IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES ROBERT DELKER — APPELLANT

VS. — NO. 2008-KA-0114-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES ROBERT DELKER **APPELLANT**

VS. **NO. 2008-KA-0114-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The grand jury of Lauderdale County indicted defendant, James Robert Delker for Felony Driving Under the Influence in violation of Miss. Code Ann. § 63-11-30. (Indictment, cp.2, & order amending c.p. 33). After a trial by jury, Judge Robert Walter Bailey, presiding, the jury found defendant guilty. (C.p.135). Defendant was sentenced to 5 years, as an habitual offender without possibility of suspension, reduction, probation, parole, earned time or good time or any early release. Further defendant was fined $2,000, fees of $100, and costs of $328.50. (Judgment of Conviction & Sentence, cp. 135).

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

On December 24, 2006, Marion Police Chief, Ben Langston, was out on patrol. He had pulled his car to the entrance of the Valley Ridge Apartments on Old Country Club Road. As he was sitting there he observed a small red vehicle speed past him. Because patrol cars in Marion are not equipped with radar to detect speed, Chief Langston has been trained to estimate the speed of a vehicle. In his estimation Chief Langston testified that he thought the car was travelling around 45 miles per hour, 10 miles per hour faster than the posted speed limit. **R. 111-112.** He then pulled onto Old Country Club Road and turned on his lights in order to stop the driver and give him a warning. **R. 20.** He testified that at no point did he have any intention of making an arrest, but he did call the Lauderdale Sherriff's office. He followed him and both cars were traveling about 65 miles per hour. **R. 137.**

The driver did not stop, but continued for 8/10ths of a mile when he turned into a driveway and stopped. **R. 137.** Chief Langston pulled up and appraoched the vehicle. He noticed the smell of alcohol emanating from the vehicle, a beer can thrown over the passenger seat, and he asked the driver why he didn't stop. The driver, James Robert Delker, responded with slightly slurred speech that he knew he was going to jail and didn't want to leave his car on the side of the road. **R. 122-123.** Chief Langston then handcuffed Delker and placed him in the back of his car. He

then turned him over to Karey Williams, a Lauderdale County officer. Officer Williams then performed the field sobriety tests and actually took custody of Delker. **R. 152-161.**

Unkown to Chief Langston at the time, the Valley Ridge Apartments are in the town limits of Marion, but Old Country Club Road is not. Therefore, when Chief Langston began pursuit he was outside of his jurisdiction. **R. 20.**

The jury heard the evidence and found defendant guilty as charged.

SUMMARY OF THE ARGUMENT

A. Chief Langston Made a Valid Citizen's Arrest

i. Citizens arrest.
ii. Chief Langston Was Not Acting Under the "Color of Office."
iii. There is Sufficient Proof defendant was Driving Under the Influence.
iv. Answers to Rhetorical Questions [And not actually necessary].
v. Mississippi Exclusionary Rule Application.

B. Does *stare decisis* require continued adherence to controlling case law?

C. Essentially presented, argued and answered by the State above.

D. Essentially the same argument as presented in Issue A. above.

E. Did the trial court err in denying the motion for directed verdict, motion for judgment notwithstanding the verdict and motion for new trial. Oh, and a total accumulated error claim.

i. Lack of foundation for expert opinion as to the speed of vehicle.
ii. Defendant through appellate counsel seeks to have this court re-examine the facts decided by the judge and jury.

ARGUMENT

A. Chief Langston Made a Valid Citizen's Arrest

i. Citizens arrest.

Delker connects a number of different legal and factual points to basically say that Chief Langston was outside of his jurisdiction, the arrest began when he turned his lights on to stop Delker, that any citizen's arrest must be for an indictable offense, a violation of a municipal offense cannot be indictable, and the arrest and subsequent search and seizure were illegal. However, the facts are not as Delker presents them, and his argument does not succeed.

Miss. Code Ann. § 99-3-7 states that "An officer or *private person* may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence." (Emphasis added).

Chief Langston was situated in the Valley Ridge Apartments when he saw Delker speed by on Old Country Club Road. Though he didn't know it at the time, the apartments he was parked in were part of Marion, but Old Country Club Road was not within the city limits of Marion. Therefore, the trial court found that Chief Langston was outside his jurisdiction, not in hot pursuit, and he made a citizen's arrest.

