about eight quarts of liquid in their bodies; Hayne testified he found nearly four quarts of blood in Hampton's chest and abdominal cavity. T. 517. Although Mrs. Hampton testified her husband only drank an occasional beer, at least one report refers to empty beer cans spilling from Hampton's driver side door at the scene. T. 321; 383.

Officer Natyyo Gray was dispatched to the scene about 11:30 P.M. where he testified he found Mr. Harness standing next to his vehicle, a statement in substantial conflict with testimony that Gray reported to family members Mr. Harness had to be cut from his vehicle and sustained severe injuries. T. 366; 369; 625. Upon arrival at the scene, Gray testified that Hampton did not respond, so the officer assumed Hampton was deceased; Gray identified him only through the contents of wallet after emergency personnel removed him from the truck. T. 369; 371. On the other hand, Gray testified that Mr. Harness was "cognitive, mobile" and laid his driver's license on the trunk for Gray's review; Gray testified that Mr. Harness said he had been drinking but was not drunk. T. 372; 381; 383. Gray further testified that Mr. Harness had no blood on him and showed no abrasions and only later complained of pain. T. 375; 380. Once Mr. Harness claimed to be in pain, Gray told the jury under cross-examination that he did not do a field sobriety test after talking with lead investigator, Officer Joseph Cotten, "to avoid having that work against us." T. 384; 483. Cotten, however, testified he did not discuss field sobriety tests at all with Gray. T. 483.

Officer Cotten was summoned to the scene as both lead investigator and accident reconstructionist, although at the time he had attended only two of the three, two-week sessions necessary to sit for the state accident reconstructionist examination. T. 395; 396; 398. The case of the Westhaven Boulevard collision was his second accident. T. 393; 395; 404. Both drivers were removed by the time Cotten arrived, about midnight. T. 405; 409; 469. After speaking briefly with Gray and marking tires and other areas in the roadway with paint, Cotten said he went first

to MBMC to check on Hampton. T. 443. Hampton was unconscious, but smelled of alcohol, so Cotten said he filled out a blood draw form and provided a blood specimen kit for a MBMC nurse to draw blood, which he then sealed and placed in an evidence bag. T. 444. The evidence was later taken to the Mississippi State Crime Laboratory for analysis. T. 445.

After checking on Hampton, Cotten went to CMMC to determine the condition of Mr. Harness. T. 445. Cotten testified he smelled alcohol on the person of Mr. Harness so filled out a similar form to have blood drawn. T. 446. Mr. Harness was in a trauma room of the emergency room and was semi-conscious, not the "cognitive, mobile" individual Gray testified to have seen after the wreck. The head of Mr. Harness was bandaged, he had a neck brace on and he was hooked up to various monitors, Cotten testified. T. 471.

While Gray identified at trial Nurse Noreen Kenny as the one who drew blood from Mr. Harness, Kenny repeatedly testified she had no recollection whatsoever of signing the blood specimen kit or a form certifying she drew blood from Mr. Harness or anything regarding Mr. Harness and his stay at CMMC. T. 358; 359; 360; 363; 364; 559; 560.

As with the blood sample of Hampton, the state crime lab received a blood sample purporting to be from Mr. Harness on October 7, 2003. T. 563. John Stevenson, a forensic scientist with the crime laboratory, testified he first tested the blood of Mr. Harness on October 16, 2003 in two separate analyses to ensure accuracy, but the results were outside the laboratory's standard error margin. T. 571. A second test October 23, 2003 showed that blood purporting to be from Mr.

Harness yielded results within the acceptable ranges and a report showing .11 grams of ethyl alcohol in the tested blood sample was sent October 24, 2003 to the Hinds County District Attorney's Office. T. 109; 121; 567. Stevenson testified that a third test was not conducted on Mr. Harness's blood. T. 572. Hampton's blood alcohol level test showed .3 grams of ethyl alcohol from blood sample recovered from MBMC. T. 570.

The October 24, 2003 report to the Hinds County District Attorney's office contained a notation of the Crime Laboratory's policy to destroy all samples within six months of the test date unless otherwise notified. T. 110. At a pre-trial hearing on a *Motion to Suppress* blood evidence filed by Mr. Harness, Stevenson said any requests to retain samples must come through the submitting entity; in this case, the Hinds County District Attorney's Office. T. 128-129. The lab failed to destroy the blood sample within six months as stated in its report, but destroyed it on October 7, 2004 – one week after counsel for Mr. Harness filed a *Motion to Compel* production of Mr. Harness's blood sample for independent testing. T. 111. CP 10-11.

