IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

KRYSTAL MARIE TESTON **APPELLANT**

VS. **Case#2007-TS-00353-COA**

STATE OF MISSISSIPPI

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

(APPELLANT REQUESTS ORAL ARGUMENT)

REPLY BRIEF OF APPELLANT KRYSTAL MARIE TESTON

Tim C. Holleman [redacted]
tim@boyceholleman.com
Boyce Holleman & Associates
11240 Highway 49 N
Gulfport, Ms 39503
(228) 539-9600 office
(228) 539-9699 facsimile

Michael Boyce Holleman [redacted]
MHOLLEMANLAWFIRM@BELLSOUTH.NET
HOLLEMAN LAW FIRM, PLLC
P. O. BOX 1598
GULFPORT, MS 39502
(228) 868-0064 OFFICE
(228) 868-0925 FACSIMILE

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II. REPLY TO APPELLEE'S STATEMENT OF THE CASE

The omission of any discussion of the undisputed evidence by the State's own witnesses from Appellee's Statement of the Facts is significant. While Stacey Ross' testified that the Black Honda was driving aggressively, she repeatedly conceded that the Black Honda was in control. (R. Vol. VI. p. 466:29; 467:15-18). She observed the Black Honda for several minutes, as it moved up and back, trying to get the Buick to move over. (R. Vol. VI. p. 478:19 to 479:3). The Black Honda "didn't venture out of its lane". It did not weave in its lane. (R. Vol. VI. p. 479:18-26). The driver of the Black Honda attempted to change lanes into the center lane and then went back into its lane when the driver realized the SUV was there. (R. Vol. VI. p. 466:17-26). Following the accident, the Honda came to a safe stop (R. Vol. VI. p. 467:17-28), in the middle of the center lane. (R. Vol. VI. p. 468:5-8). Ross observed the driver of the Honda make a left U-turn. (R. Vol. VI. p. 468:22-24; 469:7), drive a quarter of a mile back to the accident scene. (R. Vol. VI. p. 469:16; 473:19) and park perfectly parallel to the shoulder of the road. (R. Vol. VI. p. 472:6; Exhibits D-1 through D-5). Ross described "aggressive" driving, but nothing that indicated any impairment – no weaving, no running off the road-nothing. The State omitted this clear evidence of the driver of the Black Honda not being impaired ***at the time of the accident***. Likewise, the State failed to discuss the critical and uncontradicted evidence by the only trained DUI enforcement officer who testified for the State, Officer Brantley[1]. Brantley, a **10-year veteran DUI enforcement officer**, had significant interaction with Teston within minutes (approximately 20 minutes) of the accident. He clearly testified that he saw no evidence

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[1] He was the only officer called by the State, despite at least ten (10) other officers being present (including other trained DUI enforcement officers) on the scene and having contact with Teston. In fact, another DUI enforcement officer, (Cvitanovich) was seen talking to Teston in photographs taken by Officer Moran. No report was produced by as to any observations of impairment of Teston (R. Vol. VI. pp. 548:10 to 550:21) and he was not called to testify by the State.

of impairment in Teston within minutes of the accident. (R. Vol. VI. pp. 535-536). He left Teston unsupervised for an extended period and when he returned, he noticed obvious signs of impairment. This was different from the first time he talked with her. This is undisputed evidence by the State's witness that Teston was not impaired at the time of the accident, but became impaired well after when she took her prescription pain medications. (R. Vol. VI. pp. 518:9-14; 538:1-10).

The State's expert, Barbieri, conceded that given the observations of Officer Brantley, at the first encounter, Teston was **not** impaired at that time (within 20-30 minutes of the accident). Barbieri testified that the observations by Officer Brantley of at the second encounter (an hour or more after accident), were consistent with impairment **at that time**; and that "it's obvious something has changed" between Brantley's first and second encounter. (R. Vol. VII. p. 672-673). More precisely, Teston took her pain medications after the accident and she became impaired after Brantley's first encounter with her following the accident. Barbieri and Teston's expert testified that Teston would have had to take the pain medications after the accident, or her blood levels at the time of the accident would have been at lethal levels.

IV. REBUTTAL ARGUMENT

A. THE TRIAL COURT SHOULD HAVE SUSTAINED TESTON'S MOTION FOR A JNOV OR, ALTERNATIVELY THE VERDICT IS SO CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE THAT TO ALLOW IT TO STAND WOULD SANCTION AN UNCONSCIONABLE INJUSTICE.

The evidence of lack of "impairment" **at the time of the accident** is much stronger here than in *Headrick v. State*, 637 So.2d 834 (Miss. 1994) wherein the Mississippi Supreme Court reversed and rendered a conviction for driving under the influence causing death.

Within minutes of the accident, Officer Brantley, a trained DUI Enforcement Officer, with ten (10 years experience, arrives on the scene and the first reported driver he talks to is Krystal Teston. Brantley was 1 to 3 feet from her, asked her several questions to which she had no problems responding or answering. He asked her for her driver's license. He watched her walk to her car, get her purse out of the car, retrieve her license, walk back to him and hand him driver's license. He handed her a form to fill out and she took it. Teston exhibited no signs of impairment at that time.[2] (R. Vol. VI. pp. 535-536). See e.g. *Accu-Fab v. Ladner*, 778 So. 2d 766, 771-72 (Miss. 2001).

He left her unsupervised for an extended period.[3] She had her prescription medicines with her and no one told her she could not take them after having witnessed a horrible accident, which by all accounts upset her. When he returned to her, she was "sitting" on the hood of her car "[h]er *speech was slurred when I was asking a few questions, and she had this dazed and confused look.* She actually had to think about certain answers." (R. Vol. VI. p. 518:9-14). "*[H]er eyes were dilated and very glassy. It took her time to answer questions. She really had to think. She kind of had this confused look about what was going on.*" She had *"Very, very slurred speech"*. (R. Vol. VI. p.530:28 to 531:6). These symptoms were not present on his first contact with her.