Delker's argument relies on Langston *not* being a private citizen making an

arrest and that the Court finds that the arrest began when Langston turned on his lights and began pursuit. The courts have held that an arrest begins when an officer begins his pursuit for the purpose of making an arrest. *Smith v. State,* 128 So.2d 857 (Miss.1961). However, the statement of law in *Smith* clearly finds that an *officer* makes an arrest when he begins pursuit. It is impossible to base an argument on the finding that Langston was a private citizen, but to apply law that applies only to police officers. Every case that Delker cites in support of this rule involve pursuit by police officers. *Singletary v. State,* 318 So.2d 873 (Miss. 1975); *Pollard v. State,* 233 So.2d 792 (Miss. 1970); *Ford v. City of Jackson,* 121 So. 278 (Miss. 1929).

Second, regardless of his status as an officer or private citizen, Langston stated he had no intention of making an arrest, and he didn't make an arrest until after Langston stopped. This pursuit rule also requires that pursuit is begun for the explicit purpose of arrest. *Pollard v. State,* 233 So.2d 792 (Miss. 1970). Chief Langston stated in his testimony that he had no intention of arresting Delker when he began pursuit. **R. 20.**

When, as a private citizen, Langston turned his lights on in pursuit, Delker never stopped or heeded the siren. In fact, Delker sped up to what Chief Langston estimated was 60-65 miles per hour, and he didn't stop until he pulled into his own home. When Langston approached the car to ask Delker why he didn't stop,

Langston smelled alcohol, saw a beer can, and then Delker stated that he knew he was going to jail. It is clear that a citizen's arrest does not allow for anything similar to a stop and frisk *Terry* stop. However, without a stop or detention of any kind, police officers and private citizens are free to engage in voluntary conversation. A voluntary conversation is valid no matter what facts are known to the officer since it involves no force and no detention of the person interviewed. *Singletary v. State*, 318 So.2d 873, 876 (Miss. 1975). During the interview, Chief Langston was able to gather probable cause that Delker had been drinking.

Therefore the State, in opposition to the Appellant's characterization of the events urges this court to find that Chief Langston was outside of his jurisdiction, Delker stopped of his own accord, the arrest did not occur until after Chief Langston detected alcohol on Delker, the arrest was for an indictable offense and a breach of the peace, therefore any subsequent search and seizure performed by the Lauderdale police officers was legal.

ii. Chief Langston Was Not Acting Under the "Color of Office."

Delker also claims that because of Chief Langston's use of his patrol car, badge, and uniform (his "color of office") he was able to gather information not normally available to a private citizen making a citizen's arrest. The analysis of the "color of office" question was correctly stated by the Appellant and found *United*

States v. Atwell 470 F.Supp.2d 554 at 567-69 (2007)

> What is most essential in the determination regarding the validity of a citizen's arrest and the impact of the "under the color of office" doctrine is whether the arresting officer acting outside of his jurisdiction had probable caue for the arrest based *solely* on evidence that a private citizen might observe and have the ability to interpret.

Delker asserts that a private person could have seen that he was driving fast and would have been able to smell alcohol emanating from the vehicle, but maintains that it is unlikely that a private person without a patrol car, siren and lights would have been able to make a stop. However, Langston was unable to make a stop. Delker stopped of his own accord. Additionally, all that is needed for probable cause to arrest for drunk driving would be the knowledge that a person is driving and that there is a strong odor of alcohol. It is a well settled precedent in Mississippi that the smell of alcohol emanating from a car is enough to provide an officer with probable cause to make an arrest. *Dale v. State*, 785 So.2d 1102 (Miss.Ct.App.2001). The argument that Delker makes regarding Chief Langston's color of office, training, and ability to detect speed is irrelevant in this DUI arrest.

iii. There is Sufficient Proof defendant was Driving Under the Influence.

Delker has been charged and convicted of Felony DUI. It is not necessary that the information the officer had at the time of the arrest be sufficient to sustain a conviction of the crime charged, *Jones v. State, 461* So.2d 686, 695 (Miss.1984), nor

does the arrest have to have been on the charge ultimately brought. *Goforth v. City of Ridgeland*, 603 So.2d 323, 326 (Miss.1992).

