IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-KP-00614-SCT

WAYNE GILPATRICK — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

APPEAL FROM THE FINAL JUDGMENT OF THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI
ENTERED APRIL 16, 2007

ORAL ARGUMENT REQUESTED

ATTORNEY FOR APPELLANT,
WAYNE GILPATRICK

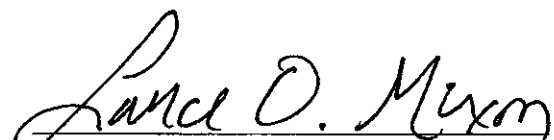
Lance O. Mixon, Esq. (MSB #[redacted])
VICTOR W. CARMODY, JR., P.A.
499 South President Street
Jackson, MS 39201
(601) 948-4444

CERTIFICATE OF INTERESTED PARTIES

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 judges of this Court may evaluate possible disqualification or recusal.

1. State of Mississippi;
2. Wayne Gilpatrick, Appellant;
3. Honorable Jim Hood, Esq., Counsel for Appellee;
4. Honorable Lance O. Mixon, Esq.; Counsel for Appellant;
6. Honorable William Chapman, Circuit Court Judge for Rankin County.
7. District Attorney's Office for the 20th Judicial District.

Respectfully submitted,



Lance O. Mixon, Esq. (MSB # 102406)
VICTOR W. CARMODY. JR., P.A.
499 South President Street
Jackson, MS 39201
(601) 948-4444

TABLE OF CONTENTS

Page:

Certificate of Interested Parties i

Table of Contents ii

Table of Authorities iv

Statement of the Issues 1

Statement of the Case 2

A. Nature of Case 2

B. Course of Proceedings and Disposition in the Court Below 2

C. Statement of Facts Relevant to the Issues 3

Summary of the Argument 15

Argument 17

I. The Circuit Court of Rankin County erroneously allowed the State's forensic toxicologist to testify regarding retrograde extrapolation when there was no showing that he was qualified to give such testimony, nor was there sufficient facts to base such testimony on. 17

II. The proof was insufficient that Gilpatrick was legally intoxicated at the time the accident occurred at approximately 1:04 a.m. on March 29, 2005. 22

III. The verdict was so contrary to the overwhelming weight of the evidence that to allow it to stand would result in an unconscionable injustice. 24

Conclusion 27

Certificate of Service 28

TABLE OF AUTHORITIES

CASES

Burgess v. State, 911 So. 2d 982 (Miss. App. 2005).....23

Gibson v. Wright, 870 So. 2d 1250 (Miss. App. 2004).....17

Herring v. State, 691 So. 2d 948 (Miss. 1997) 24

Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31 (Miss. 2003).....17

Puckett v. State, 737 So. 2d 322 (Miss. 1999).....17

Seeling v. State, 844 So. 2d 439 (Miss. 2003).....22

Smith v. State, 942 So. 2d 308 (Miss. App. 2006).....15, 18, 19, 20, 21

Smith v. State, 956 So. 2d 997 (Miss. App. 2007).....24, 25

U.S. v. Delk, 586 F.2d 513 (5th Cir. 1978).....26

Westbrook v. State, 202 Miss. 426, 32 So. 2d 251 (Miss. 1947).....18, 21

STATUTES

Miss. Code Ann. § 63-11-30(5) (1972), as amended.....18, 23, 24

RULES

Miss. Rule of Evidence 702 17

OTHER

Kurt Dubowski, Ph.D., *Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects*, Supp. 10 Journal of Studies on Alcohol 98, 99 (July 1985).....19

STATEMENT OF THE ISSUES

I. **Whether the Circuit Court erred in allowing the State's forensic toxicologist to testify regarding retrograde extrapolation when there was no showing that he was qualified to give such testimony, nor was there sufficient facts to base such testimony on?**

II. **Whether there was insufficient proof that Gilpatrick was intoxicated at the time of the accident?**

III. **Whether the verdict of the Circuit Court was so contrary to the overwhelming weight of the evidence that to allow it to stand would result in an unconscionable injustice?**

STATEMENT OF THE CASE

A. Nature of Case

This is an appeal from the final judgment of the Circuit Court of Rankin County, Mississippi in favor of the State of Mississippi ("State"), where the Circuit Court found the Appellant, Wayne Gilpatrick ("Gilpatrick"), guilty of three (3) counts of driving under the influence ("DUI") of alcohol and negligently causing mutilation. (R. at 37-39; 47. R.E. at 7-9.) Gilpatrick was sentenced to the custody of the Mississippi Department of Corrections for a period of twenty-five (25) years on each count, with the sentences to run concurrently. (R. at 38; R.E. at 8.)

B. Course of Proceedings and Disposition in the Court Below

This case involves criminal charges brought by the State of Mississippi against Wayne Gilpatrick. On April 14, 2006, Gilpatrick was indicted by a Rankin County Grand Jury on three (3) counts of driving under the influence ("DUI") of alcohol and negligently causing mutilation, in violation of Miss. Code Annotated § 63-11-30(5) (1972). (R. at 1-2.) These offenses were alleged to have occurred on or about March 19, 2005. *Id.* Gilpatrick subsequently waived arraignment and pleaded not guilty to the charges set out in the indictment. (R. at 7.)

The Circuit Court set Gilpatrick's trial for October 10, 2006. (R. at 8.) On this date, a jury was impaneled and the Circuit Court presided over the trial. (T. at 1) The State called the following witnesses in its case-in-chief, in this order: Andrea Wade (Brandon Police Officer); David Ruth (Brandon Police Officer); Joey Thrash (factual witness); Brian Chalk (Brandon Police Officer); John Stevenson (Mississippi Crime

Laboratory); Craig Beebe (victim); John Callicott (victim); Vince Pontillo (victim); and Sue Graham (Pontillo's mother). (T. at 2-3.)