Even the State's own expert, when presented with this material evidence,[4] testified:

Q. Assuming that a trained police officer, we started talking about this and I didn't get to it, trained in DUI enforcement approached an individual, had a conversation

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[2] The State attempts to explain Brantley's observations by characterizing this first encounter with Teston as "very brief". As this testimony shows, Brantley's first contact with Teston was anything but a casual encounter.

[3] Brantley did not know how long he left Teston, but photographs were taken of Teston's vehicle at approximately 8:40 pm, more than 1 ½ hours after the accident. (See Defendant's Exhibits 1-5). Even in those photographs, she was left unattended. (See Defendant's Exhibit 5).

[4] As opposed to the vague and incomplete hypothetical posed by the State. See Brief of Appellant p. 21-22.

one to two feet away from them, did not notice any slurred speech, did not notice any sleepiness, did not notice any lethargicness, did not notice any type of confusion, asked her questions and got responses, asked her to walk to her vehicle and get her driver's license and got out, and noticed no evidence of impairment, do you agree that that would be indication that that person was not impaired?

A. I would agree that would be indications of **not impairment at that time.**

Q. And if that person, that police officer, that trained police officer comes back to that individual some 40 to 45 minutes later, maybe an hour, and at that time he notices slurred speech, confusion, mumbling, things of that nature that indicate -- do you agree that that would indicate impairment at that time?

A. It sounds that would indicate **impairment at that time.**

Q. Would you also agree that it indicates that maybe something has changed between the first time that he talked to her, talked to somebody, that individual, until the second time he talked with her?

A. I think it's obvious that **something has changed.**

(R. Vol. VII. pp. 672-673). (Emphasis added).

This trained DUI enforcement officer and the State's own expert established that Teston was not impaired by any substance **at the time of the accident**. The State's evidence precludes a finding by any juror of the existence of the element of "impairment" of Teston by any substances **at the time of the accident** beyond a reasonable doubt. The jury's verdicts and the judgment of the Trial Court must be reversed and this Court should rendered verdicts of acquittal. Alternatively, the verdicts were against the overwhelming weight of the evidence and reversal and a new trial are required. *Seeling v. State*, 844 So.2d 439 (Miss. 2003); *Headrick v. State*, supra; *Richbourg v. State*, 744 So. 2d 352, 356 (Para. 19) (Miss. Ct. App. 1999).

Bad driving, "crazy" driving, negligent driving, unfortunately occur every day on the interstate highways of this State and without any alcohol or other substances impairing those drivers. One only needs to drive on Interstate 10, 55 or 20 to observe such. Being hysterical and crying uncontrollably after seeing a horrible and tragic accident is likewise not evidence of

impairment. This would be normal for any person witnessing such an accident.[5] None of these by themselves or together are evidence of impairment "at the time of the accident".

The Court has, on numerous occasions, used the observations of a trained law enforcement officer as to Defendant's impairment close to the time of an accident to affirm convictions for driving under the influence, both misdemeanor or felony. See e.g., *Starkey v. State*, 941 So. 2d 899, 903 (Para. 11) (Miss. Ct. App. 2006) [officers testified that they observed defendant unsteady on his feet, with red, watery eyes, a dazed stare, and slurred speech]; *Saucier v. City of Poplarville*, 858 So. 2d 933, 936 (Para. 17) (Miss. Ct. App. 2003) [officer's testimony regarding the defendant's failure of field sobriety tests, slurred speech, smell of alcohol, and glazed eyes was sufficient]. In this case, we have the observations of a trained DUI law enforcement officer that shows Teston was "not impaired" **close to the time of the accident** and only observed her to be impaired after he left her unsecured and unsupervised for an extended period of time. The standard should apply both ways. As in *Headrick v. State*, 637 So.2d 834 (Miss. 1994), this case should likewise be reversed and rendered.

The State attempts to make much of the testimony of Nicole Thurman[6]; however, her testimony does not present evidence of "impairment at time of the accident". Teston's aggressive driving[7] is not evidence of impairment, particularly in light of Brantley's observations within 20

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[5] As Senior Circuit Court Judge Kosta Vlahos commented to the State on this contention: I think most people that might come on to the scene if they saw the bodies and everything they might be a little bit upset. (Vol. III p. 45:1-13).

[6] Miss. Thurman candidly admitted she was angry with Ms Teston because she caused the accident. While her testimony was highly emotionally she was not an unbiased witness, Mrs. Ross and Officer Brantley were. At trial Miss. Thurman attempted to paint a picture of this "crazy, frantic, reckless" car that came flying up out of nowhere, yet she admitted that when the Honda came up she thought "that's a cute car", then they saw it was from "Florida" because "had a Florida tag" and began to discuss they ought to go to Florida on their next trip" (R. VII p. 613:5-11). Such does not sound to "crazy, frantic, reckless" at that time.

[7] Ross' description of Teston's driving shows Teston was in control of her vehicle.

minutes after the accident. That Teston was hysterical and crying uncontrollably[8] after the accident is not evidence of impairment, particularly in light of Brantley's observations within 20 minutes after the accident.

After Brantley left Teston unsecured and unsupervised with her prescription medicine[9] available to her, for an extended period of time, returns to her then and only then he finds that she is "different" and impaired. Contrary to State's argument, like *Headrick*, there was no evidence of consumption of hydrocodone by Teston **before the accident**. Justice McRae's dissent in *Headrick* is inapplicable. Brief of Appellee at p. 13. No one in this case testified that Teston appeared "drunk" or impaired prior to or shortly after the accident.[10] Brantley's testimony alone takes this case out of the scenario Justice McRae envisioned.

The State takes liberties with the record. Teston did not deny "involvement" in the accident or even "lie" about it. This was a non-contact, single-car accident, which Teston observed in the rear-view mirror. Teston gave a written statement of what she observed in the rear view mirror. (See State's Exhibit 5). Teston was ahead of the SUV and what she described in the rear view is consistent with all other accounts.