As in the case of *Mayo v. State*, 843 So.2d 739 (Miss.App. 2003) where the defendant was charged with beer possession as well as driving under the influence, he was only convicted of the DUI charge. The possession charge was dismissed, but the dismissal of the underlying probable cause did not require dismissal of the conviction.

Her, Delker was never arrested for speeding nor has he been convicted in any way on any speeding charges. However, the speeding was an additional element in the officer's probable cause. Coupled with the smell of alcohol, and the statements of the Defendant, there was sufficient proof to make an arrest.

iv. Answers to Rhetorical Questions [And not actually necessary].

By definition, a rhetorical question is asked merely for effect with no answer expected, but Delker's appeal requires a response. Delker has continually asserted the unlawfulness of the speed limits on Old Country Club Road as well as challenged the subsequent DUI arrest based solely on the speeding charge. However, as stated above, there is no need to prove that the defendant was speeding. Not only did Chief Langston never intend to ticket or arrest Delker for speeding, there is no charge or conviction for violating the speed limit. Once Delker stopped, there was more than

sufficient evidence to arrest him for DUI. The legality of speed limits in the state of Mississippi is not at issue.

v. Mississippi Exclusionary Rule Application.

The State does not find error in the Appellant's characterization of the law regarding illegal arrests and searches. It is well settled law that a search may take place incident to a lawful arrest. *U.S. v. Robinson*, 414 U.S. 218, 235 (1973). However, there was no unlawful arrest in this case as discussed above. Had Delker been given a citation for speeding without an arrest, a search would not have been lawful. However, Delker was charged with driving under the influence and arrested. Any search or seizure performed was legal.

All told there is no merit to these collective assignments of trial court error and no relief should be granted.

vi. Recent appellate decision issued after Delker's appeal was perfected.

While appellate counsel gives a lengthy and citation to several appellate cases, none appear to be on point. The total argument presented is based upon the premise that defendant's arrest was unlawful. As noted above there is no merit to this proposition and no relief should be granted. ***Robinson***, at 235.

B. Does *stare decisis* require continued adherence to controlling case law?

The State will posit the answer is yes. Interestingly, this entire allegation of

error cites not one error of the trial court, or prosecutor. There is not one citation to the record on appeal or any claim of error. This claim of error is basically a long rhetorical question presented to this Court for consideration. More specifically asking this reviewing Court to reject or overturn about 86 years of case law.

The State would urge this Court to apply the standard it has in the past when presented such 'invitations':

> ¶ 3. . . . This Court, sitting as an intermediate appellate court, is obligated to follow precedent established by the Mississippi Supreme Court. Therefore, we decline any invitation to overrule the existing case law on the subject. That is a matter that could only be considered by the Mississippi Supreme Court after granting a writ of certiorari in this case.
>
> Kennedy v. State 766 So.2d 64, 65 (Miss.App.,2000)

No relief should be granted on this open request to change the settled course of law.

C. Essentially presented, argued and answered by the State above.

In this reiteration of error appellate counsel re-packages arguments previously presented and answered above. *Miss. Code Ann.* § 99-3-7.

Again, no relief should be granted on this claim of error.

D. Essentially the same argument as presented in Issue A. above.

In this reiteration of error appellate counsel re-packages arguments previously presented and answered above. With the exception of adding a claim the trial court

erred in denying the motion to recuse.

> The law surrounding the recusal of a judge in Mississippi is well settled. Under Canon 3 of the Code of Judicial Conduct, an appellate court, in deciding whether a judge should have disqualified himself from hearing a case uses an objective standard. A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality. The decision to recuse or not to recuse is one left to the sound discretion of the trial judge, so long as he applies the correct legal standards and is consistent in the application. This Court presumes that a trial judge is qualified and unbiased, and this presumption may only be overcome by evidence which produces a reasonable doubt about the validity of the presumption. When a judge is not disqualified under the constitutional or statutory provisions the decision is left up to each individual judge and is subject to review only in a case of manifest abuse of discretion.
>
> *Beckum v. State*, 917 So.2d 808 (¶29) (Miss.App. 2005).

Having established a look to the record will clearly show there was no manifest abuse of discretion. It is worth noting that in all the citations to constitutional provisions, statutory authority, federal and U.S. Supreme court authority – appellate counsel didn't cite to the record.

