IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2007-KA-02197-COA

CHARLES P. LEPINE — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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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. Charles P. Lepine

THIS 16th day of May, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Charles P. Lepine

By: George T. Holmes
George T. Holmes, Staff Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Pearl River County, Mississippi where Charles P. Lepine was convicted of vehicular homicide (a/k/a "aggravated DUI") as codified in Miss. Code Ann. §63-11-30(5) prior to its 2004 amendment. A jury trial was held August 22-24 , 2007, with Honorable Prentiss Harrell, Circuit Judge, presiding. Charles Lepine was sentenced to twenty (20) years with five (5) years suspended and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On February 23, 2003 Charles Lepine, of Hancock County, took his family to a Mardi Gras parade in Terrytown, Louisiana. [T. 343-48]. The Lepines were accompanied by members of the Verrett family and Gina Stockstill. *Id.* The group traveled in Lepine's 1985 Buick station wagon. [T. 149]. In all, ten (10) people were in the car: Lepine's wife Ellen Lepine, his two sons Adam Lepine (age 16) and Lance Lepine (age 7 months), his daughter Rachel Lepine, his grandson Chandler Hill (2 years old), Kenneth Verrett, Kenneth Verrett, Jr. (1 month old), Frank Verrett and Gina Stockstill. [T. 150-56, 344].

According to Lepine, the crew ate lunch, watched the parade and had some beer between lunch and 3:00 p. m.. [T. 346-48, 366]. Lepine said he drank three beers and was eating off and on during the afternoon. *Id.*

On the way back home, about 7:30 the same night they traveled North on U. S. 59 back into Mississippi and took Exit 4 at Picayune in Pearl River County and headed East on Mississippi Highway 43. Before crossing over into Hancock County, they had a bad one car accident. [T. 108, 194-97, 259-64, 349-50]. Lepine's car left the roadway hit a culvert, flipped and landed over 379 feet from the point where it left the roadway. [T. 262-69; Ex. 47]. Four people died in the accident: Kenneth Verrett, Sr., Frank Verrett, Kenneth Verrett, Jr., and Lance Lepine. [T. 292-94; Exs 33-36.].

Lepine said he was not speeding. [T. 349-50]. He said that an approaching car on Highway 43 crossed the center-line and he went off the road and lost control. [T. 349-52].

Lepine and his son Adam allegedly tussled with responding officers at the accident scene which resulted in one count of the indictment in this case for assault of a law enforcement officer for which Lepine was acquitted by the jury. [T. 109-110, 406; R. 2, 247, 251-54]. Lepine denied assaulting the officers, who he described as being belligerent and cursing him and calling him a "drunken murderer". [T. 354-60].

Officers who responded said Lepine, besides being antagonistic, distraught and upset, appeared to be intoxicated. [T. 115, 124, 126, 145]. Analysis showed that Lepine's blood alcohol content was .09 per cent on samples drawn two hours after the accident. [T. 218-33; Ex 40-45]. Nevertheless, officers said Lepine was coherent enough to waive counsel after being *Mirandized*, admit that he was the driver, and consent to a physical drawing of blood at Crosby Memorial Hospital in Picayune. [T. 118-20, 143-47,

181-83; R. 30-40, 53-56].

There was no testimony as to any particular negligent act of Lepine. There was no expert testimony as to the speed of Lepine's car (except his statement that it traveled between 55 and 60 miles per hour), nor the posted speed limit on the particular portion of Highway 43. [T. 350].

SUMMARY OF THE ARGUMENT

An amendment of the indictment was fatally flawed. The trial court wrongfully denied Lepine a continuance following late disclosure of expert testimony and erred by not qualifying a defense expert. The state failed to prove all of the elements of vehicular homicide particularly negligence. The trial court erred in the introduction of blood evidence and allowed a state witness to opine outside her area of expertise. There was an erroneous jury instruction and prejudicial prosecutorial misconduct.