At the conclusion of the State's case-in-chief, Gilpatrick moved for a directed verdict of not guilty. (T. at 151.) The Circuit Court denied Gilpatrick's motion for a directed verdict of not guilty. (T. at 152.) Gilpatrick did not call witnesses to testify in his defense, but he testified in his own behalf. (T. at 154.) After each side rested, the jury heard closing arguments and ultimately found Gilpatrick guilty on all three (3) counts. (T. at 197.) Gilpatrick was sentenced to the custody of the Mississippi Department of Corrections for a period of twenty-five (25) years on each count, to run concurrently. (R. at 38; R.E. at 8.)

Being aggrieved by the verdict and sentence, Gilpatrick filed a Motion For a New Trial in the Circuit Court on October 20, 2007. (R. at 41; R.E. at 5.) On April 16, 2007, the Circuit Court entered an Order which denied Gilpatrick's Motion for a New Trial. (R. at 47; R.E. at 4.) Gilpatrick, aggrieved by the disposition of the Circuit Court, now appeals to this Court. (R. at 53.)

C. Statement of Facts Relevant to the Issues

On or about March 19, 2005, Wayne Gilpatrick was involved in a two-vehicle automobile accident in Rankin County, Mississippi. (T. at 48.) Gilpatrick was driving a white Chevrolet pickup truck and heading south on Highway 18 when his vehicle veered into the northbound lane of traffic and collided with a Ford Ranger driven by John Callicott. (T. at 49-53.) The accident occurred in the early morning hours, as the first officer to the scene, Andrea Wade of the Brandon Police Department, was dispatched to

the scene of the accident at approximately 1:04 a.m.. (T. at 48.) Gilpatrick had departed from work and was on his way to his home when the accident occurred. (T. at 154; 162.)

Gilpatrick testified that on the evening prior to the accident, he had been working at the Warehouse in Raymond. (T. at 154.) The Warehouse is a pool hall that has karaoke. (T. at 154; 164.) On the night in question, Gilpatrick had set up a karaoke machine at the Warehouse where he operated it for patrons. (T. at 155.) At approximately 12:00 a.m., Gilpatrick shut down the karaoke machine and disassembled it. *Id.* He testified that it took him approximately thirty (30) to forty-five (45) minutes to disassemble the karaoke machine. *Id.* As he was doing so, Gilpatrick started drinking beer because he was considered to be "off work" at that point. (T. at 155-157.) Gilpatrick testified that he drank about three (3) beers upon finishing his duties with the karaoke machine and then leaving the Warehouse to go to his home in Rankin County. (T. at 157.)

Prior to his departure from the Warehouse, Gilpatrick's girlfriend and passenger, Candace Burr, had a friend named Denise who had earlier asked Gilpatrick to give her a ride to her home. (T. at 157.) Gilpatrick testified that he had earlier observed Denise drinking vodka while at the Warehouse, as the Warehouse is a place where "you can bring your own booze in," according to Gilpatrick. *Id.* Denise had went out to Gilpatrick's vehicle and placed some of her belongings in it, including the bottle of vodka she had been drinking from, in anticipation of departing with Gilpatrick and Burr. *Id.* In his testimony, Gilpatrick stated, "when we were getting ready to leave, I guess she was gone, we couldn't find her anywhere." *Id.*

When Gilpatrick left the Warehouse, he testified that he did not feel impaired as he had consumed less than three (3) beers at that point. (T. at 159.) Gilpatrick testified

that he was drinking the third beer while he was driving. (T. at 163.) The cause of the accident, according to Gilpatrick's testimony, was that he took his attention off the road in an attempt to retrieve a ringing cell phone in his vehicle, thereby causing his vehicle to venture into the oncoming lane of traffic and subsequently collide with an oncoming Ford Ranger. (T. at 160-161.) Specifically, Gilpatrick testified as follows:

> Well, on going home, after leaving that light right there in Crossgates where the railroad tracks are, I heard the phone ringing. As soon as I crossed over the railroad tracks, I heard the cell phone ringing. And upon not having Denise with us, I thought it might be her calling being stranded somewhere or something, because we looked, and nobody knew where she went.
>
> That was the girl with the vodka bottle. Now, I reached down for the cell phone, because Candace had laid down, went to sleep on my lap, or on my shoulder, one of the two, and the cell phone was somewhere in between us, in my coat pocket or her purse or something, I just heard it ringing. I finally found it; and, you know, taking my eyes off the road, I finally found it. And when I went to open it, it came out of my hand and it hit the floorboard. Well, I went down to get it, to answer it while it was still ringing. I reached down to grab it, and that's the last thing I remember.

(T. at 160.) State's exhibits one (1), four (4), and five (5) each show that there is a cell phone on the passenger side floorboard of Gilpatrick's truck, as well as a bottle of vodka which was placed in the floorboard by Denise. (T. at 161.)

Continuing his testimony, Gilpatrick said that the police officer's allegations about smelling beer around the area of the accident scene (infra) was not a surprise to him. (T. at 162.) He testified that there was a cooler of beer and ice in the back of his truck, which obviously would have burst open and spilled as a result of the collision. *Id.* Further, Gilpatrick testified that he was drinking his third beer while he was driving. (T. at 163.) Gilpatrick stated that the journey from the Warehouse to the site where the accident occurred was about thirty-five (35) miles in distance. (T. at 159.) Gilpatrick

testified that he could not remember anything that happened immediately after the accident occurred. (T. at 163.)

The first officer to the scene, Andrea Wade of the Brandon Police Department, was dispatched to the scene at approximately *1:04 a.m.*. (T. at 48.) (Emphasis added.) At trial, Wade testified that "when [she] arrived on scene, [she] observed two vehicles, a white Chevrolet and a greenish-blue Ford Ranger, compacted on the northbound lane of Highway 18." (T. at 49.) Further, Wade testified that "the white Chevrolet appeared to have been going southbound and the Ford Ranger was going northbound. [She] observed debris and chemical spill on the street on the northbound lane." (T. at 50.)