Certainly the inflammatory statement included in the brief is not to be found within those pages.

Be that as it may, the discussion on the motion to recuse may be found in the record of the trial transcript between pages 248 and261. Within those few pages it is clear the judge followed the canon and the law.

No relief should be granted on this reiterated claim of error.

E. Did the trial court err in denying the motion for directed verdict, motion for judgment notwithstanding the verdict and motion for new trial. Oh, and a total accumulated error claim.

i. Lack of foundation for expert opinion as to the speed of vehicle.

Succinctly, appellate asks this court to apply the wrong standard to the officers testimony.

> ¶ 7. While the citation would have definitely added to the persuasiveness of the officers' testimony and could have easily been produced, the courts have never held that to be a requirement. The standard merely requires the officer(s) to articulate particularized facts which support an objective belief that the subject has already participated in or is in the process of participating in criminal activity. McCray, 486 So.2d at 1249. Here, two separate officers testified that Ray was driving in excess of the posted speed limit and that they had observed him swerve off the side of the road. It is our opinion that the officers' testimony, as presented, met the threshold of particularized facts required to support a reasonable suspicion justifying the initial stop.
>
> Ray v. State, 798 So.2d 579 (Miss.App. 2001).

The standard as shown above is one of reasonable suspicion to support the officers probable cause determination.

No relief should be granted on this allegation of error.

ii. Defendant through appellate counsel seeks to have this court re-examine the facts decided by the judge and jury.

While appellate counsel has correctly cited appropriate authority for the applicable standard of review he then asks this court to make its own determination of the evidence.

However, decisions as to the relevance and admissibility were within the purview of the trial judge and determination of facts to the jury.

It must be noted that no defense was presented. The testimony and the evidence while tested before the jury in cross-examination went without rebuttal.

> ¶ 17. Guerrero contends that the jury verdict was contrary to the overwhelming weight of the evidence and that the trial court should have granted his motion for a new trial. However, a review of the record makes clear that there was ample evidence proving that Guerrero shot Olmeda at the Pop-a-Top Cantina on June 25, 2005. Both Edwards and Olmeda identified Guerrero as the shooter, and all three witnesses called by the defense to rebut that assertion admit to being unable to see the shooter from their vantage points. The facts, when viewed in the light most favorable to the verdict, indicate that a jury could find beyond a reasonable doubt and to the exclusion of every reasonable hypothesis that Guerrero shot Raul Olmeda on the night of June 25, 2005, during an altercation at the Pop-a-Top Cantina. The lower court correctly denied Guerrero's motion for a new trial and this Court will not disturb the jury verdict where, as here, no unconscionable injustice will result and there is ample evidence to support the jury's findings. The jury verdict was not against the overwhelming weight of the evidence and is, therefore, affirmed.
>
> *Guerrero v. State*, 943 So.2d 774 (Miss.App. 2006).

Looking to the abundance of testimony, evidence, and tape presented for the jury to consider there is amply evidence supporting the jury verdict. And, most assuredly, an unconscionable injustice is not being enforced. The evidence supports the verdict.

Finally, as to the accumulated error claim. (Which was not really argued in the

brief).

> ¶ 36. Keys argues that even if the individual claims do not constitute error, their cumulative effect deprived him the right to a constitutionally fair trial. Our analysis of a claim of cumulative error has been described as follows:
>
> > upon appellate review of cases in which we find harmless error or any error which is not specifically found to be reversible in and of itself, we still have the discretion to determine, on a case by case basis, as to whether such error or errors, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting cumulative effect.
> >
> > Powers v. State, 945 So.2d 386(¶ 26) (Miss.2006) (quoting Byrom v. State, 863 So.2d 836, 847 (Miss.2003)).
>
> ¶ 37. The record and arguments before us demonstrate that Keys received a fair trial. Keys was entitled to a fair trial, not a perfect trial. Powers, 945 So.2d at 386(¶ 26) (quoting McGilberry v. State, 741 So.2d 894, 924 (Miss.1999)).
>
> *Keys v. State*, 963 So.2d 1193 (Miss.App. 2007).