ARGUMENT

ISSUE NO. 1: WHETHER THE AMENDMENT OF THE INDICTMENT WAS ERRONEOUS?

Originally, there were five (5) counts to the indictment here, four vehicular homicide counts and one count of assault of a law enforcement officer. [R. 4]. When it was pointed out to the trial court that the accident in this case occurred before the 2004

amendment of Miss. Code Ann. §63-11-30(5), it was determined that the case of *Mayfield v. State*, 612 So.2d 1120 (Miss.1992), which limited convictions to one regardless of the number of deaths, controlled the situation and the trial court consolidated the four death counts into one count, but left all of the other counts "in full force and effect" including the assault on a law enforcement officer charge which is count 5 on the indictment, but was presented to the jury as count 2. [R. 122, 153-55, 179-80, 186-91].[1]

In *Mayfield, supra*, the defendant was convicted of two counts of vehicular homicide, one for each person who died in the accident. The Supreme Court found since the statute criminalized "driving while intoxicated rather than the act of killing" Mayfield could not be convicted twice on the basis of two deaths for driving drunk only once. 612 So. 2d at 1128; see also *Matlock v. State*, 732 So.2d 168, 171(¶ 11) (Miss.1999).

Amendment of the Indictment, Form v. Substance

Lepine's first suggestion is that the amendment of the indictment here was one of substance, not form. Trial courts do not have authority to grant substantive amendments to indictments. See *Baine v. State*, 604 So. 2d 258 (Miss. 1992), *Monk v. State,* 532 So. 2d 592 (Miss. 1988), *State v. Allen*, 505 So. 2d 1024 (Miss. 1987).

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[1] The version of § 63-11-30(5) in effect on the date of the accident in this case read: (5) Every person who operates any motor vehicle in violation of the provisions of subsection (1) of this section and who in a negligent manner causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any other limb, organ or member of another shall, upon conviction, be guilty of a felony and shall be committed to the custody of the State Department of Corrections for a period of time of not less than five (5) years and not to exceed twenty-five (25) years.

"An indictment may not be amended to change the nature of charge, except by action of the grand jury which returned the indictment." *Griffin v. State*, 584 So. 2d 1274, 1275 (Miss. 1991)

> It is well settled in this state ... that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case. 584 So. 2d at 1275-76 [cite omitted]

In *Griffin, supra*, the trial court allowed an amendment to the indictment from "assault with a deadly weapon 'by shooting the [victim] in the head'" to a charge "assault by using a pistol 'by means like to produce serious bodily harm.'" *Id.* The Supreme Court ruled that such a change was substantive in nature because it changed the charges from an actual shooting to something else. *Id.* See also *Griffin v. State*, 540 So. 2d 7, 20-21 (Miss. 1989). After the amendment in *Griffin,* the defendant was not defending a shooting anymore, and his defense of accidental discharge was not available after the amendment.

Here the court actually added an aggregate count, thus creating a new charge which was not the result of a grand jury presentation, and altered the circumstances so that Lepine did not know which death was the basis of the vehicular homicide charge. Lepine knew that only one death could be the basis of the charge per *Mayfield, supra*, but did not know which death he was going to have to defend. Ultimately, when he was

convicted, we do not know if the jury deliberated unanimously for one death and if so which one, or for the aggregate of deaths which was not authorized by the statute nor the *Mayfield* decision.

Multiplicity of Charges

It is also the appellant's position here that the indictment, as amended, was fatally flawed in the it was multiplicitous. Just because the state, in this case, could not charge a count per each death, does then mean that it could then charge all of the deaths in one count.