Mr. Harness spent from August 22 to September 19, 2003 in the hospital and was still unable to walk when discharged. T. 597. Mr. Harness did not begin walking again until November 2003; he was still on crutches in early 2004 when Officer Cotten came to see him. T. 599. Cotten had the Mississippi Crime Laboratory blood analysis during this visit; Mr. Harness disputed that and emphasized the only alcohol found in his car was an unopened bottle of brandy. T. 600.

In July 2004, Mr. Harness met with representatives of Hampton's insurance company, who paid Mr. Harness $50,000 in exchange for a release of all claims against the estate of Hampton. T. 603; RE 38. Mr. Harness testified company officials felt Hampton was at fault in the accident. The trial court refused to permit the jury to hear that evidence, which counsel for Mr. Harness preserved for this review in a proffer. T.603; 638, Exhibits 37, 38 for Identification. The trial court denied Mr. Harness the right to present this evidence to the jury. T. 640-641. The trial court also refused to permit the jury to hear that Mrs. Hampton hired a lawyer to sue Mr. Harness for events in connection with the death of her husband and that the complaint named a second, unknown individual who may also have been negligent. T. 587; RE 37.

Mr. Harness steadfastly maintained he was not drinking when the accident occurred and that he had no memory of the accident itself due to the severe injuries he sustained. T. 595; 600.

SUMMARY OF THE ARGUMENT

Mr. Harness would respectfully argue that the trial court fatally erred when it admitted into evidence the testimony of Joseph Cotten for the officer was only in the midst of training as an accident reconstructionist at the time of the accident and not yet certified as an expert in any way. Therefore Mr. Harness submits Officer Cotten failed meet the standards of MISS.R.EVID. 702. The conclusions of Officer Cotten were extremely prejudicial in that the officer concluded Mr. Harness was at fault in the collision.

In addition, the trial abused its discretion when it permitted into evidence a diagram by Cotten, admittedly not to scale and inaccurate. Numerous pictures were available to give meaning to the measurements made by Cotton; the diagram was irrelevant and confusing due to its admitted inaccuracy and coupled with other errors, prejudicial to the fundamental right of Mr. Harness to a fair trial.

Evidence regarding the blood alcohol content determined from blood allegedly drawn from Mr. Harness in the early morning hours of August 23, 2003 should not have been admitted. Indeed, Mr. Harness contends the cause should have been dismissed due to destruction of the sample in October 2004, *after* he sought its production for independent testing. The blood sample was critical to establish that Mr. Harness was intoxicated, a necessary element. Second, the state was never able to lay a sufficient evidentiary foundation for the matter, as the nurse who allegedly drew the blood testified repeatedly she had no recollection of the incident whatsoever.

ARGUMENT

I. The trial court erred when it admitted the testimony of Joseph Cotten as an accident reconstructionist because Cotten failed to qualify as an expert under MISSISSIPPI RULE OF EVIDENCE 702; thus, the substantial right of Mr. Harness to a fundamentally fair trial was fatally compromised;

In permitting Joseph Cotten to testify as an expert accident reconstructionist, the trial court abused its discretion to the fatal prejudice of Mr. Harness because the record plainly shows that not only was Officer Cotten *not* certified in August 2003, he also had yet to take the third and final level of training involving application of scientific calculations of mass, speed and friction necessary to investigate this accident. T. 11; 12; 18; 96-97; 400-401;404; RE 22-23; 26.

The Westhaven Boulevard collision of August 22, 2003 was only the second accident Officer Cotten worked; the case at bar presented the first time he sought qualification as an expert accident reconstructionist. T. 36; 393.

Officer Cotten possessed ten years of experience as a police officer and less than one month in the accident reconstructon division. T. 393. He had an associate's degree and some university courses, all in criminal justice, no mathematics, science, physics or engineering. T. 398-399; 400. Officer Cotten's certification, which he received after sitting for a state examination in January 2004, came after receiving instruction from only one individual, Brady McMillin of the Mississippi Department of Public Safety. T. 42; 398. Officer Cotten receives no continuing education in this field, subscribes to no professional publications or on-line services and is not a member of any national accident reconstruction

organization. T.402; 404. Officer Cotten's only professional membership is with the Mississippi Accident Reconstruction Society, the purpose of which is solely to provide a directory and access for and among other accident reconstructionists. T. 403.