Wade stated that upon approaching the white Chevrolet, she saw that Gilpatrick was trapped between the driver's side seat and the dashboard, while Burr was trapped between the passenger side area and the dashboard. (T. at 51.) Wade then went to the Ford Ranger where she saw that Vince Pontillo lay injured in the front passenger side, while Craig Beebe was in the back of this vehicle. (T. at 52.) Wade determined that the driver of the Ford Ranger was John Callicot. (T. at 53.) According to Wade, all three occupants of the Ford Ranger were severely injured. (T. at 53-54.)

Further, Wade testified that she noticed "a partially consumed bottle of vodka on the passenger side floorboard" of Gilpatrick's vehicle at the time the law enforcement and medical personnel extracted Gilpatrick and Burr from the white Chevrolet. (T. at 53.) In addition, "[t]here was also a cooler of beer that was cold to the touch. Also initially, when [Wade] approached the vehicle, the white Chevrolet truck, there was a, the smell of an alcoholic beverage coming from the interior of the truck," according to Wade's testimony. (T. at 53.) Wade said that she did not smell the odor of intoxicating beverages coming from the Ford Ranger driven by Callicott. (T. at 53.) Photographs that

were admitted into evidence at trial showed the bottle of vodka on the passenger side floorboard. (T. at 54.)

Officer David Ruth of the Brandon Police Department testified that he arrived on scene and took photographs. (T. at 72.) Ruth stated that he has had experience and training in accident investigation, but is not an accident reconstructionist himself. (T. at 73.) Ruth explained that the gouge marks in the roadway determined the point of impact between the two vehicles, which was in the northbound lane of traffic on Highway 18. (T. at 73-76.) Further, Ruth testified that it was his understanding that the Ford Ranger was traveling in the northbound lane at the time of the accident. (T. at 77.)

Joey Thrash, an eyewitness to the accident, testified for the State. (T. at 83.) Thrash testified that "around one o'clock in the morning, [he] had just gone to the Texaco . . . to get a couple of Cokes . . . ." (T. at 84.) When he left the Texaco, according to Thrash, he observed the white truck driven by Gilpatrick behind him and that this truck was weaving in the road. (T. at 85.) Thrash testified that eventually, he saw the white truck weave into the oncoming lane of traffic, which he estimated was about thirty (30) feet behind him, and that he looked into his rearview mirror to observe the oncoming Ford Ranger's brake lights come on and then collide head on with Gilpatrick's vehicle. (T. at 85-86.)

Thrash proceeded to testify that he stopped his own vehicle "and ran down to see if [he] could help, if everybody was okay, if anybody was hurt, to just assess the accident site." (T. at 90.) Thrash was the first person to check on those involved in the accident, before the police arrived. *Id.* According to Thrash, the occupants of the Ford Ranger were nonresponsive. *Id.* Thrash said that he could hear Burr, the passenger in Gilpatrick's vehicle, moaning in pain inside of the white Chevrolet truck. *Id.* Further,

Thrash testified that he could "distinctly smell beer" coming from the *area* of the white Chevrolet. (T. at 94-96.) (Emphasis added.)

The State's next witness was Brian Chalk of the Brandon Police Department. (T. at 98.) Chalk is a narcotics officer who was called by Officer Wade to get a search warrant to be used to acquire a sample of Gilpatrick's blood. *Id.* Wade had went to the Brandon Police Department to obtain the blood kits at about 2:30 a.m., more than an hour after the accident occurred. (T. at 56.) Wade then drove to the Mississippi Baptist Hospital in Jackson (where Gilpatrick was transported) with the blood kits. (T. at 58.) Once there, Wade found that Gilpatrick was being treated in the emergency room. (T. at 59-60.) Wade called a city judge and obtained a search warrant for Gilpatrick's blood while he was being attended to by medical staff. (T. at 60-61.) Dr. James Hutto drew Gilpatrick's blood sample *at 5:00 a.m.* on March 19, 2005, as evidenced by a chain of custody form (State's Exhibit 2) and Wade's testimony. (T. at 62-63.) (Emphasis added.)

Officer Chalk testified that he assisted in handling evidence related to this case by subsequently transporting the blood samples of Gilpatrick and Callicott (driver of the Ford Ranger) from the Brandon Police Department to the Mississippi Crime Lab. (T. at 99-100.) Chalk stated that the blood kits were within his custody and control without any breaking or tampering with the kits until they were submitted to the crime lab. (T. at 101.)

The State then called John Stevenson of the Mississippi Crime Laboratory. (T. at 102; R.E. at 10.) Stevenson testified that he is "employed as a forensic scientist, specializing in blood alcohol analysis and drug analysis." *Id.* Additionally, Stevenson stated that he has, in the past, been admitted as an expert in Mississippi state courts in the

fields and sub-fields of alcohol impairment and alcohol elimination. (T. at 103-104; R.E. at 11-12.) During preliminary questioning by the State and *voir dire* by Gilpatrick, Stevenson never stated that he is qualified in the scientific area of retrograde extrapolation.

Gilpatrick conducted a *voir dire* on Stevenson regarding his expert qualifications. (T. at 104-106; R.E. at 12-14.) Stevenson testified that he holds a bachelor's degree in biology and is certified by the Mississippi Crime Lab to conduct blood alcohol analysis. (T. at 105; R.E. at 13.) During this questioning, Stevenson stated that neither he nor his supervisor has a master's degree or a Ph.D.. *Id.* Gilpatrick objected to the proffer of Stevenson as an expert, and the trial court overruled this objection. (T. at 105-106; R.E. at 13-14.)