All the state should have been allowed to do is to charge one death as the basis of the charge according to *Mayfield*, *supra*. By aggregating multiple deaths here in the alternative where only one is required, resulted in an additional count of the indictment which was multiplicitous stating multiple alternative charges and allegations in one count. R. 122, 153-55, 179-80, 186-91] There is no mechanism for doing what the trial court did here. Rule 7.07 of the Unif. Crim. Rules of Circuit and County Court Practice, provides in pertinent part that:

> MULTIPLE COUNT INDICTMENTS
> A. Two (2) or more offenses which are triable in the same court may be charged
> in the same indictment with a separate count for each offense if: (1) the offenses are based on the same act or transaction; or (2) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.
> B. Where two (2) or more offenses are properly charged in separate counts of a
> single indictment, all such charges may be tried in a single proceeding.

This is the same language as Miss. Code Ann. §99-7-2 (Rev. 1986).

Duplicity of Charges

"Duplicity in criminal pleading is the joinder of two or more distinct and separate offenses in the same count of an indictment or information." *Taylor v. State*, 754 So.2d 598, 604-05 (Miss. Ct. App.,2000), citing *Hitt v. State*, 217 Miss. 61, 67, 63 So.2d 665, 668 (1953).

In *Hitt v. State*, 63 So. 2d 665, 668 (Miss. 1953), *supra*, the court reversed a receiving stolen property conviction because, even though the defendant was charged with receiving stolen property in two instances on the same night, the crimes were committed "at different times and on separate and unconnected occasions constitut[ing] separate offenses."

In *State v. Freeman* 43 So. 289 (Miss. 1907), the defendant was charged in one count of an indictment for both burning a barn and for burning the corn therein. The Supreme Court, in a one sentence opinion, ruled that those two charges constituted two separate and distinct felonies under Mississippi Code 1906 §§ 1040, and 1042, which, therefore, could not be charged in a single count.

Here, even though Lepine could not be prosecuted for more than one vehicular homicide, the arguable extra non-chargeable deaths charged in the alternative nevertheless constitute the stacking of multiple separate charges in one count.

The indictment, here as amended, also leaves Lepine subject to double jeopardy.

"[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The application of the *Blockburger* rule does not rely on facts adduced at trial, rather on the statutory elements of the offense charged. *Brock v. State*, 530 So.2d 146, 150 (Miss.1988) (citing *Brown v. Ohio*, 432 U.S. 161, 166, 97 S.Ct. 2221, 2225-26, 53 L.Ed.2d 187 (1977)). Since each death in count one required proof of an additional death and since all of the other counts remained in effect without ever being dismissed or remanded, and since the basis of the one death allowed by *Mayfield, supra*, is unclear, Lepine is exposed to double jeopardy. See Jury Instruction S-9. Which death was the basis of the conviction? [R. 236].

Here Lepine stood trial on a charge which was not presented to a grand jury, which was multiplicitous, duplicitous and which exposes him to double jeopardy. The application of the above principles reveal that Lepine's indictment was defective. The original indictment should have been quashed. A dismissal of the charges and conviction is respectfully requested as both the original indictment and amended indictment are defective.

ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED IN DENYING LEPINE A CONTINUANCE FOLLOWING LATE DISCOVERY FROM THE STATE?

A few days before the trial, for the first time, defense counsel was advised that the state expert was going to offer an opinion on "retrograde extrapolation" which the estimation of blood alcohol content of an individual at a given time based on rates of alcohol absorption and dissipation over time. [T. Supp. Vol. 1, pp. 2-9]. The purpose was to establish that Lepine was intoxicated at the time of the accident.

Prior to the disclosure of the state's intent, the only discovery provided on this aspect of the case had been the blood alcohol content readouts. [*Id.;* Exs. 40-45]. Counsel asked for a continuance and for the authority to retain a toxicology expert for the indigent Lepine or for the state's retrograde extrapolation evidence to be excluded. *Id.* At the time of the motion for continuance, no actual discovery as to what the state's witness' opinion had been provided.

The trial court overruled all of defense counsel's requests but allowed for the opportunity of defense counsel to voir dire the state expert outside the presence of the jury. [T. Supp. Vol. 1, pp. 18-20].