The State's next argues that Teston "did not say she had taken Lorcet in that time period at that time". (emphasis added). Teston answered the questions asked. When asked how many today, she answered truthfully. When asked "when today?" she answered truthfully. The State

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[8] If someone is hysterical and crying uncontrollably they may well be perceived as "spilling" over their words, but it does not mean any substance impairs them. The State argued this was "highly abnormal" behavior. Just what was "normal" about an accident in which four (4) people are thrown out of a vehicle on the interstate and injured or killed? How is one supposed to act? How can a jury or this Court judge their reaction?

[9] Much like the Gin, in *Headrick v. State*, 637 So.2d 834 (Miss. 1994).

[10] They did testify to Teston's aggressive driving, and spilling over her words while hysterical and crying uncontrollably, however such did not show impairment.

takes advantage of a bad question not a bad answer asked when Teston was obviously impaired hours **after** the accident.

The evidence in this case, taken in the light most favorable to the State, requires this Court to reverse and render the verdicts and convictions of Krystal Marie Teston. The State did not and could not establish the element of Krystal Marie Teston impairment **at the time of the accident** from any "other substance". Brantley's testimony, which was consistent with all other material facts, disproved such. The State had to prove that Teston took hydrocodone before the accident and was impaired **at the time of the accident**. The State failed to do so. *Headrick v. State*, 637 So.2d 834 (Miss. 1994); *Wilkerson v. State*, 731 So.2d 1173 (Miss. 1998). The record in this case does not contain sufficient evidence from which a rational juror could have found the existence of the element of "impairment" of Teston by other substances **at the time of the accident** beyond a reasonable doubt, therefore the jury's verdicts were against the overwhelming weight of the evidence and the judgment of the Trial Court and the imposition of punishment must be reversed and this Court should rendered verdicts of acquittal. *Headrick v. State*, supra.

B. THE TRIAL COURT ERRED IN ALLOWING THE STATE'S EXPERT, BARBIERI, TO GIVE HIS OPINION OF THE LEVELS OF HYDROCODONE IN TESTON'S BLOODSTREAM AT THE TIME OF THE ACCIDENT AND THAT SHE WAS IMPAIRED BY HYDROCODONE AT THE TIME OF THE ACCIDENT

If the State's arguments are correctly perceived, it contends that Barbieri's opinions were properly admitted or, incredibly, that the error was *harmless* because Teston was negligent, she apologized to one of the victims, her conduct (attempting to help a survivor, as four victims lay dead, dying or seriously injured around her) was "bizarre" and that, at some point after the accident, she was in an impaired condition. (Brief of Appellee, p. 24). If all the State had to prove was negligence, remorse, acting less than ordinary in response to such carnage and, at

some point after such an experience, that a driver became impaired, then our "rule of law", of which we so proudly boast, is in great peril.

The State's arguments in support of the admission of Barbieri's opinions are, with respect to the hypothetical, that Teston failed to make specific objections, the hypothetical was, nevertheless, complete and not misleading or any deficiencies were cured by cross-examination.

The undisputed facts, proven through the State's witnesses, demonstrated that while Teston drove her vehicle in an aggressive manner, she drove it in a controlled manner, not erratically. After the accident, she brought her vehicle to a controlled and safe stop, turned around and drove back to the scene, parking her car parallel to the roadway. She then exited her vehicle and, unlike the other eyewitnesses who stood across the roadway, crossed two lanes of travel to render aid. (R. Vol. VI. pp. 467-469). Yes, she was hysterical, upset and crying uncontrollably, when she exited the car (R. Vol. VI. p. 475:12-17), and in that state, she was "spilling over her words" and "some of the words didn't make sense together". (R. Vol. VII. p. 621). The question of whether Teston was impaired by hydrocodone at the time of the accident or later, after having ingested her prescription medications during the nearly three hours she waited at the scene, is answered by the observations of trained DUI Enforcement Officer, Brantley. Brantley is not a casual observer and his contacts with Teston were not casual encounters.

If any burden of proof exists in such a tragic and emotional case, Brantley's testimony cannot be ignored, not in the ultimate outcome of this case, and to the point, not in a hypothetical submitted to an expert to elicit an opinion to prove that which the omission disproves.

Only when there had been a fair and full effort to embrace all the facts, and, through oversight, some of the material facts are omitted, then the objection should state such omitted

facts. *Cates v. State*, 171 Miss. 106, 125, 157 So. 95, 100-101 (1934). In this case, the prosecutor not only omitted materially important facts, but also misstated the facts that he used. For example, the prosecutor omitted entirely Brantley's testimony showing Teston was not impaired a few minutes after the accident, and instead, referring to Brantley's second encounter falsely stated, "she still had slurred speech, she was still disoriented, she was still confused". There was no testimony that prior to Brantley's second encounter, Teston had exhibited slurred speech, was disoriented or confused. Teston's objections to the misleading and incomplete hypothetical sufficiently preserved this error for review.

It is true that Barbieri admitted on cross-examination the materiality of omitted facts. In fact, when Barbieri was supplied with the observations of Brantley in the first and second encounter, he conceded the State's case completely.[11] However, where the State attempts to obtain convictions through the use an expert, it cannot cull or misstate the undisputed facts toward that end.

> [J]ustice and humanity demand that in a criminal case, where life, liberty, and reputation are at issue, the prosecuting officer, in examining an expert, should lay before such expert fairly and fully every material fact undisputed that can have a possible bearing upon the opinion of such witness.

Cates v. State, 171 Miss. 106, 122-123, 157 So. 95, 100 (1934).

The State's response to the *Daubert* and MRE 702 arguments is difficult to follow. With respect to the "retrograde extrapolation", the State concedes that no court has approved the technique as applied to hydrocodone. It asserts that this Court has approved the technique;

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[11] This concession supports Teston's argument for reversal and/or acquittal on other grounds. However, while it might render moot, it does not cure the error.

however, that case[12] is an alcohol case, in which alcohol elimination and driving impairment is the subject of years of scientific study and reporting. Even in those cases, the technique is subject to some criticisms and significant qualifications.[13]

> Furthermore, unlike alcohol, where studies have been able to establish a direct measurement and correlation between the amount of alcohol in the system and the extent of impairment, with drugs there have been insufficient studies (and it may not be possible to do sufficient studies) to establish a comparable correlation between drug levels and impairment.