On direct examination of Stevenson by the State, he testified that he had received a sample of blood drawn from Callicott (driver of the Ford Ranger) that he tested, and the results showed that Callicott's blood was 0.00 for alcohol. (T. at 107; R.E. at 15.) Stevenson also referred to a lab report that reflected that Gilpatrick's blood had been tested for alcohol by Stevenson. *Id.* Gilpatrick's blood tested at 0.07 percent for ethyl alcohol on March 25, 2005, six (6) days after it been drawn from Gilpatrick on March 19, 2005 at 5:00 a.m. – three (3) hours, fifty-six (56) after the first officer arrived to the accident scene. (T. at 61; 108. R.E. at 16.)

Further, Stevenson offered testimony regarding the effects of ethyl alcohol on people. (T. at 109-110; R.E. at 17-18.) Stevenson said that "[e]thanol affects all of us the same way" and that "[t]he effects of ethyl alcohol are loss of good mental judgment, loss of skills, motor coordination, perception, more so, motor skills and tasking, multitasking." (T. at 109; R.E. at 17.) Additionally, he testified that someone with a

blood alcohol content of .07 percent loses multitasking abilities and judgment. (T. at 110; R.E. at 18.)

The State asked, "[a]re you familiar with elimination rates of alcohol from the human body?" *Id.* Gilpatrick objected to this question on the grounds that Stevenson was not qualified as an expert toxicologist for retrograde extrapolation purposes. (T. at 111; R.E. at 19.) The trial court overruled Gilpatrick's objection and allowed Stevenson to testify about elimination rates of alcohol from the human body. *Id.* Stevenson continued by testifying that "[t]he rate of elimination over a general population for an individual is between 0.015 to 0.018 grams per deciliter. That's like a drink per hour." *Id.*

Stevenson went on to discuss the absorption phase, peak absorption, and elimination phases of alcohol consumption. (T. at 111-112; R.E. at 19-20.) In Stevenson's opinion, "you reach a peak absorption somewhere around 45 minutes to hour and a half. From there, afterwards, you are in the elimination phase, which you begin to eliminate ethanol the minute you begin to drink." (T. at 112; R.E. at 20.) The State proceeded to ask Stevenson whether he was familiar with the concept of retrograde extrapolation, to which Stevenson answered in the affirmative. (T. at 113; R.E. at 21.) Further, Stevenson was questioned whether there was a sufficient amount of information available to him to perform a retrograde extrapolation in this case, which drew another objection from Gilpatrick on the grounds that Stevenson was not qualified to expound on retrograde extrapolation. *Id.* The trial court again overruled Gilpatrick's objection. *Id.*

Continuing his testimony, Stevenson replied, "[t]here's some factors in it, sir, that are there to perform a retrograde extrapolation. But we are making, as I stated, *some assumptions and some probabilities here*, sir. (T. at 114; R.E. at 22.) (Emphasis added.)

Stevenson proceeded to testify that he *did not know* the last time that Gilpatrick had consumed any food, nor the last time that Gilpatrick had consumed an alcoholic drink, among other things. *Id.* (Emphasis added.) Instead, according to Stevenson, he was "making some *assumptions and hypotheticals*" to perform a retrograde extrapolation analysis in this case. *Id.* (Emphasis added.) When asked if had enough information to conclude what Gilpatrick's blood alcohol content was at the time of the accident, Stevenson replied that, "[Gilpatrick] *could have been higher*, he *could have been lower*, he *could have been the same*, sir." (T. at 114-115; R.E. at 22-23.) (Emphasis added.) Finally, on direct examination, Stevenson opined that Gilpatrick was under the influence of alcohol at the time of the accident, and added, "[m]y opinion is that an individual is under the influence the minute they start to drink." (T. at 115; R.E. at 23.)

On cross-examination, Stevenson reiterated that Gilpatrick's actual blood actual content at the time of the accident *could have been higher*, *could have been lower*, or *could have been the same* as when it was tested some four (4) hours later. (T. at 118; R.E. at 26.) (Emphasis added.) Stevenson also testified that it was possible that Gilpatrick could have consumed alcohol immediately before driving and while driving, and could have had a blood alcohol content of .02 percent at the time of the collision, then that blood alcohol content could have risen to .07 at the time that blood was actually drawn. *Id.* Further, Stevenson stated that it is possible that any person can get off of work at midnight and start drinking immediately. (T. at 119; R.E. at 27.)

The remainder of Stevenson's testimony on cross-examination pertained to the testing procedures he followed in analyzing the blood samples. (T. at 120-123; R.E. at 28-31.) Stevenson said that the machine that he used to test the blood was a Perkin Elmer XL gas chromatograph attached with an FID detector. (T. at 120; R.E. at 28.) According

to Stevenson, he performed a calibration check on the instrument and completed a protocol of steps in performing the test. (T. at 122-123; R.E. at 30-31.)

After Stevenson's testimony was completed, the State called accident victims Craig Beebe, John Callicott, and Vince Pontillo. (T, at 126; T. at 132; T. at 138.) The State also called Sue Graham, the mother of Pontillo, to testify about Pontillo's condition following the occurrence. (T. at 142.) Beebe testified that although he did not remember the purpose for traveling in the back seat of the Ford Ranger, he could remember that the accident occurred. (T. at 127-128.) Beebe's injuries consisted of broken ribs, a broken tailbone, lacerations to the face, spleen, and liver, and chipped vertebrae in his neck. (T. at 129.) Part of Beebe's treatment consisted of plastic surgery to repair the lacerations, as well as confinement to a wheelchair for over a month due to the broken ribs and tailbone. (T. at 129-130.) Finally, Beebe testified that he still has numbness in his foot, and pain that he did not have prior to the accident. (T. at 130-131.)