The court had authorized funds for a toxicology expert for Lepine, but since the state did not indicate that an extrapolation opinion was going to be offered, the defense did not plan on having their expert present at trial. [T. Supp. Vol. 1, pp. 2-9]. When it turned out that the defense could get its expert to trial, the court did not qualify him as an

expert. [T. 324-25, 330, 332-33, 339] .

The trial court was presented with a similar situation in *Lawrence v. State*, 931 So.2d 600, 605 (Miss. Ct. App.,2005). The appellate court in *Lawrence* pointed out the steps which are to be taken with such a discovery violation: first the "the trial court should give the defendant a reasonable opportunity to become familiar with the undisclosed evidence", which did not happen here because the state's witness only provided raw data, without an opinion. [T. Supp. Vol. 1, pp. 9-12].

So, the *Lawrence* opinion said, in this situation defense counsel "must request a continuance", which did occur and which was denied. *Id.* After the defendant's continuance motion, according to *Lawrence*, "the state may choose to proceed with trial and forego using the undisclosed evidence." *Id.* However, if "the State is not willing to proceed without the evidence, the trial court must grant the requested continuance", which did not occur here. In *Lawrence*, there was no reversal because the court found that the defense was given adequate information prior to trial under Miss. R. Evid. 705. What is different here is that in *Lawrence* the state and defense basically had the same information which formed the basis of the state's expert opinion. In the present case, the state had an advantage in that their witness was a toxicologist who had formulated an opinion based on undisclosed information and methodology, but who withheld the specifics of that opinion and the basis for the opinion. [T. Supp. Vol. 1, pp. 9-12]. It appears as though trial counsel was justified in asking for a continuance and the trial court

abused its discretion under *Lawrence*. A new trial is warranted and respectfully requested.

ISSUE NO. 3: WHETHER AN EVIDENTIARY FOUNDATION WAS LAID FOR BLOOD ALCOHOL CONTENT TEST RESULTS?

The court in *Johnston v. State*, 567 So.2d 237, 238 (Miss.1990) established the three part evidentiary predicate for the admission of blood alcohol content tests. A trial court shall determine that the 1) statutory procedures of Miss. Code Ann. § 63-11-19 (1972) were followed, and 2) that the operator of whatever machinery employed was certified to conduct the testing procedures used, and 3) that the accuracy of the machine used was quarterly calibrated and certified. See also, *McIlwain v. State* 700.So.2d 586 (Miss. 1997).

None of these procedures were established here. Nor was there any substantial compliance as referenced in *Bearden v. State*, 662 So.2d 620 (Miss.,1995.).

In *Johnston, supra,* the court reversing on the basis of no certification said:

> Strictly enforcing the statutory requirements, there is no support for the accuracy of the results absent evidence of proper certification. The trial court abused its discretion in finding a sufficient predicate for admitting the results of the intoxilyzer in the testimony of Trooper Thompson. This error substantially prejudiced the defendant's right to a fair trial. 567 So.2d at 239.

Johnston controls. The facts are analogous. The record is clear. There was a timely objection that the above procedures were not followed here. [T. 218]. A reversal

with new trial is required and requested.

ISSUE NO. 4: WHETHER THE COURT ERRED IN ALLOWING OPINION EVIDENCE FROM AN UNQUALIFIED WITNESS?

The state offered the opinion of toxicologist Wendy Hathcock on the issue of whether Lepine was in "the elimination stage" at the time of the drawing of the blood samples in this case. [T. 230-31; 234]. When defense counsel objected, a cursory attempt at laying a foundation for the opinion was attempted and eventually found by the trial court to have been established. *Id.* The witness' ultimate opinion was an irrelevant "it's possible" that Lepine was in the elimination stage. [T.232-35]. Under the modified *Daubert* standard adopted in *Mississippi Transp. Comm. v. McLemore*, 863 So.2d 31, 39-40 (¶¶ 21-25) (Miss.2003), Ms. Hathcock's opinion should be relevant. That which is merely possible is irrelevant. Ms. Hathcock was never shown to be experienced in the area of retrograde extrapolation and she should not have been qualified.