Mr. Harness recognizes the acceptance of accident reconstruction as a field of expertise, as in *Hollingsworth v. Bovaird*, 465 So.2d 311 (Miss. 1985). Mr. Harness also acknowledges that Mississippi courts recognize that training and experience can render a police officer an expert in accident reconstruction, as in *Miller by Miller v. Stiglet,Inc.*, 523 So.2d 55, 57 (Miss. 1988), qualified under the former version of MISSISSIPPI RULE OF EVIDENCE (Miss.R.Evid) 702. In *Miller by Miller v. Stiglet*, the Mississippi Supreme Court affirmed the admission of testimony by two police officers who were qualified to give expert opinion on the causes of a tragic accident in which a car with three children plunged from a bridge into the Escatawpa River, drowning the three youngsters. At trial, the contractor, Stiglet, responsible for bridge maintenance, presented two law enforcement officers as experts to testify as to the cause of the accident. In affirming the admission into evidence of testimony by the two officers, Justice Prather noted the experience of the two officers. One had spent twelve of fourteen years working accidents and had graduated from several different traffic schools, including the Northwest Traffic Institute Accident Investigation School. The other officer, with the Mississippi Highway Safety Patrol, had thirty years experience, had attended several different traffic schools and had investigated causation in more than one thousand cases during his career. *Id.*, at 58.

Since the Court's decision in these two cases, however, Mississippi has adopted a more stringent standard for evaluating whether or not one can be qualified as an expert to testify in state courts.

In *Mississippi Transportation Comm. v. McLemore*, 863 So.2d 31 (Miss. 2003), the Mississippi Supreme Court adopted the so-called *Daubert* test; in *McLemore*, as in the revised rule 702, the emphasis is on *relevance* and *reliability*. *Id.*, at 36. The trial court assumes a more activist role under MISS.R.EVID. 702, "gatekeeping responsibilities" that require a trial court to make preliminary assessments "of whether the reasoning or methodology is scientifically valid and of whether that reasoning and methodology properly can be applied to the facts in issue." *Id.*, at 36 quoting *Daubert v. Merrell-Dow Pharmaceuticals Inc.*, 509 U.S. 579, at 592-593 (1993). The Court goes on to say "[t]he ***party*** offering the expert's testimony must show that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation." *Id. (emphasis added).* The Mississippi Supreme Court sternly notes, "neither *Daubert* nor the Federal Rules of Evidence requires that a court "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert," as *self-proclaimed accuracy by an expert is an insufficient measure of reliability.*" *McLemore,* at 37, quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S.136, at 157, (1999) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997) [emphasis added]

Perhaps more important in this case is that our Supreme Court in *McLemore* noted "there is universal agreement that the *Daubert* test has effectively tightened, not loosened, the allowance of expert testimony. *McLemore*, at 38 (citing *Hammond*

v. Coleman Co., 61 F.Supp.2d 533, 537 (S.D. Miss. 1999), *aff'd mem.* 209 F.3d 718 (5th Cir. 2000). In *McLemore*, the state Supreme Court applied the new *Daubert* test and ruled the trial court abused its discretion when it recognized an appraiser as an expert. Further, the Court held it was error to admit the appraiser's testimony that certain pieces of property were more adversely affected and thus less valuable because such testimony entirely speculative and therefore, inadmissible.

In the instant case, on August 22-23, 2003, Officer Cotten had only the training to mark the vehicles and roadway with paint at the scene. T. 20. Both vehicles were towed from the scene to the city impound lot, where Cotten testified he inspected them. T. 72-75; 496. Despite the fact that Cotten told the jury that he identified the area of impact from fresh gouges in the asphalt, the result of contact between metal parts and the road, he also testified he found no asphalt upon physical examination of the vehicles, nor did he find any asphalt-crusted debris on the roadway. T. 496. This seemingly contradictory testimony begs the question; if Cotten determined the area of impact – and thus the negligence of Mr. Harness – from asphalt gouges made from contact between the vehicles, debris and the road, how and why did his examination of the vehicles and debris fail to turn up any evidence of asphalt on the underside of the vehicles? The gouges and scrape marks were critical to determination of calculation of where the impact occurred –in the lane of Mr. Harness or the southbound lane Hampton travelled and thus the culpability of Mr. Harness. Although he testified it is customary to rely upon and interview other witnesses, Cotten interviewed only one witness, Bobbie Moore. T.440; 469-470. Cotten spoke briefly with Natyyo Gray upon arrival at the scene,

but made no effort to talk to ambulance or fire personnel who dealt directly with the scene, Hampton and Mr. Harness immediately after the accident. T. 482-483.