United States v. Everett, 972 F. Supp. 1313, 1317-1318 (D. Nev. 1997).

The State, like Barbieri, relies on the Barnhart study for support of Barbieri's retrograde extrapolation opinion. The Barnhart study was **not** a study of retrograde extrapolation at all. This single-dose study of five men and some dogs does not rise to the level required to support the opinions heard by this jury. Barbieri conceded the significance of weight and gender and, importantly, of multiple or sequential dosing. In addition, Barbieri stated that his opinion depended on the dosage history, which the evidence does not supply. (See Brief of Appellant, pp. 32-33).

For the reasons argued in the Brief of Appellant, (pp. 26-29), the record demonstrates that this attempted retrograde extrapolation was (1) not based upon sufficient facts or data, (2) was not the product of reliable principles and methods, and (3) Barbieri did not apply the principles and methods reliably to the facts of this case.

The State's argument in support of Barbieri's opinion on impairment at the time of the accident does not address Teston's arguments at all. These include, in addition to the "retrograde extrapolation" objection used to reach a level three (3) hours earlier than the time of the blood

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[12] *Smith v. State*, 942 So.2d 308 (Miss. Ct. App. 2006) (test given 4 hours after the accident with no intervening consumption of alcohol – retrograde extrapolation allowed).

being drawn, that Barbieri's opinion that a 100 ng/ml blood serum level is "impairment" was nothing more than the *ipse dixit* of the expert, i.e., "it is so because I say it is so". *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 1171, 143 L. Ed. 2d 238 (1991). Barbieri arrived at this opinion based on two antidotal reports of drivers, with much higher levels.

> There's a statement by a toxicologist that I typically use where he reported on two driving cases where an individual had in their blood, this again was whole blood, 130 nanograms and 190 nanograms of hydrocodone and they were judged to be erratic drivers at that point. So *typically I use the value of somewhere around 100 nanograms for impairment* as we're defining it today for hydrocodone induced effects. But that's just a ballpark number of course. (R. Vol. IV. pp. 174-75).

Unlike alcohol, where the relationship of alcohol blood levels to impairment have been measured in many accepted scientific studies, Barbieri based his opinion on two antidotal reports, which have no apparent relevant connection to this case and certainly to no scientific studies. How Barbieri uses these clearly distinguishable cases, involving levels of 190 ng/ml and 130 ng/ml, to reach his threshold of 100 ng/ml for Teston is beyond explanation or comprehension and certainly not supported by the scientific community.

Furthermore, even assuming the 100 ng/ml threshold is correct; there is a 10% margin of error by Barbieri's estimation. (R. Vol. VII. p. 691). Barbieri testified that if Teston took only two of her medications after the accident, she would be below his threshold, allowing for the margin of error, at the time of the accident. (R. Vol. VII. p. 676) (Brief of Appellant, pp. 31-32).

The admission of Barbieri's opinions was clear error. In this case, where there was no other evidence of impairment supporting the verdicts and, in fact, undisputed evidence to the contrary, there is no doubt that the error in allowing the jury to consider such dubious opinions

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[13] See e.g., *Mata v. State*, 46 S.W.3d 902 (Tex. Crim. App. 2001).

based upon erroneous hypothetical questions caused substantial prejudice to Teston's right to a fair and constitutional trial. The case should be reversed on this ground.

C. THE COURT ERRED IN EXCLUDING AND PROHIBITING MENTION OF THE STATEMENT OF KRYSTAL TESTON THAT WAS RECORDED BY THE BILOXI POLICE DEPARTMENT FOLLOWING THE ACCIDENT AND/OR PROHIBITING CROSS EXAMINATION OF OFFICER BRANTLEY OR OTHER WITNESSES REGARDING THE STATEMENT.

Let's see. A law enforcement officer encounters an individual who finds her speech was slurred, she was very mumbly, and she was *confused* and *dazed*, and her eyes were dilated and very glassy. It took her time to answer questions. She really had to think. *She kind of had this confused look about what was going on.* Very, very slurred speech.[14] While in this "confused" state, Brantley, a trained police officer, allegedly asked Teston:

Q: How many of these (Lorcet) have you had today?
A: Two. (R. Vol. VI. 524:1; 538-539)[15].

Importantly, he did not ask her "when" today she took them and Brantley conceded "today" included after the accident. (R. Vol. VI. p. 539:1-6). Later, according to Brantley[16], he asked her if she would submit to a blood test. She said yes, but she took half a Z-bar (Xanax)[17] and a Goody's PM after the accident to calm her down. (R. Vol. VI. p. 524).

With these two oral statements, the State was permitted to Teston's statements "out of context" and make it appear that Teston admitted she took two (2) Lorcet *before the accident* and *after the accident* a Z-bar (Xanax)[18] and a Goody's PM, when the State knew that such wasn't

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[14] His second encounter with her. (R. Vol. VI. at p. 530:28 to 531:1-6). None of such was present in his first encounter with her within approximately 20 minutes after the accident.

[15] This statement was allegedly made at approximately 9 pm, two hours after the accident. (R. Vol. VI. p. 524:15).

[16] Brantley's memory at trial was this occurred at the accident scene, but his report written near the accident states this occurred at the station, which makes Brantley's memory suspect. (R. Vol. VI. p. 539:17-19).

[17] Blood testing confirmed that no Xanax was found in her blood. (R. Vol. VI. p. 597:16-25).