To aggravate the error, the state was allowed to place into evidence the average rate of alcohol dissipation. [T. 234] This information was from the unqualified Hathcock. The jury was also given the "raw data" information, the jury was then put into a position to use incompetent "raw data" numbers from chromatography which was not shown to be calibrated or accurate and use that questionable data with a dissipation rate tendered by an unqualified "expert". What resulted was a violation of the fair trial standard.

Admission of expert opinion testimony is governed by Miss. R. Evid. 702[2] and the requirements set out in *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31, 34-36 (Miss 2003). First a person offered as an expert must be qualified so that the opinion is reliable, secondly, the witness' knowledge must be able to assist the fact finder so, the opinion must be relevant. *McLemore* 863 So. 2d 34-36. The trial court's rulings on expert testimony are reviewed on appeal under a standard of whether there was an abuse of discretion. *Webb. v. Braswell*, 930 So. 387, 396-97 (Miss. 2006), *Edmonds v. State*, 955 So.2d 787, 791-92 (Miss.2007).

On the topic of human toxicological retrograde extrapolation of alcohol, Hathcock failed all three requirement of the enumerated principles of Miss. R. Evid.702. The worst violation, however, pertains to number three (3) that in the qualifying of an expert, the trial court must determine that "the witness has applied the principles and methods reliably to the facts of the case." The fact that Hathcock could only say that it was possible shows that she did not apply the principles or that the results were inconclusive.

The third prong of Rule 702 referenced above is addressed in *McLemore*, where

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[2]Miss. R. Evid 702 states:

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

the court said:

> The trial court is vested with a "gatekeeping responsibility.". The trial court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning and methodology properly can be applied to the facts in issue." [Citations omitted]. *McLemore,* 863 So. 2d 36.

The 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. *McLemore* 863 So.2d at 35. Hathcock's opinion that Lepine was possibly in the elimination stage was nothing more than speculation.

The fact that Hathcock's incompetent opinion was based further on an assumption leads to the legal conclusion that her opinion testimony and information about dissipation was not what it purported to be, and thus is not authentic under Miss. R. Evid. 901.[3] Authenticity is a condition precedent to admission of evidence. *Middlebrook v. State*, 555 So.2d 1009, 1012 (Miss. 1990). If the evidence is not authentic it is irrelevant according to the comments to the rule. See also, *Walker v. State,* 878 So.2d 913, 914-15 (Miss.2004), where the court said, the introduction of irrelevant expert opinion evidence "without employing the available scientific means for authentication, fails the unfair prejudice standard set forth in M.R.E. 403, infringed upon Walker's right to a fair trial,

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[3]M.R.E. 901(a) provides:
(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

and served only to bolster the testimony of the prosecution's witnesses.. ... With no direct link [the incompetent evidence] would tend to mislead, confuse, and incite prejudice in the jury..."

If follows that Lepine was denied a fair trial by the introduction of incompetent opinion testimony. A new trial is respectfully requested.

ISSUE NO. 5: WHETHER THE TRIAL COURT ERRED IN FAILING TO QUALIFY A DEFENSE EXPERT?

In *Cowart v. State* 910 So. 2d 726, 728-29 (Miss. Ct. App. 2005) the court reiterated that the qualification of experts is a matter "left to the sound discretion of the trial court" under a "clearly erroneous" standard.

Cowart concerned the testimony of Timothy Hayne, M. D. who, after testifying as to the cause of death "was recalled as a rebuttal witness to testify as an expert on rates of absorption and metabolism of alcohol." The qualification of Dr. Hayne in the area of toxicology was challenged by the defense.