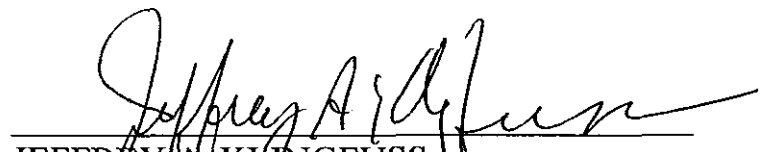
The State submits defendant got a fundamentally fair trial. That is all that is required, consequently no relief should be granted total assignment of collected errors.

CONCLUSION

Based upon the arguments presented herein as supported by the transcript and evidence introduced at trial the State would ask this reviewing Court to affirm the jury verdict and sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Robert Walter Bailey
Circuit Court Judge
Post Office Box 1167
Meridian, MS 39302

Honorable Bilbo Mitchell
District Attorney
Post Office Box 5172
Meridian, MS 39302-5127

Robert Compton, Esquire
John G. Compton, Esquire
Attorneys At Law
Post Office Box 845
Meridian, MS 39302-0845

This the 30th day of October, 2008.

JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO.: 2007-TS-01844-COA

THOMAS LAVIRL SLADE — APPELLANT

VS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
FORREST COUNTY, MISSISSIPPI

APPELLANT'S BRIEF
(Oral Argument Not Requested)

Submitted By:

JOHN R. McNEAL, JR., [redacted]
POST OFFICE BOX 690
JACKSON, MISSISSIPPI 39215
(601) 969-7794

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO.: 2007-TS-01844-COA

THOMAS LAVIRL SLADE **APPELLANT**

VS

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

I, the undersigned counsel of record certify that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

THOMAS LAVIRL SLADE	DEFENDANT/APPELLANT
JOHN R. McNEAL, JR., ESQ.	ATTORNEY FOR APPELLANT
JOHN MARK WEATHERS, ESQ.	ATTORNEY FOR FORREST CO., MS
HON. ROBERT HELFRICH	CIRCUIT COURT JUDGE

JOHN R. McNEAL, JR.

TABLE OF AUTHORITIES

CASES CITED: **PAGE NO(S).:**

STATEMENT OF THE ISSUES

(1) The Court erred as a matter of law and abused its discretion by refusing to grant Appellant's Motion for Change of Venue.

(2) The Court erred as a matter of law and abused its discretion by refusing to grant Appellant's Motion for Recusal.

(3) The Court erred as a matter of law and abused its discretion by denying Appellant's Motion for New Trial or in the alternative, a Judgment NotWithstanding the Verdict.

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF THE PROCEEDINGS:

This is an appeal from a Judgment of guilty and Sentencing Order and the Court's denial of Appellant's motions during the course of the trial.

The Appellant was arrested and charged with possession of firearm after felony conviction and other violations on March 13, 2007. The Appellant was subsequently indicted on May 2, 2007 by the Forrest County Grand Jury.

The attorney for Appellant filed his Motion for Disclosure of Any Possible Basis of Judicial Recusal and Motion for Change of Venue on July 29, 2007. Following the State's Response to the Motion for Change of Venue filed on July 24, 2007, the Appellant filed an Amended Motion for Change of Venue on July 27, 2007.

The State, thereafter, filed it's Election to Proceed under Counts III, IV and V of the Indictment on August 10, 2007, followed by the Appellant's Motion for Psychiatric Examination of Defendant and the attorney for Appellant's Motion to Withdraw on August 14, 2007.

The trial in this matter commenced on August 16, 2007. After having been found guilty on two (2) counts, the Sentencing Order in this matter was entered on August 21, 2007.

Appellant filed his Motion for New Trial, or in the alternative, Judgment Notwithstanding the Verdict on September 4, 2007 followed by the State's Response to Defendant's Motion For New Trial having been filed on September 14, 2007.

The Appellant now appeals the Trial Court's denial of all pre-trail and post-trial motions filed herein and the verdict of the jury.

B. STATEMENT OF THE FACTS:

On March 6, 2007, Patrick Herrington reported that someone had broken into his home at 1084 Bonhomie Road, Forrest County, Mississippi and had stolen seven (7) firearms and assorted jewelry items. A witness reported seeing a vehicle speeding away from the Herrington's home at approximately 9:00 o'clock a.m. on the morning that the burglary occurred. This vehicle closely resembled a vehicle driven by Thomas Slade. Investigator Terrell Carson later discovered that two (2) of Herrington's guns had been pawned at the Glendale Pawn Shop on March 6, 2007, the same day that the Herrington's home had been burglarized. The owner of the Glendale Pawn Shop identified Thomas Slade as the person who had pawned the guns.