Callicott testified that he had no recollection of the events concerning the accident. (T. at 133-134.) Callicott's injuries consisted of several broken bones, including his right foot and left femur, lacerations to his liver, and his right lung was collapsed. (T. at 134.) Callicott remained hospitalized from March 19th to May 2nd, 2005, during which time he had several surgeries. *Id.* Callicott testified that as part of his extensive treatment for his injuries, his spleen was removed which left a scar on his abdomen. (T. at 135-136.)

The evidence at trial showed that Pontillo was the most seriously injured among the people involved. Pontillo testified that he could not remember anything about the wreck. (T. at 139.) He stated that he could walk only with help, and that he attends a rehabilitation center at St. Dominic's Hospital as part of his medical treatment. *Id.*

Pontillo's condition made it difficult for him to testify at the trial, so the State called his mother, Sue Graham, to further establish the physical harm done to Pontillo as a result of the accident. (T. at 142.) Graham testified that Pontillo was attending Hinds Community College in March 2005. (T. at 143.) She stated that on the night before the early morning hours of March 19, 2005, she recalled that he left her home to go to a friend's house to play video games. (T. at 144.)

Graham and her husband received a phone call from a nurse while they were asleep, and were informed that Pontillo had been in the car accident. *Id.* She arrived at the hospital to find that Pontillo was in intensive care with a traumatic brain injury, and he remained in intensive care for about two to three weeks. (T. at 145.) Graham testified that Pontillo is still going to rehabilitation for treatment related to speech, strength, and walking, and that he needs help doing things such as getting dressed and going to the restroom (T. at 146-147.) The testimony of Beebe, Callicott, Pontillo, and Graham was offered for the purpose of establishing the permanent injuries to the three young men involved in the accident. None of these witnesses were cross-examined by Gilpatrick. (T. at 132; 138; 142; 150.)

At the conclusion of Graham's testimony, the State rested its case-in-chief. (T. at 151.) Gilpatrick made a motion for a directed verdict of not guilty based on his argument that the State failed evidence sufficient to show a prima facie case. *Id.* The motion was denied by the trial court. (T. at 152.) At that point, the trial court examined Gilpatrick with questions to inquire whether he understood his rights related to testifying in his own defense. (T. at 152-153.) Gilpatrick informed the court that he would testify. (T. at 153.)

Gilpatrick did not call any witnesses to testify in his defense, but he testified in his own behalf, *supra.* (T. at 154.) After each side rested, the jury heard closing arguments and ultimately found Gilpatrick guilty on all three (3) counts. (R. at 33-35; T. at 197.) Gilpatrick was sentenced to the custody of the Mississippi Department of Corrections for a period of twenty-five (25) years on each count, to run concurrently. (R. at 38; R.E. at 8.)

Being aggrieved by the verdict and sentence, Gilpatrick filed a Motion For a New Trial in the Circuit Court on October 20, 2006, which stated that the trial court "should grant [Gilpatrick's] motion for a new trial because the verdict was rendered against the overwhelming weight of the evidence." (R. at 41; R.E. at 5.) On April 16, 2007, the Circuit Court entered an Order which denied Gilpatrick's Motion for a New Trial. (R. at 47; R.E. at 4.) Gilpatrick, aggrieved by the disposition of the Circuit Court, now appeals to this Court. (R. at 53.)

SUMMARY OF THE ARGUMENT

The Circuit Court of Rankin County erroneously allowed the State's forensic toxicologist to testify regarding retrograde extrapolation when there was no showing that he was qualified to give such testimony. Additionally, there were insufficient facts available to testify about a retrograde extrapolation analysis of Gilpatrick's blood alcohol analysis and whether he was under the influence at the time of the accident. Instead, the State's forensic toxicologist relied on assumptions and probabilities to form his opinions. The admission of such testimony was clear error which has adversely affected a substantial right of Gilpatrick, requiring that this Court reverse the judgment of the trial court.

Further, the proof was insufficient to show that Gilpatrick was legally intoxicated at the time the accident occurred at approximately 1:04 a.m. on March 19, 2005. The State's forensic toxicologist produced speculative testimony through which any inferences obtained were hardly reasonable. There was no prima facie case, viewing all of the evidence in the light most favorable to the State, that Gilpatrick was under the influence at the time of the offense.

Finally, the verdict was so contrary to the overwhelming weight of the evidence that to allow it to stand would result in an unconscionable injustice. Critical evidence necessary to prove driving under the influence, mayhem, is absent in this case that was very much present in a 2007 opinion handed down by the Court of Appeals. *Smith v. State*, 956 So. 2d 997 (Miss. App. 2007.) The verdict of the trial court has produced an unconscionable injustice, and as such, Gilpatrick's motion for a new trial was erroneously denied.

For these reasons, and the reasons specifically set forth under the heading titled "ARGUMENT" below, Wayne Gilpatrick respectfully requests that this Court reverse and render the judgment of the Circuit Court of Rankin County, or alternatively, reverse and remand for a new trial.

ARGUMENT

I. The Circuit Court of Rankin County erroneously allowed the State's forensic toxicologist to testify regarding retrograde extrapolation when there was no showing that he was qualified to give such testimony, nor was there sufficient facts to base such testimony on.

Mississippi law recognizes the gatekeeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable. M.R.E. 702. The Supreme Court of Mississippi has held that "[t]he admission of expert testimony is within the sound discretion of the trial judge." *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003). In *McLemore*, the Court also held that "the party offering the 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.* at 36. (Emphasis added.) The decision of a trial judge will stand "unless [the reviewing court] concludes that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion." *Id.* at 34.

In this case, the trial court abused its discretion by allowing John Stevenson of the Mississippi Crime Laboratory to testify about retrograde extrapolation when there was no showing that he was qualified in this specific area and which was based on assumptions, probabilities, facts that were not in evidence, and *unsupported speculation.* (Emphasis added.) The trial court allowed the jury to decide whether to believe Stevenson's testimony rather than exercising its duty in prohibiting inadmissible testimony as part of its gatekeeping function. *Puckett v. State*, 737 So. 2d 322, 342 (Miss. 1999).