Furthermore, although Cotten testified that the weight of the vehicles was critical to determination of speed and again, to determination of fault, he never weighed the vehicles although he testified he could have. T.481. Cotten also testified that he obtained the weight of the 1975 Mercury Marquis from his instructor, McMillin, and that all he did was "plug in the numbers and calculate them" with a computer software program. T. 488. This record clearly shows from his prior experience and training that Officer Cotten lacked the scientific and mathematical education and training to do anything other than used prepared formulas. His initial calculations were wrong, he admitted, because he failed to use the proper weight for the vehicles. T. 489; 490.

And with all due respect to the trial court, who once served honorably as a prosecutor, Mr. Harness would humbly argue that the judge stepped outside his judicial role under the guise of gatekeeping. Mr. Harness would submit that MISS.R.EVID. 702 envisions questions seeking information rather than questions which provide answers for the witness, as demonstrated in the pre-trial hearing over Officer Cotten's qualifications. T. 66-68; 70-72. Put another way, the Rules of Evidence require the judge to guard the gate, not lead the witness safely through it. Counsel for Mr. Harness has brought this type of conduct by this trial judge before the Court in previous cases, as in *Omar Jackson v. State*, 2003-KA-2606 (Miss. 2005), which the Mississippi Supreme Court affirmed *per curiam* and *Brent v. State*, 929 So.2d 952, (Miss.Ct.App. 2005), in which this Court reversed due to failure of

the trial court to recuse itself in passing on a search warrant issued by the same judge in a different capacity.

Officer Cotten was also assigned as lead investigator in this case; the fact that the trial court sanctioned a clearly unqualified individual as an expert witness lent undue weight to his testimony in his customary role as investigator. The state was required to prove that Mr. Harness was driving his vehicle under the influence of intoxicating liquors and while so doing, acted negligently and killed another. Officer Cotten was obviously a crucial witness upon whom proof of the state's case hinged, so that admission into evidence of Cotten as an expert prejudiced the right of Mr. Harness to a fair trial, necessitating reversal.

II. The trial court abused its discretion when it admitted into evidence a diagram by Joseph Cotten as it was an incorrect and incomplete depiction of the accident scene, confusing to the jury and prejudicial to a fair hearing of the cause against Mr. Harness;

Mr. Harness further submits it was prejudicial error to admit into evidence the diagram handwritten by Officer Cotten purporting to depict the scene. T. 420-421; 424; RE 27-28; 35.

The diagram by Cotten's own admission was not drawn to scale. T. 416; 422; 465. Upon cross-examination, Cotten was forced to admit the diagram failed to adequately depict certain features of the roadway and debris that were far more fully displayed through the copious numbers of photographs taken the night of and in the days following the accident. For instance, Cotten was forced to admit that his diagram wrongly showed Mr. Harness's car totally in the opposite lane, when

photographs of the scene demonstrated it was substantially in its proper lane. T. 416-417; Exhibits 15; 16. The diagram shows the truck of Hampton facing a different direction than the photographs. Exhibit 31; T. 466. The private drive where Bobbie Moore parked is also not drawn in relation to the actual scene. T. 417. The diagram shows separate roadway gouges as one, completely confusing to anyone trying to correlate the pictures of the scene and a hand-drawn diagram admittedly inaccurate. T. 478-479. Finally, Cotten also testified that he arrived at his conclusions through use of the photographs, not the diagram. T. 433. Mr. Harness therefore submits that under MISS.R.EVID. 401 and 403, the diagram was not only irrelevant, due to its inherent inaccuracy, but was also confusing to the jury which had available numerous photographs depicting the actual scene as it appeared August 22, 2003.

In *Palmer v. Volkswagen of America Inc.,* 905 So.2d 564, ¶ 53, (Miss.Ct.App. 2003) *overruled on other grounds by Palmer v. Volkswagen of America, Inc.,* 904 So.2d 1077 (Miss. 2005), this Court affirmed the trial court's exclusion from evidence diagrams regarding the autopsy of the ten-year-old victim due to the adequate testimony from Dr. Steven Hayne, forensic pathologist, explaining the autopsy to the jury. Mr. Harness submits that the extensive number of photographs more than effectively provided the jury with an accurate representation of the scene in a realistic manner, versus the diagram drawn by Officer Cotten which by his own admission failed to meet scale proportions. T. 465.