The *Cowart* court stated that under Miss. R. Evid. 702 a witness is "qualified as an expert by knowledge, skill, experience, training, or education" and may offer opinions if his or her "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue", but, must limit such opinion testimony "to matters within his demonstrated area of expertise." [Citations omitted.]. *Id.*

at 730. There is no prohibition to being qualified in more than one field. *Id.*

Such experts must, under Rule 702 "possess some experience or expertise [or peculiar knowledge or information regarding the relevant subject matter] beyond that of the average, randomly selected adult. *Id.* The content of the testimony must be relevant and reliable under the modified *Daubert* standard adopted in *Mississippi Transp. Comm. v. McLemore*, 863 So.2d 31, 39-40 (¶¶ 21-25) (Miss.2003). The *Cowart* court found Hayne qualified as any competent physician would be.

In *Langdon v. State* 798 So. 2d 550, 556 (Miss. Ct. App. 2001), the Mississippi Court of Appeals addressed the qualifications needed to render an opinion on retrograde extrapolation or alcohol absorption and dissipation. In *Langdon* the defense sought to qualify an investigator as an expert, but the trial court found him unqualified because his "education, experience, and background-which was admittedly generally limited to training and experience in the proper administration of DUI testing procedures-did not establish his expertise on those scientific subjects about which he proposed to testify." *Id.* The *Langdon* court found specifically that the scientific area of alcohol absorption and dissipation rates "required some demonstrated expertise [or specialized knowledge] in such scientific fields as human physiology and chemistry." *Id.*

Turning to the facts in the present case. The defense tendered Olen Brown, Ph. D. to give an opinion about "retrograde extrapolation". [T. 305]. The trial court found that Dr. Brown was qualified in the area of toxicology, but the court would not allow Dr.

Brown to offer an opinion about retrograde extrapolation. [T. 324-25, 330, 332-33, 339]. The court excluded Dr. Brown's opinion even though Brown had certifications in Toxicology from the American Board of Toxicology, in Chemistry and Chemical Engineering from the American Institute of Chemists, and in formerly in Forensics from the American Board of Forensic Examiners. [T. 306 Ex. 48]. The trial court made this ruling even though Dr. Brown had published broadly in life sciences, Toxicology, Biology, Microbiology and Environmental Biology. *Id.*

Dr. Brown had published particularly on "toxicology of acute and chronically acting chemicals". He had conducted applied research in the "mechanisms of actions of drugs and other chemicals". He had worked as a expert in DUI cases. *Id.*

Dr. Brown was involved professionally in "Therapeutic and untoward effects of ethyl alcohol ..., drugs and analysis of alcohol. [T. 311]. However, he had never testified about retrograde extrapolation of alcohol. [T. 312]. He was experienced in chromatograph analytical laboratory technics. [T. 315]. Dr. Brown explained to the court that analyzing blood alcohol was similar to analyzing other "biological samples" and he has reviews materials in his work dealing with alcohol. [T. 316].

Dr. Brown stated that he was familiar with "the mechanism, the process and the factors that go into" retrograde extrapolation. [T. 333-34]. Dr. Brown explained that based on his training and "experience in the laboratory" his experience was with "extrapolating the concentration of substance in the human body" and the effect of these

concentrations in "pharmacokinetics and pharmacodynamics of drugs" including alcohol as well as other substances. [T. 334]. Dr. Brown explained that the workings of these interaction of drugs in the human body vary with concentration and elimination from metabolism and absorption and distribution. *Id.* He said, "[a]ll of these factors are general principles of ... toxicology and are applicable to alcohol."

Most importantly, and what the trial court ignored was that the "general principles" of alcohol extrapolation and other substances are the same. [T. 335]. Dr. Brown said "alcohol is metabolized by what's called zero order kinetics". "The equation for retrograde alcohol absorption only has two or three factors ... [which could be taught] to a high school student. But to understand the underlying principles, the assumptions that must be made, the limitations of it, requires an intense understanding of human medicine, physiology, biochemistry [and] analytical techniques", all of which Dr. Owen stated and demonstrated to possess. [T. 335].