[18] Blood testing confirmed that no Xanax was found in her blood. (R. Vol. VI. p. 597:16-25).

true by the third recorded statement with Brantley present and contributing to the questioning. At the time, the above statements were introduced ***by the State*** over objection, both the State and Brantley knew that Teston had advised "when" she took her prescription medicines:

> Q. Okay. How about the Lorcets?
>
> A. Lorcets, yeah. I have taken one today. I took one this morning, and after the accident I took one and a half, and a half a more. Because my boyfriend gave it to me because I couldn't breathe. I was having an anxiety attack, because I can't see people like that, because of my brother dying and all that.

(R. Vol. V. p. 414 - Exhibit 1 to Brantley Proffer p. 14 lns 25 to p. 15 lns 1-7).

This recorded statement was also consistent with Brantley's observations in his initial encounter with Teston, and his subsequent encounter in which he observed obvious signs of impairment. The trial court allowed the State to mislead the Jury by offering only portions of Teston's voluntary statements. This was fundamentally unfair and contrary to *Mississippi Rules of Evidence*, Rule 106 and 611(a) (1).

The State's reliance on *Adams v. State*, 851 So. 2d 366, 374 (Miss. Ct. App. 2002) is misplaced[19] and, in fact, *Adams* supports Teston's argument herein. In *Adam,* the State did not introduce or offer to introduce the statement of Ms. Adams. The State merely asked a witness if "John Barrett" was mentioned by Ms Adams in her statement. There was nothing in that statement at all about "John Barrett", therefore nothing could be taken out of context. Adams then wanted to introduce the entire statement[20], which the Trial Court disallowed. The Trial Court correctly noted: [u]nder Mississippi case law, the rule of completeness . . . attempts to prevent misleading the jury by taking evidence out of context..." Id. The problem in *Adams*

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[19] *Murphy v. State,* 453 So. 2d 1290 (Miss. 1984) has no application at all to this case. The recorded statement of Teston is admissible for the same reason the oral statements were admissible.

[20] To show she "cooperated, told the truth, and investigators failed to objectively investigate the death of Woolf." *Adams,* Id. at p. 374.

there was no part of the statement, which could explain "John Barrett", as "John Barrett" was not mentioned in the statement. Such is not the case here.

In this case, the State, not Teston, introduced the incomplete "statements" of Teston. There is no question that these two (2) statements together were taken "out of context" and misled the Jury. Teston answered the questions asked. The failure to ask the follow-up question immediately lies with Brantley.[21] The evidentiary ruling by the Court prevented the jury from hearing the truth when the right question was asked. The portion of the recorded statement Teston sought to either have the State introduce or to least cross-examine Brantley on was directly on the issue of how many and when she took the Lorcet, to prevent her earlier oral statements from being taken out of context. Rule 106 of the *Mississippi Rules of Evidence* specifically permits such. The Trial Court abused its discretion in refusing such evidence.

The State next contends that Appellant did not urge Rule 611(a) to the trial court, therefore "may not raise it here". Such could not be further from the truth, the central principle of Rule 611(a), Mississippi Rules of Evidence ("ascertainment of the truth") was argued vehemently. (See, e. g. R. Vol. V. pp. 397:21-25; 413:3-8). As stated by the Mississippi Supreme Court in *Murphy v. State*, 453 So. 2d 1290, 1293 (1984)[22] it would be vain and foolish to demand that in the heated flow of trial, where the grounds of the objection are reasonably apparent from the context, that counsel state his grounds or waive his objection.

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[21] It is reasonable to state that if Brantley had simply asked "when" specifically did you take them, Teston would have responded as she did in her recorded statement.

[22] Cited by the State at p. 27 of its Reply Brief.

The State next argues the "written statement[23] simply was not part of the two unrecorded statements". Such is not required and is specifically contrary to the provisions of Rule 106 and Rule 611, Mississippi Rules of Civil Procedure. The purpose of both Rules together is the same-to ascertain the truth in an orderly fashion. Rule 106 specifically permits the introduction of "or **any other .... recorded statement** which ought in fairness to be considered contemporaneously with it". The three (3) statements of Teston introduced by the State were not part of the others; each was made at a different time. The State only chose to introduce the ones that misled the jury and took Teston's statements out of context. The parts of the fourth recorded statement necessary to bring the earlier statements in context "ought in fairness to [been] considered contemporaneously with it" and for an "ascertainment of the truth". Rule 106 and Rule 611(a), *Mississippi Rules of Evidence.*

The State completely avoided discussing Teston denial of her right to cross-examine Brantley on the recorded statement of Teston, in which he was present and participated. The State somehow argues that "Teston" abandoned her claim by "presenting no authority"[24]. The truth existed just as the "recorded statement" existed and no matter how the State avoids the issue, the Jury was misled by the State and Teston was prevented from showing the "truth" to the Jury. Even Brantley admitted, during the proffer that the reason he did not protest when Teston stated in the recorded statement that after the accident she had taken 1½ Lorcet and then another ½ Lorcet such was not inconsistent with her statements at the scene. (R. VI p. 566:1-7). These

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[23] The State the refers to the "written statement" actually it was a tape-recorded statement of Teston although a written transcript was also introduced for identifications as part of Teston's Motion. (R. VI. Proffer pp. 558-565).

[24] The Appellant cited in its Brief and recites in the rebuttal *Myers v. State*, 296 So. 2d 695, 700 (Miss. 1974) in case the State missed it, which is authority for his argument.

rulings were clearly in error and caused substantial prejudice to Teston's right to a fair trial. The Court should reverse and remand for a new trial.

D. THE TRIAL COURT ERRED IN REVERSING ITS RULING, *IN LIMINE*, PROHIBITING EVIDENCE OF THE DEFENDANT BEING CHARGED WITH DRIVING WITH SUSPENDED LICENSE) AND ERRED IN DOING SO AFTER *VOIR DIRE* AND SELECTION OF THE JURY.

The State has still not explained how the Teston's arrest for driving with a suspended driver's license was relevant to why no field sobriety tests were conducted or why the officer didn't even ask Teston to submit to field sobriety testing despite the arrest. The State did not do so at trial and has not done so in its Reply Brief. The State has failed to cite any authority to support such argument either at Trial or before this Court and therefore its arguments should be procedurally barred. *Glasper v. State*, 914 So. 2d 708, 726 (Miss. 2005). Such should apply equally to the State.