Coupled with the fact that Cotten testified not only as an expert accident reconstructionist but the lead investigator, the cause of Mr. Harness was fatally

prejudiced by admission into evidence of the diagram that by Cotten's own admission was inaccurate and reversal is therefore required.

III. The trial court erred in denial of the *Motion to Dismiss* and *Motion to Suppress* due to the destruction of blood drawn from Mr. Harness; destruction of this crucial evidence deprived him of his fundamental rights to due process of law and to confront evidence mounted against him under AMENDS. V, VI, XIV, U.S. CONST. and ART. III, §§ 14, 26, MISS. CONST., and

Under *California v. Trombetta*, 467 U.S. 479 (1984), the prosecution is under a duty to preserve evidence expected to play a determinative role in the defense of a criminally accused. A reviewing court engages in a two-prong test to determine whether or not the fundamental fair trial rights of a defendant have been fatally prejudiced by the prosecution's destruction of the sought-after evidence. First, was the exculpatory nature of the evidence apparent? Second, the defendant must be unable to obtain comparable evidence.

Applying this test to the facts of this case, the blood sample drawn in the early morning hours of August 23, 2003 was the only evidence by which the prosecution could hope to establish for the jury that Mr. Harness was driving under the influence of intoxicating liquors in excess of the legislative limit. The nurse who drew the blood testified twice she had no recollection whatsoever of drawing the blood of Mr. Harness or signing the document certifying for Officer Cotten that she had so done. T. 358; 359; 360; 363; 364; 559; 560. The sample was duly sent to the Mississippi Crime Laboratory where it was tested. T.563; 570; 571. The problem is that the first test yielded results outside the laboratory's accepted margin of error,

according to the testimony of John Stevenson, crime laboratory analyst. T. 571. The test was repeated, which showed Mr. Harness had a blood alcohol level above the legal limit in the hours after the accident. T.109; 121; 567. No third test to confirm the results was done. Stevenson then sent a report with the results to the Hinds County District Attorney's Office, along with a notation that the evidence would be destroyed within six months of the October 23, 2003 test unless otherwise notified. T. 110. Despite the crime laboratory's policy, however, the blood sample was *not* destroyed within six months; instead, the sample was not destroyed until October 7, 2004 – seven days *after* counsel for Mr. Harness filed a *Motion to Compel* production of the sample for independent testing. T.111; CP 10-11.

In *Banks v. State*, 725 So.2d 71, ¶ 11 (Miss. 1997), the Mississippi Supreme Court reversed the capital murder conviction of Calvin Banks due to the state's destruction of a bologna sandwich purportedly bearing the marks of Banks' teeth. The destruction of the evidence, the only physical evidence placing Banks inside the home of the victim, was held a violation of Banks' fundamental right to due process of law. As in the present case, the Supreme Court found there was no intentional effort to deprive Banks of viewing the evidence but its importance was obvious. *Id.*.

An essential element of the crime with which Mr. Banks was charged is whether he was intoxicated. The blood sample allegedly drawn August 23, 2003 by Nurse Kenny was critical to determination of that element, a fact of which the state was well aware. Despite the fact that Mr. Harness first made his demand for the blood sample in July 2004 (CP 6-9) and a *Motion to Compel* filed on September 30,

2004, the prosecution made no effort to follow established crime laboratory policy to preserve the blood sample. T. 111-112.

Due to denial of his fundamental right to due process of law and to confront evidence mounted against him, this cause should be reversed and remanded.

IV. The State failed to establish an adequate evidentiary foundation to admit evidence of a blood sample allegedly drawn from Mr. Harness. The trial court further erred when it held MISS.R.EVID. 803.5 applied to permit presentation of otherwise inadmissible evidence to the jury.

The trial court erred in permitting into evidence information from Exhibit 29 for identification, regarding the alleged drawing of blood from Mr. Harness by CMMC Nurse Noreen Kenny. RE 29; 30; T. 567; 579.

The simple fact is that Kenny repeatedly testified she had absolutely no recollection of Mr. Harness, Officer Cotten, the morning of August 23, 2003 and most importantly, complying with the request of Officer Cotten to draw blood from Mr. Harness for a blood alcohol analysis. T.358; 359; 360; 363; 364; 559; 560.