On March 8, 2007, Larry and Donna Johnson reported that someone had broken into their home at 263 Steel Road, Forrest County, Mississippi and had stolen ten (10) firearms and various items of jewelry. Investigator Terrell Carson discovered that two (2) of the guns stolen from the Johnson home had been pawned at the Discount Pawn Shop in Petal, Mississippi, on March 9, 2007, the day after Larry and Donna Johnson's home had been burglarized. The owner of the Discount Pawn Shop identified Thomas Slade as being the person who had pawned these two (2) guns.

On March 12, 2007, Vic and Darlene Clepper reported that someone had broken into their home at 117 Herrington Road, Forrest County, Mississippi, and had

stolen two (2) firearms and various items of assorted jewelry.

The next day, on March 13, 2007, Deputy Sheriff Trey Rudder was on duty in a marked patrol car when he recognized Thomas Slade driving an older model black Ford Mustang on Carnes Road near Highway 49 in South Forrest County. Deputy Rudder was aware that Thomas Slade was wanted for the crime of burglary. He therefore proceeded behind Slade and activated his blue lights and siren at which time Slade accelerated and sped off at a high rate of speed. Deputy Rudder pursued Thomas Slade for approximately 8.3 miles while Slade operated his vehicle in a dangerous and reckless manner, often exceeding 120 mph and forcing other vehicles off the road. Deputy Mark Stinson was able to stop Thomas Slade by using stop sticks to disable the tires on Slade's vehicle. After stopping his vehicle, Thomas Slade fled on foot into a nearby wooded area and was finally captured a few minutes later. At the time of his arrest, Thomas Slade was in possession of a .22 caliber Remington Rifle with the name "Vic Clepper" engraved on the rifle. Mr. Clepper identified the rifle as being one of the firearms that was stolen during the burglary of his home on March 12, 2007.

After hearing that Thomas Slade had been arrested, a citizen delivered an envelope containing assorted items of jewelry to the Petal Police Department and advised that Thomas Slade had given the jewelry to him. Darlene Clepper identified some of the jewelry as being items of jewelry that had been stolen from her home during the burglary on March 12, 2007.

The State contended that records disclosed that Thomas Lavirl Slade had been previously convicted of multiple felonies, including two (2) counts of burglary of

a dwelling on October 20, 1993, in the Circuit Court of Lamar County, Mississippi and further asserted that Thomas Lavirl Slade was a habitual offender based upon the following convictions.

a. On July 28, 1976, Slade was convicted in the Circuit Court of Lamar County, Mississippi of the felony of Robbery; and was sentenced to a term of fifteen (15) years in the custody of MDOC; and did serve at least one (1) year and one (1) day of said sentence;

b. On August 15, 1977, Slade was convicted in the Circuit Court of Forrest County, Mississippi of the felony of Grand Larceny; and was sentenced to a term of five (5) years in the custody of MDOC; and did serve at least one (1) year and one (1) day of said sentence;

c. On August 15, 1977, Slade was convicted in the Circuit Court of Forrest County, Mississippi of the felony of House Burglary; and was sentenced to a term of seven (7) years in the custody of MDOC; and did serve at least one (1) year and one (1) day of said sentence;

d. On August 15, 1977, Slade was convicted in the Circuit Court of Forrest County, Mississippi of the felony of Possession of Burglary Tools; and was sentenced to a term of five (5) years in the custody of MDOC; and did serve at least one (1) year and one (1) day of said sentence;

e. On December 19, 1983, Slade was convicted in the Circuit Court of Forrest County, Mississippi of the felony of Burglary; and was sentenced to a term of three (3) years in the custody of MDOC; and did serve at least one (1) year and one (1) day of said sentence;

f. On October 20, 1993, Slade was convicted in the Circuit Court of Forrest County, Mississippi of the felony of Two (2) Counts of Burglary of a Dwelling; and was sentenced to a term of five (5) years in the custody of MDOC; and did serve at least one (1) year and one (1) day of said sentence;

g. On November 9, 1993, Slade was convicted in the Circuit Court of Forrest County, Mississippi of the felony of House Burglary; and was sentenced to a term of five (5) years in the custody of MDOC; and did serve at least one (1) year and one (1) day of said sentence.