More importantly, the State never even asked Officer Brantley why he did not conduct or even offer field sobriety testing to Teston. Officer Brantley never testified, even on cross-examination, the arrest for "driving with a suspended license" was the reason he did not conduct field sobriety testing. Even on redirect examination, the State asked Brantley about not removing the handcuffs and being on the interstate as reasons for not conducting field sobriety testing. (R. Vol. VI. p. 573). Additionally, the handcuffs and the interstate were not the explanation offered by the State in seeking reversal of the confessed order *in limine*. The only conclusion that may be drawn is the representation was *not true*.

The State unbelievably contends that despite the misrepresentation by the State "[t]he evidence was before the jury to counter any later argument by the defense on the lack of a field sobriety test". In other words, it was left to the Jury to figure out why this evidence was admitted. The Jury had no idea why the issue or arrest for the driving with suspended license

was introduced, yet the State introduce it, so the Jury would certainly believe it must have been important.

Teston had the right rely on the Order *in limine* in questioning, during voir dire, the prejudices of prospective jurors and investigate their thoughts on matters directly related to the issues to be tried and would have done so if the Court had not sustained Teston's Motion *in Limine* upon the State's confession thereof. *West v. State*, 553 So.2d 8, 22 (Miss. 1989). One need only mention that a person driving with a suspended license as now being charged with Driving Under the Influence causing death or injury to see the immediate adverse reaction by a member of the public (potential jurors) regardless of the truth as to the DUI charge itself.

The State asserts there is no evidence the Jury "used the evidence" of driving with a suspended license against Teston. This ignores the obvious dangers inherent in these cases regardless of the evidence of driving under the influence or lack thereof. e.g. *Headrick v. State*, 637 So. 2d 834 (Miss. 1994). This evidence was neither relevant nor material to any issue before Jury and if it was, then any such relevance was outweighed by its prejudicial effect. *Miss. Rules Evid.* 401, 402, 403 and 404. This matter should be reversed and remanded for new trial on this ground.

E. THE COURT ERRED IN ALLOWING THE STATE TO PROCEED TO TRIAL ON COUNTS V-VIII OF THE INDICTMENT REQUIRING THE DEFENDANT TO DEFEND SAID CHARGES.

The State seems to concedes that the Indictment in this case was improper as it charged Teston with eight (8) Counts of the same offense, with two (2) counts *for each* death and injury based on the same "other substances" under Section 63-11-30(1) (b) Mississippi Code of 1972. The State merely argues that it was "mooted" by the "directed verdicts" on Counts V-VIII and Teston was "not prejudiced by the Indictment" and Teston "demonstrates none". This Court need only examine the substantial amount of time devoted in the record in trying either to get the

evidence, which supported Counts V-VIII for "other substances", or to get these Counts dismissed. Counsel for the Appellant could not fulfill their obligation to defend their client, prepare a defense, consult with experts, on an on. It is patently prejudicial to a citizen charged and its counsel[25] to devote time, energy and money chasing an elusive "rabbit" purposely created by the State. This Court should correct such misleading tactics by the State, which is inherently prejudicial.

F. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO THE CORRECT BURDEN OF PROOF IN THIS CASE, THE EVIDENCE BEING ENTIRELY CIRCUMSTANTIAL.

The State's arguments on this issue demonstrate that this was an entirely circumstantial evidence case. Circumstantial evidence is a fact that must be used to infer another fact. It implies something occurred but does not directly prove it; proof of one or more facts from which one can find another fact. *State v. Rogers*, 847 So. 2d 858, 863 (Para. 22) (Miss. 2003); *Alexander v. State*, 749 So. 2d 1031, 1036 (Para. 16) (Miss. 1999). Every piece of evidence the State has referenced can only be used to "infer" another fact, none of it is "direct evidence". No eyewitness that identified Teston as the driver involved in the accident or that she was impaired at the time of the accident. The only two eyewitnesses were Thurman or Ross and neither could identify Teston as the driver of the Black Honda. Teston did not admit driving the vehicle involved in the accident with the SUV; in fact, she believed another vehicle caused the accident. (See State's Exhibit 5 R. Vol. VI. p. 517). Teston admitted driving "her vehicle", but was not asked if she was driving at the time of the accident. (R. Vol. VI. p. 519, ln 14). At best, one can only infer such from the alleged statement to Officer Brantley. Such is clearly not direct evidence but only circumstantial evidence.

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[25] And Trial Court. The State never even made an effort to present evidence on Counts V-III, so why were

The State claimed Mrs. Ross testified she saw the Appellant get out of the driver's side of the Accord after the accident.[26] **This is untrue.** Mrs. Ross specifically stated she could not identify Teston as the person who exited the Black Honda. (See Testimony of Ross, R. Vol. V. pp. 452:20-22; 474:3-5). Thurman's testimony[27] that Teston approached her and was hysterical[28] (spilling over her words, etc.) which caused her to assumed Teston was the driver of the vehicle is clearly indirect and circumstantial, if such is evidence at all. (R. Vol. VII. p. 621).

The blood test results taken three (3) hours after the accident and the expert's purported testimony thereon is clearly NOT direct evidence and State's argument thereon is disingenuous at best. Blood test result only show blood levels **at the time the blood** is drawn, 3 hours after the accident, and the expert's purported opinions attempted to extrapolate back could not be direct evidence. This particularly true since Teston was unsupervised, unsecured and had access to her prescription medicines between the time of the accident and the time the blood was drawn.[29]

More importantly, as with every single piece of "evidence" the State has discussed in its Brief on this issue, one must "infer"[30] from that evidence that the Defendant, Teston, drove or otherwise operate a vehicle within this state while under the influence of any other substance which impaired her ability to operate a motor vehicle and in a negligent manner caused the death

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these Counts there?