This error has adversely affected a substantial right of Gilpatrick requiring that this Court reverse the trial court's verdict. *Gibson v. Wright*, 870 So. 2d 1250, 1258

(Miss. App. 2004). By erroneously allowing the testimony regarding retrograde extrapolation, Gilpatrick was effectively deprived of his constitutional guarantee that the State prove each element of the offense beyond a reasonable doubt. The Mississippi Supreme Court has long held that "convictions of crime cannot be sustained on proof which amounts to no more than a possibility or even when it amounts to a *probability*, but it must rise to that height which will exclude every reasonable doubt; that when in any essential respect the state relies on circumstantial evidence, it must be such as to exclude every other reasonable hypothesis than that the contention of the state is true, and that throughout the burden of proof is on the state." *Westbrook v. State*, 202 Miss. 426, 432-33, 32 So. 2d 251, 252 (Miss. 1947). In this case, the speculative testimony about retrograde extrapolation was introduced to meet the burden of proof that Gilpatrick was in fact intoxicated *at the time of the accident*, a necessary element for a violation of Section 63-11-30(5) of the Mississippi Code. Without such testimony for the jury's consideration, the State would not have met it's burden on this element.

The recent case of *Smith v. State*, decided by the Court of Appeals, offers guidance on the very issue of whether retrograde extrapolation testimony should be admitted. *Smith v. State*, 942 So. 2d 308 (Miss. App. 2006). In *Smith*, an aggravated DUI case, the State offered the testimony of its forensic toxicologist who applied a retrograde extrapolation formula to conclude that the defendant was intoxicated at the time of the accident. *Id.* at 312. The State's expert in *Smith* testified "that she relied on the entire body of knowledge available on the subject" in drawing a conclusion based on retrograde extrapolation. *Id.* at 317. The Court, in its opinion, found that the trial court properly admitted her testimony because it was "based on the 'methods and procedures of science.'" *Id.*, quoting McLemore, 863 So. 2d at 36. Additionally, "[t]he record

indicate[d], and Smith concede[d], that he did not consume any food or alcohol in the interim between the accident and the drawing of the blood sample." *Id.* Thus, the State's expert in *Smith* had an additional *known factor* – the absence of food consumption – to rely on in her utilization of retrograde extrapolation that was markedly absent in Gilpatrick's trial.

In Gilpatrick's case, there was never any testimony regarding any food consumption by Gilpatrick, nor was there any evidence introduced at any time concerning his body weight. Kurt Dubowski, Ph.D., a leading alcohol scientist and researcher, noted in perhaps the leading article on the subject of retrograde extrapolation, the following:

> The rate of alcohol absorption after oral intake is greatly influenced by the nature and concentration of the alcoholic beverage, *food intake* and a multitude of other physical, biological, psychological and time factors that combine with the individual's sex, *body weight* and body water, and related habitus characteristics as well as offsetting metabolic disposition to determine the ultimate peak blood alcohol concentration and other characteristics of the time course of the blood alcohol concentration.

Kurt Dubowski, Ph.D., *Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects*, Supp. 10 Journal of Studies on Alcohol 98, 99 (July 1985). (Emphasis added.) For these reasons, the trial court in *Smith* had the benefit of a known factor – that the defendant had not consumed any food in a certain period of time – that is lacking in the case *sub judice*, thus distinguishing the factual circumstances in *Smith* from those of the instant matter. *Smith*, 942 So. 2d at 312.

Further, in *Smith*, the trial court conducted a hearing outside the presence of the jury on the qualification of the expert in question. *Smith*, 942 So. 2d at 316. During that hearing, the State's expert "testified that retrograde extrapolation is a mathematical

calculation through which scientists attempt to predict an unknown value based on a known value or series of known values." *Id.* at 316-317. The Court stated that, "[a]fter hearing brief arguments from counsel, the trial judge ruled that the State had adequately shown [the State expert's] testimony to be based on the 'methods and procedures of science,' and relevant to the issue of whether or not Smith was likely intoxicated at the time of the accident." *Id.* at 317, citing *McLemore*, 863 So. 2d at 36. Further, the Court held that because the expert testimony "*would aid the jury* in determining whether Smith was under the influence of alcohol at the time of the accident," it was reliable and properly admitted. *Id.* at 318. (Emphasis added.)

Thus, in *Smith*, the trial court conducted the hearing partly for the specific reason of determining whether the expert was qualified to testify about retrograde extrapolation, and partly to determine if retrograde extrapolation was relevant and reliable in that case. No such hearing on the retrograde extrapolation was conducted in the case at hand, but Gilpatrick twice objected to Stevenson's testimony regarding retrograde extrapolation. (T. at 111; 113. R.E. at 19; 21.) Also, in *Smith*, the State's expert opined that the defendant's blood alcohol content was higher at the time of the accident than at the time that the blood was taken in that case. *Smith*, 942 So. 2d at 317. Thus, a definite opinion was formed in *Smith*, unlike in the case at hand where Stevenson essentially stated that he did not know whether Gilpatrick's blood alcohol content was higher or lower at the time of the accident, but still opined that Gilpatrick was intoxicated.