C. SUMMARY OF THE CASE:

Court convened on July 27, 2007 for pre-trial motions, specifically a Motion for

Change of Venue. [T. Pg. 4, L.8 through T. Pg.31, L. 1-26] Additionally, Defendant brought on a Motion for Recusal [T. Pg.31, L.27-29 ; T. Pg. 35, L. 1-12]

Defendant had argued strenuously for change of venue based on pre-trial publicity as set out in the Affidavits and news media coverage attached to Defendant's submitted Motion for Change of Venue. In support of Defendant's Motion for Recusal, it was brought to the Court's attention that the Defendant alleged that the trial court had personal contact with him in the past in a prior position and that there was some animosity involved in the past between the trial court and the defendant and therefore the defendant had questioned the trial court's ability to be fair or to grant a fair trial at this time. At this time, the trial court admitted that he had known Mr. Slade for a long time and that the trial court had represented him and prosecuted him. [T. Pg. 32, L. 1-18] In addition, the Defendant stated that the trial court had previously stated that if it was left up to him he would throw him away. The trial court stated that he did not remember said statement. [T. Pg. 32, L.19-29; T. Pg. 33, L.1-39] During said discourse the trial court informed the Defendant "I think what was probably said was the last time you got whatever deal it was, and I don't even know what the deal was, that you told me, you know, that this is it. You ain't coming back. And I probably said, well, I hope not, and if you do, you should be a man about it and stand up and take the max." [T. Pg.33, L. 15-29]. The Defendant reiterated the fact that the Judge had stated previously that if it were left up to him he would throw him away. The Court subsequently denied the Motion for Recusal. [T. Pg. 34, L. 24-29; T. Pg. 35, L. 1-9].

After denial of the Motion for Change of Venue and the Motion for Recusal the

trial commenced on August 16, 2007.

The first witness called was Deputy Rudder who was a deputy sheriff with the Forrest County Sheriff's Department. Officer Rudder testified that on March 13, 2007, he and the sheriff's department were looking for a black mustang driven by Thomas Slade. [T. Pg. 126, L.1-10]. The officer further testified that he was looking for Mr. Slade in reference to some residential burglaries. He further testified that he had a description of the vehicle. [T. Pg. 126, L. 26-28]. The deputy further described his efforts to arrest Defendant Slade. [T. Pg. 127, L.1-29; T. Pg. 128, L.1-29; T. Pg. 129, L. 1-29; T. Pg. 130, L. 1-29; T. Pg. 131 -T. Pg.156, terminating at Pg. 158, L. 10.]

Next, the State called Anthony Bolton as a witness. Mr. Bolton testified as to his participation in the apprehension of Thomas Slade. (T. Pg. 170, L 15-29; T. Pg. 171 - T. Pg. 178, L. 5]

The next witness called by the State was Robert Corey Long who testified as to the maps relevant to the apprehension of the Defendant, Thomas Slade. [T. Pg. 182, L 6-29; T. Pg. 183, L. 1-29; T. Pg. 184, L. 1-29].

The next witness called on behalf of the State was Lt. Mark Stinson, a deputy with the Forrest County Sheriff's Department, who testified concerning his encounter with Thomas Slade on March 13, 2007. [T. Pg. 186, L. 10-29; T. Pg. 187 - T. Pg. 196, L. 1-21].

The next witness on behalf of the State was Mike Riels who was a chief investigator with the Forrest County Sheriff's Department. [T. Pg. 202, L. 8-20]. Officer Riels testified as to investigation of the allegations against the Defendant. [T.

Pg. 202, L. 21-29 through T. Pg. 214; L. 1-10].

The next witness on behalf of the State was Mr. Wayne Taylor. Mr. Taylor testified he was a deputy sheriff with Forrest County Sheriff's Department and also served as Post One Constable for Forrest County. [T. Pg. 220, L. 3-12]. He further testified as to his involvement in the case against the Defendant. [T. Pg. 220, L. 13-29 through T. Pg. 225, L. 1-16].