[26] The State gave no reference in record to this testimony for good reason, it does not exist.

[27] Thurman is not an independent or impartial witness, her friends were killed and she candidly was "angry" at Teston. (R. Vol. VII. p. 620:7-8).

[28] As Senior Circuit Court Judge Kosta Vlahos commented to the State on this contention: I think most people that might come on to the scene if they saw the bodies and everything they might be a little bit upset. (Vol. III p. 45:1-13).

[29] When you consider Officer Brantley's testimony, a trained DUI enforcement officer, about the differences between Teston at his first contact with her within minutes of the accident and his second contact, the relevance and materiality of blood test results is doubtful at best.

or injury of another ("the gravamen of the offense charged"). The length that the State goes in its Brief to attempt to explain its claims that there was direct evidence, demonstrates without question that the evidence was completely circumstantial and a circumstantial evidence instruction should have been given. The failure to give circumstantial evidence instructions was error and this matter must be reversed. *Windham v. State*, 602 So.2d 798, 800 (Miss. 1992).

G. THE STATE IMPROPERLY COMMENTED IN OPENING STATEMENT AND IN CLOSING ARGUMENT ON TESTON'S FAILURE TO TESTIFY

The State started out in "opening statement" improperly "arguing" that:

> She [Defendant] can't come here now and say, oops, and we're all sorry about the dead kids. That's just not how it works.

(R. Vol. V. p. 422:17-22).

Teston was not required to "say" anything and it was clearly improper for the State to "argue" in "opening statement" that Teston might "say". The State asserts a contemporaneous objection was not made to this statement. This Court need only examine the record to determine such is incorrect. (R. Vol. V. p. 422:20-28). While Teston had not yet testified, such comment is still improper. In fact, when Teston elected not to testify the statement becomes prophetic.

The Court should read the entire closing argument of Teston's counsel, there is nothing in that closing argument (R. Vol. VIII. pp. 754-772) that could reasonably permit the State to argue Teston "can't come HERE with a straight face and tell you I lied..." (emphasis added) (R. Vol. VIII. p. 774:10-25). "[N]o ingenuity, however artful, no subtlety, however refined, can escape the conclusion that this statement made by the prosecuting counsel held up to the jury the failure of the defendant to testify". See *Gurley v. State*, 101 Miss. 190, 57 So. 565 (1911). No

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[30] None of this evidence is direct evidence of the "gravaman of the offense".

reasonable juror or person could possibly interpret such argument otherwise and this matter should be reversed on this ground alone.

The State was clearly referring to Teston during closing:

> **She [Teston] can't come here with a straight face and tell you I lied** for whatever kind, sweet reason counsel opposite might have you believe and just —
>
> Mr. Tim Holleman: Your Honor, to which we would object.
>
> The Court: Overruled.
>
> Mr. Ward: --and say well, maybe we got a little benefit of time, but its not our fault because the police should have. That's just not the way it is. **SHE** lied because **SHE's** impaired on hydrocodone, and **SHE** wanted to wait as long as **SHE** could.
>
> The Court: Mr. Ward, direct your comments to the Jury.
>
> Mr. Ward: Yes, sir.
>
> (R. Vol. VIII. p. 774:10-25). (emphasis added).

This Court is not required to close it eyes or leave common sense outdoors to see exactly what the State was doing when the Court admonished State to cease such improper conduct. *Clark v. State*, 260 So. 2d 445, 446 (Miss. 1972). This compounded the State's telling the Jury, Teston can't come to this courtroom ("here") with a straight face and lie. *Jimpson v. State*, 532 So.2d 985, 991 (Miss. 1988). This was particularly error considering the lack of evidence against Teston. *Headrick v. State*, *supra*. This conduct was clearly improper and requires reversal of Teston's convictions and remand of new trial.

H. DEFENDANT'S SENTENCE OF 15 YEARS ON EACH COUNT FOR A TOTAL OF 60 YEARS TO RUN CONSECUTIVELY WITH 30 YEARS SUSPENDED WAS GROSSLY DISPROPORTIONATE TO THE CRIME

The State failed to discuss the elements of disproportionality. *Hoops v. State*, 681 So.2d 521, 538 (Miss. 1996). The very same Trial Court which sentenced Teston approximately 7

months before Teston's sentenced, sentenced a young man (State v. Rutland) to 1 year of house arrest for DUI causing the death of six (6) college-age friends in Cause Number 2006-42 in the Circuit Court of Stone County, Mississippi (See R. Vol. VIII. p. 844; Exhibit 1 to Motion for New Trial etc.) Other cases cited in Brief of Appellant likewise show the disproportionality of Teston's sentence herein. See p. 47. Teston's "consecutive" sentence is grossly disproportionate to the crime, the facts of this case and is a denial of equal protection of the laws. The State cited *Lawrence v. State*, 931 So. 2d 600 (Miss. Ct. App. 2005) as an example of a more severe sentence, however disproportionality was not raised on appeal in said case, therefore it is inapposite. Teston's "consecutive" sentence should be reversed and rendered or remanded for resentencing.

I. THE COURT ERRED IN PERMITTING THE INTRODUCTION OF BLOOD DRAWN IN VIOLATION OF SECTION 63-11-8, MCA, 1972

The importance of the timing with regards to the taking of blood was not lost on the Mississippi Legislature when it enacted §63-11-8(1), MCA, (Rev. 2000) requiring "Any blood withdrawal required by this section shall be administered by any qualified person and shall be administered *within two (2) hours after such accident, if possible.*"[31] More importantly in each of the cases wherein the Courts have allowed an extended time period beyond the legislatively imposed limit of two (2) hours the Defendant was in custody or under the supervision of the law enforcement and/or there was no evidence any alcohol or other substances had been consumed between the time of the accident and the blood test. *Smith v. State*, 942 So.2d 308, 315 (Para.