In Gilpatrick's trial, Stevenson discussed his own application of retrograde extrapolation and testified that he had to make *assumptions and probabilities* to form his opinion that Gilpatrick was intoxicated at the time of the accident. (T. at 114; R.E. at 22.) (Emphasis added.) Stevenson testified that Gilpatrick "*could have been higher, could*

have been lower, or could have been the same," referring to the BAC result of .07, at the time of the accident. (T. at 114-115; R.E. at 22-23.) (Emphasis added.) It was this very testimony about retrograde extrapolation – that Gilpatrick "*could have been higher, could have been lower, or could have been the same*" – that supported Stevenson's opinion that Gilpatrick was under the influence of alcohol at the time of the collision. (T. at 115; R.E. at 23.) This level of speculation is not helpful to the trier of fact in determining a fact in issue, especially without a predicate which showed that Stevenson possessed any specialized qualifications in the area of retrograde extrapolation. Such speculation and indecisive conclusions could hardly be said "*aid the jury* in determining whether [Gilpatrick] was under the influence of alcohol at the time of the accident," as it was found in *Smith*. *Id.* at 318. (Emphasis added.) Instead, the ambiguous and uncertain substance of Stevenson's testimony might have served to confuse the jury, not aid it. Furthermore, Stevenson's testimony relied on "*probabilities*," a dangerous term that the Mississippi Supreme Court warned about long ago, to which a conviction of a criminal offense cannot be rendered when the standard of proof is beyond a reasonable doubt. *Westbrook*, 202 Miss. at 432-33, 32 So. 2d at 252.

For these reasons, the trial court erroneously allowed Stevenson, the State's forensic toxicologist, to testify about retrograde extrapolation. There was no showing that he was qualified to give such testimony, nor was there sufficient facts to base such testimony on. The admission of this testimony was clearly erroneous and adversely affected Gilpatrick's substantial right to a fair trial in which the State must prove each element of the offense beyond a reasonable doubt, without reliance on probabilities, as was done in this case. This error requires that this Court reverse the verdict rendered against Gilpatrick.

II. The proof was insufficient that Gilpatrick was legally intoxicated at the time the accident occurred at approximately 1:04 a.m. on March 19, 2005.

A motion for a directed verdict is a challenge to the legal sufficiency of the evidence presented at trial. *Seeling v. State*, 844 So. 2d 439, 443 (Miss. 2003). The reviewing court is required to view all evidence in the light most favorable to the State, and the State is entitled to all favorable inferences that may reasonably be drawn from the evidence. *Id.* In this case, Gilpatrick made a motion for a directed verdict at the conclusion of the State's case-in-chief. (T. at 151.) The motion for a directed verdict was denied. *Id.*

At trial, Gilpatrick did not object to the admissibility of the blood alcohol content result of .07 percent. Rather, Gilpatrick contended, and still contends, that the BAC taken from his blood which was drawn some four (4) hours after the accident is not accurate to determine whether he was intoxicated at the time the accident actually occurred. (T. at 110-111; R.E. at 18-19.) Stevenson was qualified as an expert witness in the area of blood alcohol analysis and drug analysis, but never stated that he is qualified in the scientific area of retrograde extrapolation. (T. at 102; R.E. at 10.) Further, Stevenson conceded that he had to make *assumptions and probabilities* to form his opinion that Gilpatrick was intoxicated at the time of the accident. (T. at 114; R.E. at 22.) (Emphasis added.) Finally, Stevenson testified that Gilpatrick "*could have been higher, could have been lower, or could have been the same*," referring to the BAC result of .07, at the time of the accident. (T. at 114-115; R.E. at 22-23.) (Emphasis added.)

The degree of speculation that is the substance of Stevenson's testimony on the issue of whether Gilpatrick was intoxicated at the time of the accident fails to show that there is a prima facie case on an element of the offense. The elements of the crime for

which Gilpatrick was indicted are: (1) intoxication *at the time of* the accident; (2) negligence by the defendant; which (3) causes death or serious bodily injury to another. Miss. Code Ann. § 63-11-30(5) (1972), as amended. (Emphasis added.) In this case, the State did not meet the initial burden of showing that every element of the offense existed. Specifically, the State failed to show that Gilpatrick was intoxicated at the time of the accident. *Id.* (Emphasis added.) As discussed above, Stevenson's testimony regarding retrograde extrapolation was improperly admitted in forming his opinion that Gilpatrick was under the influence at the time of the accident.

To sustain a conviction in the face of a motion for a directed verdict, the evidence must show beyond a reasonable doubt that the accused committed the act charged and did so under such circumstances that *every element* of the offense existed, while giving the State all favorable inferences reasonably drawn from the evidence. *Burgess v. State*, 911 So. 2d 982 (Miss. App. 2005) (Emphasis added.). Any inferences drawn from Stevenson's testimony clearly show that he was relying on *assumptions and probabilities* and that Gilpatrick "*could have been higher, could have been lower, or could have been the same*," referring to whether Gilpatrick was intoxicated when the collision occurred. (T. at 114-115; R.E. at 22-23.) (Emphasis added.) These inferences drawn from the testimony were not "reasonable," as required by law, because they were ambiguous, indecisive, and speculative. As such, the State could not properly prove that Gilpatrick was under the influence at the time of the offense without these unreasonable inferences. For these reasons, the trial court erred in ruling that the State had met its initial burden and by denying Gilpatrick's motion for a directed verdict.

III. The verdict was so contrary to the overwhelming weight of the evidence that to allow it to stand would result in an unconscionable injustice.

On review of a trial court's denial of a motion for a new trial, the reviewing Court must view the evidence in a light most favorable to the verdict, and will disturb the trial court's decision "[o]nly when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Herring v. State*, 691 So. 2d 948, 956 (Miss. 1997). In this case, Gilpatrick filed a Motion for a New Trial in the Circuit Court on October 20, 2007, which stated that the trial court "should grant [Gilpatrick's] motion for a new trial because the verdict was rendered against the overwhelming weight of the evidence." (R. at 41; R.E. at 5.) On April 16, 2007, the Circuit Court entered an Order which denied Gilpatrick's Motion for a New Trial. (R. at 47; R.E. at 4.)