As related in the discussion in Issue III, a condition precedent to admissibility is that evidence offered must be what it is purported to be. *Walker v. State*, 878 So.2d 913, ¶¶ 15-16; MISS.R.EVID.901. After two separate appearances on the witness stand, the state was still unable to present a legally sufficient foundation that the blood sample tested by the Mississippi Crime Laboratory and critical to proving the essential element of intoxication was blood drawn from Mr. Harness in a medically acceptable manner. Following two bites at the apple, the

trial court sent out the jury and instructed the state in the form of a monologue on the procedure to use to get the information into the record, MISS.R.EVID. 803 (5). T. 551-552; 554.

The trial court then erred when it permitted Nurse Kenny to read from the part of the form that she drew blood on August 23 and gave it to Officer Cotten. T. 559. On cross examination, Kenny reiterated that all she did was sign and print her name, while someone else filled out all the other information. T. 560. The problem is that MISS.R.EVID. 803(5), an exception against the rule banning hearsay testimony, requires by its very terms that the witness have some past knowledge of the information but cannot now recall it. Kenny very definitely testified she had no past recollection of the incident whatsoever. T. 560.

The blood sample is critical for several reasons. First, the state relied upon the blood sample to establish a necessary element of the crime, that Mr. Harness was intoxicated at the time of the collision with Hampton. Second, Dr. Steven Hayne, a forensic pathologist, testified extensively for the state about the projected level of alcohol in the blood of Mr. Harness at the time of the accident, all based upon the blood sample. T. 526-528. Finally, John Stevenson, forensic scientist with the crime lab, testified that the first test of the sample yielded results that were outside the lab's accepted margin of error. A second test about a week later provided results consistent with the acceptable range and the district attorney's office was notified of the results. T. 572.

Time and again this information was placed before the jury through a variety of witnesses when the plain fact was the state was unable to lay an evidentiary

predicate sufficient to satisfy MISS.R.EVID. 901 or 803(5) as an exception to the bar against the use of hearsay.

Mr. Harness respectfully contends that it was reversible error to deny the *Motion to Suppress* the blood sample as it was a crucial piece of evidence that was never authenticated to be what Officer Cotten purported it to be. The fact that the crime lab obtained inconsistent results in two tests, failed to do a third test to confirm the results and then destroyed the sample after Mr. Harness filed a *Motion to Compel* its production for independent testing all demonstrate the unique factual situation that mandate reversal and remand.

VI. The trial court violated the fundamental right of Mr. Harness to mount a defense when it denied admission of the release and settlement he received from Hampton's insurer and evidence of a complaint filed against him alleging the negligence of a second, unknown individual.

Mr. Harness sought at trial to demonstrate that either Hampton was at fault or a second,unknown individual contributed to the accident through the introduction of evidence that Hampton's insurer paid him $50,000 based on their finding that Hampton was at fault and through the allegations of a lawsuit naming a "John Doe" or unknown individual whose negligence was responsible for the accident. T. 587; 603; 638-640; Exh. 37, 38 for Identification; RE 37; 38.

The United States Supreme Court as recently as 2006 as reiterated that substantive constitutional concerns must have sway over procedure when the issue is a fundamental constitutional right, such as the right to mount a defense. In *Holmes v. South Carolina*, 547 U.S. 319 (2006), an unanimous court reversed the capital murder conviction of Holmes due to arbitrary application of a state

evidentiary rule that effectively prevented Holmes from presenting evidence that another individual had confessed to the crime. In so holding, Justice Alito wrote that state evidentiary rule-making power is limited by the due process clause of the Fourteenth Amendment or the compulsory process clause of the Sixth Amendment because the U.S. Constitution guarantees a criminal defendant "a meaningful opportunity to present a complete defense," citing *Crane v. Kentucky*, 464 U.S. 683, 689-90 (1986).

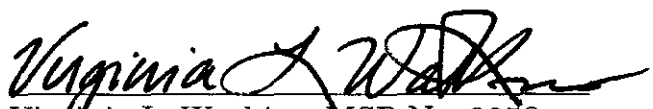
That "meaningful opportunity" was denied Mr. Harness and as such, he respectfully seeks reversal and remand of this cause.

CONCLUSION

The trial court repeatedly violated his fundamental rights to a fair trial or to mount a defense and persistently failed to prevent irrelevant, inaccurate and confusing testimony and documentary evidence coming before the jury.

Based upon the foregoing reasons and persuasive authority recited herein, Mr. Harness humbly asks this honorable Court to vacate this conviction and reverse and remand for a new trial.

Respectfully submitted,



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Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing BRIEF OF APPELLANT ON THE MERITS to the following:

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So certified, this the 23rd day of April, 2008.

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