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[31] *McDuff v. State*, 763 So.2d 850 (Miss. 2000) merely held that you must still have "probable cause" under §63-11-8(1) to obtain the blood and as far as the statute was interpreted as not requiring "probable cause" it was unconstitutional. Whether the blood is obtained through "probable cause" or "consent", the statutory time limitations is still applicable "if possible".

16) (Miss. Ct. App. 2006); Wash *v. State,* No. 1999-KA-00738-COA (Miss. Ct. App. 2001) (Para. 2-3).

The present case is a clear example of the prejudicial effect of delay, particularly where the citizen charged is not secured or under supervision between the time of accident and the time the blood if drawn and consumes alcohol or "other substances" after the accident. It is even more critical when one considers that Brantley, a trained DUI officer and the only police officer to testify[32], he talked to was Krystal Teston and she exhibited no signs of impairment at that time. (R. Vol. VI. pp. 535-536).

Q. Okay. Nothing alerted you at all about a person that said, I just drove this car and I witnessed this accident?
A. Right.
Q. All right. Then you left her there, didn't you?
A. Yeah.
(R. Vol. VI. at p. 536:21-27).
Q. It was a good period of time. And you don't know what she took during that time that she was not supervised by any officer?
A. No.
(R. Vol. VI. at p. 537:6-9).

Brantley left her unsupervised for an unknown period of time and when he returned to her, she was noticeably different because she now had "slurred speech, mumbling, confused, dilated and glassy eyes". (R. Vol. VI. pp. 538:7-12; 539:11; 544:14).

Q. And you noticed things different from the first time you talked to her?
A. Yes.
Q. True?
A. Yes.
(R. Vol. VI. at p. 538:1-12).

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[32] The absence of any other officer testifying who had contact with Teston makes this issue even more important.

Q. But you do know that when you first arrived that her demeanor was different from the first time you saw her than when you came back in an amount of time you don't even know, correct? It was different?

A. Yes.

(R. Vol. VI. at p. 539:7-11).

Stacey Ross testified she told Officer Brantley the black Honda (allegedly Teston's vehicle) had contributed to the accident within approximately 20 minutes of the accident. (R. Vol. VI. pp. 461-462). Brantley did not even request a blood test from Teston approximately 9 pm, almost 2 hours after the accident. Even then, Brantley waited with Teston in his vehicle on a tow truck to arrive before proceeding to obtain a blood sample. (R. Vol. VI. p. 525). With no less than eleven (11) trained police officers[33] on the scene, the State's assertion that "it was not reasonably possible" to take Teston to have a blood sample drawn is specious.

The blood test results only showed the level of hydrocodone three (3) hours **after** the accident. This must be related **by evidence** to the time of the accident, some three (3) hours earlier, in order to be admissible. *Acklin v. State*, 722 So.2d 1264, 1266 (P9) (Miss. Ct. App. 1998). The State's evidence establishes that Teston "ingested" her Lorcet in the intervening time between the time of the accident and the 3 hours lapse of time when the blood was drawn. Contrasted with *Acklin v. State*, supra. the State's own evidence showed the subject blood test taken three (3) hours after the subject accident could not possibly be used to show that Teston was impaired at the time of accident, such was rank speculation at best and contrary to the observations of a trained DUI enforcement officer and the State's own expert's testimony.

The Legislature intended that the blood test be taken "if possible" within two (2) hours of the accident, whether by consent or based upon probable cause.

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[33] Officers Allen, Britt, Montifore, Moran, Lessner, Prahl, Brumley, Hancock, Toronto, and Cvitanovich. (R. Vol. VI. p. 547-548).

This is ***not*** a case where a citizen was supervised or in custody between the time of accident and blood being drawn so that no alcohol or "other substances" could be consumed between the accident and the blood being drawn. *See e.g., Wash v. State, supra.; Smith v. State, supra.; Holloman v. State*, 820 So. 2d 52 (Miss. Ct. App. 2002).

The Court erred in not sustaining Teston's Motion to Suppress. (R. Vol. IV. pp. 238-252) and admitting the blood test results taken 3 hours after the accident which could not be related to impairment at the time of the accident in light of Officer Brantley's own testimony.

V. CONCLUSION

It is in cases where the evidence is lacking that the most egregious errors often occur. This case is no exception. While these errors require reversal, it is this Court's duty to acquit, if the evidence does not support the verdicts. This is clearly the case. Teston respectfully request that this Court reverse and render these convictions.

Respectfully submitted, this the 6th day of February, A. D., 2008.

KRYSTAL MARIE TESTON, By And Through
Her Attorneys Of Record

BOYCE HOLLEMAN & ASSOCIATES

BY: _____
TIM C. HOLLEMAN

CERTIFICATE

I, TIM C. HOLLEMAN, attorney of record for the Appellant in the above-styled and numbered cause, do hereby certify that I have on this date forwarded a true and correct copy of the above and foregoing to Mark Ward, Esquire, Assistant District Attorney, 730 Martin Luther King Boulevard, P O. Box 1444, Biloxi, Mississippi 39533; John R. Henry, Esquire, Special Assistant Attorney General for the State of Mississippi, MS Attorney General's Office, P.O. Box 220 Jackson, MS 39205 and Honorable Stephen B. Simpson, Circuit Court Judge, P.O. Box 1570, Gulfport, MS 39502, by United States Mail, postage prepaid.

THIS, the 6th day of February, A. D., 2008.

TIM C. HOLLEMAN

TIM C. HOLLEMAN, [redacted]
TIM@BOYCEHOLLEMAN.COM
BOYCE HOLLEMAN & ASSOCIATES
11240 HIGHWAY 49 N, SUITE 400D
GULFPORT, MS 39503
(228) 539-9600 OFFICE
(228) 529-9699 FACSIMILE

MICHAEL BOYCE HOLLEMAN
[redacted]
MHOLLEMANLAWFIRM@BELLSOUTH.NET
HOLLEMAN LAW FIRM, PLLC
P. O. BOX 1598
GULFPORT, MS 39502
(228) 868-0064 OFFICE
(228) 868-0925 FACSIMILE