The elements of the crime for which Gilpatrick was indicted are: (1) intoxication *at the time of* the accident; (2) negligence by the defendant; which (3) causes death or serious bodily injury to another. Miss. Code Ann. § 63-11-30(5) (1972), as amended. (Emphasis added.) In the recent opinion of *Smith v. State*[1], the Court of Appeals upheld the appellant's conviction of aggravated driving under the influence based partly on testimony of specific observations of the appellant by eyewitnesses at the scene of an accident, in order to prove the appellant's intoxication. *Smith v. State*, 956 So. 2d 997, 1001-1002 (Miss. App. 2007). In *Smith*, a police officer, the victim, and an eyewitness each testified that Smith's breath and person smelled strongly of beer when each personally encountered Smith. *Id.* at 1002. Additionally, there was testimony that

[1] This 2007 case involved an appellant named *Randall M. Smith*, not to be confused with the appellant named *James M. Smith v. State*, 942 So. 2d 308 (Miss. App. 2006), discussed *supra*, which is a different case.

shortly after the accident, Smith was observed falling down, and in one eyewitness' opinion, "Smith was very intoxicated." *Id.* Further, the Court of Appeals added that the eyewitnesses testified to "abnormal behavior . . . consistent with intoxication" that was exhibited by Smith as further evidence of Smith's intoxication shortly after the accident. *Id.* at 1006.

In the case at hand, no witnesses testified that they smelled any alcoholic beverage coming from the *breath or the person* of Gilpatrick. (Emphasis added.) Instead, the testimony merely established that the smell of beer was coming from the *interior of Gilpatrick's truck* (Officer Andrea Wade's testimony) and the *area of the accident scene* (eyewitness Joey Thrash's testimony). (T. at 53; T. at 94-96, respectively.) (Emphasis added.) Gilpatrick testified that there was a cooler of beer with ice in the back of his truck at the time the collision occurred. (T. at 162.) This was also discussed in Officer Wade's testimony, when she stated that "[t]here was also a cooler of beer that was cold to the touch." (T. at 53.)

Moreover, there never any testimony regarding any "abnormal behavior . . . consistent with intoxication" by Gilpatrick that was discussed in *Smith*. *Smith*, 956 So. 2d at 1006. The specific evidence and testimony that was critical to the State's case in proving the defendant's intoxication in *Smith* is absent in the case at hand. The absence of the kind of clear, specific evidence that the Mississippi courts rely on in determining whether the burden of proof is met as to a defendant's intoxication at the time of the accident, as in the 2007 case of *Smith*, shows that the verdict in the instant case is contrary to the overwhelming weight of the evidence.

This is especially highlighted by the fact that Gilpatrick's unrebutted testimony established that he had consumed less than three (3) beers before the accident occurred.

(T. at 163.) The Court of Appeals for the Fifth Circuit holds that "it is well settled that the purpose of rebuttal testimony is to *explain, repel, counteract*, or *disprove* the evidence of the adverse party." *U.S. v. Delk*, 586 F.2d 513, 516 (5th Cir. 1978) (citing *Luttrell v. U.S.*, 320 F.2d 462, 464 (5th Cir., 1963)) (Emphasis added). That State had a chance to disprove Gilpatrick's testimony with evidence from the police officers or the eyewitness at the scene as to whether any open beer containers were found within the truck's interior, or how many beers were missing from the cooler found in the back. Additionally, Gilpatrick's testimony that he was reaching for a ringing cell phone when he ventured into the oncoming lane of traffic was unrebutted. (T. at 160.) State's exhibits one (1), four (4), and five (5) each show that there is a cell phone on the passenger side floorboard of Gilpatrick's truck. (T. at 161.)

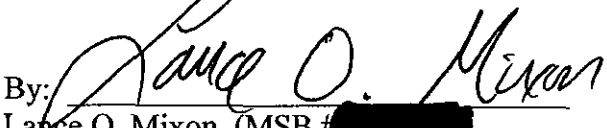
For these reasons, the verdict was contrary to the overwhelming weight of the evidence in that there was no direct evidence of Gilpatrick's physical or mental condition that would show that he was intoxicated. Further, the evidence concerning Gilpatrick's blood alcohol content was speculative and unreliable, and Stevenson's testimony about retrograde extrapolation which supported his opinion that Gilpatrick was intoxicated at the time of the accident should not have been admitted. (Discussed *supra*.) Finally, the Circuit Court erroneously denied Gilpatrick's motion for a new trial because of the above and foregoing reasons.

CONCLUSION

For the above and foregoing reasons specifically set forth under the heading titled "ARGUMENT," Wayne Gilpatrick respectfully requests that this Court reverse and render the judgment of the Circuit Court of Rankin County, or alternatively, reverse and remand for a new trial.

Respectfully submitted,

WAYNE GILPATRICK

By: 

Lance O. Mixon (MSB #[redacted]
VICTOR W. CARMODY, JR., P.A.
499 South President Street
Jackson, MS 39201
(601) 948-4444

CERTIFICATE OF SERVICE

I, Lance O. Mixon, counsel for appellant Wayne Gilpatrick, hereby certify that I have this day served a true and correct copy of the above and foregoing Brief of the Appellant on the following persons by placing a copy of same in the United States Mail, postage prepaid, first class and addressed as follows:

Betty Sephton
Supreme Court Clerk
Supreme Court of Mississippi
P.O. Box 249
Jackson, Mississippi 39205

Honorable Jim Hood
Mississippi Attorney General's Office
P.O. Box 220
Jackson, Mississippi 39205

Honorable William E. Chapman III
Circuit Court Judge for District 20
P.O. Drawer 1885
Brandon, Mississippi 39043

Office of the District Attorney
District 20
P.O. Box 68
Brandon, Mississippi 39043

CMCF
Mr. Wayne Gilpatrick, MDOC # 124377
Building 3(C)
P.O. Box 88550
Pearl, Mississippi 39208

This service effective this the 14th day of November, 2007.

Lance O. Mixon

Lance O. Mixon, Esq.
Attorney for Wayne Gilpatrick