Following these explanations, Dr. Owen's proffered opinion was that the calculations and opinions of state's toxicologist Wendy Hathcock were unreliable and not scientifically sound. [T. 336-39]. By the trial court abusing its discretion in disallowing Dr. Brown's testimony, Lepine was prevented from presenting a defense to the charges, a denial of due process. A new trial is requested.

ISSUE NO. 6: WHETHER THE COURT ERRED IN DENYING LEPINE'S MOTION FOR MISTRIAL FOLLOWING THE STATE'S DISREGARD OF THE TRIAL COURT'S RULING ON INFLAMMATORY QUESTIONS?

Since the state did not provide discovery that the states accident reconstructionist was going to offer an opinion on the speed of Lepine's station wagon, the court ruled such evidence inadmissible. [T. 281-86]. Being mindful that there was arguably no evidence of a negligent act and up to this point of the trial, there had been no mention of Lepine exceeding the speed limit or even what the posted speed limit was.

Immediately following the court's ruling excluding the reconstructionist's speed estimates, the prosecutor made the remark in the presence of the jury that:

> Your Honor, if we might, I don't think he's going to qualify it as a particular speed. I think he will testify and I think he can render an opinion based on the distances. And those distances, were, in fact, provided to counsel as to whether or not he exceeded the speed limit at the time. [T. 283].

This remark insinuated to the jury that the state had proper evidence and that the defendant was seeking to hide it from the jury. Defense counsel objected and moved for a mistrial which was denied. [T. 283-85].

These actions on the part of the prosecutor are reminiscent of the prosecutor in *Williams v. State* 539 So.2d 1049, 1051-52 (Miss. 1989) where the trial court excluded a certain video tape offered by the state after it had not been listed in the discovery. Similarly to the prosecutor here, the prosecutors in *Williams* continued to move for introduction of the video "in blatant disregard of the trial court's ruling of

inadmissibility." Williams argued that prejudice resulted and a fair trial was denied by the prosecutor's remarks about the excluded evidence "which led the jury to perceive that actions by the defense counsel kept incriminating evidence from them." The Supreme Court agreed with Williams' argument and stated:

> [t]he prosecuting attorney must conduct the trial in accordance with the rules of law and the rulings of the trial judge during the trial, particularly where accused is defended as a poor person. He should not engage in undignified argument and conduct, and should at all times maintain a proper attitude toward the jury, and not say or do anything which might improperly affect or influence the jury ...

A prosecutors is certainly allowed to argue "the admissibility of proposed evidence" but this privilege

> does not extend so far as to permit counsel to argue and remonstrate with the court or to insist that he has the right to do something or to pursue a line of questioning after the trial judge has ruled against his contentions, and he should not attempt to influence the minds of the jurors improperly under the guise of arguing on the admission of incompetent evidence.

Here in the present case, Lepine was offered a cautionary instruction from the court, which was declined so as not to draw more attention to the misconduct. [T. 285-86]. This should be on no consequence to the court's decision here; because, according to the *Williams* decision, where there was an admonition to the jury, "it cannot be said with confidence that the repeated subsequent references to the video tape did not influence the jury. Therefore, we find that the prosecutors' actions denied Williams a fair trial and amounted to reversible error." Should the result be any different here? Lepine suggests not.

ISSUE NO. 7: WHETHER THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE FOR ALL OF THE ELEMENTS OF AGGRAVATED DUI AND WHETHER THE VERDICT WAS SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

The state's case in chief contained no evidence of any negligent act on the part of Lepine. The trial court should have sustained Lepine's motion for directed verdict. [T. 303]. Simple negligence is a "failure to exercise reasonable care under the circumstances." *Turner v. State*, 726 So.2d 117, 131(¶ 54) (Miss.1998).

In *Dunaway v. State*, 919 So.2d 67, 71 (Miss. Ct. App. 2005), a vehicular homicide case, the court addressed the issue of proof of a negligent act. In *Dunaway* there was a witness who saw Dunaway on the wrong side of the road and swerving to avoid oncoming traffic thus losing control, so the court found clearly that proof of the requisite negligent act existed.. *Id.* Here in Lepine's case, contrary to *Dunaway,* there was no testimony as to any particular negligent act of Lepine. There was no testimony as to the speed of Lepine's car nor the posted speed limit on the particular portion of Highway 43.

The court in *Murphy v. State* 798 So.2d 609, 613 (Miss. Ct. App.,2001), spoke as to the elements the state would be required to prove in a vehicular homicide case. The State must prove that the defendant "not only consumed alcohol prior to the accident, but that he performed a negligent act that caused the death of another." Citing *Hedrick v. State*, 637 So.2d 834, 837-38 (Miss.1994). See also *Frambes v. State*, 751 So.2d 489, 492(¶ 17) (Miss. Ct. App.1999). There was no evidence performance of a

negligent act in the record when the court denied the motion for directed verdict and at the close of the defendants' case and at the time the court denied Lepine's JNOV. So, Lepine respectfully requests a reversal of the conviction and rendering os acquittal.

ISSUE NO. 8: WHETHER THE COURT GAVE AN ERRONEOUS JURY INSTRUCTION MISSTATING THE LAW ON THE DUTY OF MOTOR VEHICLE OPERATORS?

The court gave the following instruction to the jury at the state's request over Lepine's objection.

> Jury Instruction No. 5: The court instructs the jury that at all times a driver of a vehicle is required to maintain easy and reasonable control of his vehicle. S-5. [R. 232].

The instruction misstates the law. In *Mississippi Dept. of Transp. v. Trosclair,* 851 So.2d 408, 417 (Miss. Ct. App.,2003) the court held, "[t]he operator of a motor vehicle has a duty to keep the vehicle under proper control and to drive at a speed which is reasonable under the conditions that she faces." citing *Upchurch ex rel. Upchurch v. Rotenberry*, 761 So.2d 199, 205 (Miss.2000). See also *Albright v. Delta Regional*, 899 So.2d 897, 899 (Miss. Ct. App.,2004).(Driver "had a duty to maintain proper control of her vehicle and to exercise reasonable care to avoid causing injury in the process."). But see, *Comby v. State,* 901 So.2d 1282, 1288 (Miss. Ct. App. 2004). ("[E]asy and reasonable control" language not approved but not erroneous in that case taking all jury instructions together).

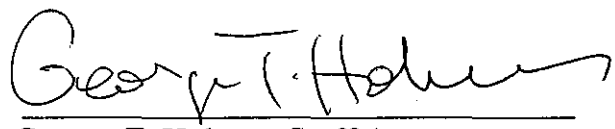
To say that negligence is the failure to easily maintain control of a vehicle results in the ludicrous consequence of someone being negligent by maintaining control of their vehicle albeit with difficulty. Also, the definition of easy is ambiguous and fluid. What is easy for one person is difficult for another. "Easy", therefore, is not an objective standard. It may be difficult for a Mississippi driver to maintain control on icy road, but no matter how reasonable that driver maintains control, so long the control is uneasy, the standard is violated under this erroneous instruction. If follows that the jury deliberated Lepine's fate with an inappropriate jury instruction and he respectfully asks the court for another trial.

CONCLUSION

Charles Lepine is entitled to have his conviction reversed with a rendering of acquittal or with remand for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Charles P. Lepine, Appellant

By: 

George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 16th day of May, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Prentiss Harrell, Circuit Judge, P. O. Box 488, Purvis MS 39475, and to Hon. Hal Kittrell, Dist. Atty., 500 Courthouse Square, No. 3, Columbia MS 39429, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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