The State next called David Gerald. [T. Pg. 229, L. 16-29] Officer Gerald testified about his involvement in the apprehension and arrest of the Defendant. [T. Pg. 230, L. 9-29 through T. Pg. 239, L. 1-13]

Additional testimony was offered by the State from Jeffrey A. Byrd, Hattiesburg Police Officer and Crime Scene Investigator, Victor Clepper, Jeremy Robb, Gavin Guy, Johnny McKinley, and Darlene Clepper, all who testified concerning the alleged burglaries that gave rise to the case *sub judice*.

Subsequent to the testimony of Darlene Clepper, the State rested, at which time the Defendant brought on his Motion for Directed Verdict. [T. Pg. 290, L. 7-29; T. Pg. 291, L. 1-13]. Said Motion for Directed Verdict was denied.

The Defendant called Thomas Slade to testify on his own behalf at which time he testified that he did not participate in the robbery nor did he pawn the guns for himself but pawned them for another individual and went into a lengthy discussion about the subsequent chase and the arrest.

D. SUMMARY OF THE ARGUMENT:

1. The Trial Court committed an error at law and abuse of discretion in

falling to grant Appellant's Motion to Change Venue. It is clear from the Motion and accompanying Affidavits and documentation that the criteria had sufficiently been met to support the presumption in that a change of venue was appropriate.

2. The Trial Court committed an error at law and abuse of discretion in failing to grant Appellant's Motion to Recuse himself based upon the discourse between the trial judge and the defendant wherein the defendant had been represented by the trial judge previously and prosecuted by the trial judge previously and had been told by the trial judge previously that if he ever came before the Court on another criminal matter he should "stand up like a man and be prepared to serve the max".

3. The Trial Court committed an error at law and abuse of discretion in failing to grant Appellant's Motion for New Trial or in the alternative, Judgment Notwithstanding the Verdict in that it was obvious that the jury was biased and prejudice against the defendant based upon prior publicity.

E. ARGUMENT:

The decision to grant or deny a Motion for Change of Venue is in the discretion of the trial judge, *King v. State*, 960 So. 2d. 413, 428 (Miss. 2007), Mingo v. State, 944 So.2d, 18, 30 (Miss. 2006).

The requirement for change of venue as set out in *Howell v. State*, 860 So.2d 704 (Miss. 2004) was thoroughly addressed in *King v. State*. "The accused has a right to a change of venue when it is doubtful that an impartial jury can be obtained." *Davis v. State*, 767 So.2d 986, 993 (Miss. 2000) (citing, *White v. State*, 495 So.2d

1346, 1348 (Miss. 1986)). "Upon proper application, there arises a presumption that such sentiment exists; and, the State then bears the burden of rebutting that presumption." *Johnson*, 476 So.2d at1211.

This Court has enumerated "certain elements which, when present would serve as an indicator to the trial court as to when the presumption is irrebuttable." *White* 495 So.2d at 1349. The elements are as follows:

(1) capital cases based on considerations of a heightened standard of review;

(2) crowds threatening violence toward the accused;

(3) an inordinate amount of medial coverage, particularly in cases of:

a. serious crimes against influential families;

b. serious crimes against public officials;

c. serial crimes;

d. crimes committed by a black defendant upon a white victim;

e. where there is an inexperienced trial counsel.

Id.; Davis, 767, So.2d at 993-94 . . .

Howell, 860 So.2d at 719.

Slade's Motion for Change of Venue, with four (4) supporting Affidavits attached, created a presumption of doubt that an impartial jury could be obtained. It also established that under part 2 (c) of the elements requiring a change of venue would indicate that the crime, for which Mr. Slade was charged, was a serial crime and therefore was irrebuttable. This is true in that Mr. Slade had previously been

convicted of numerous crimes of the same nature, seven (7) to be exact, for robbery, and therefore they were serial crimes as contemplated in the *White* case and were therefore, irrebuttable. The trial court erred as a matter of law and abused its discretion by failing to recuse itself upon proper motion made by the Defendant. "The decision to recuse or not to recuse is one left to the sound discretion of the trial judge, so long as he applied the correct legal standards and is consistent in the application." *Tubwell v. Grant*, 760 So.2d 687, 689 (¶7) (Miss. 2000). When a judge is not disqualified under the constitutional or statutory provisions, the decision is left up to each individual judge and is subject to review only in case of manifest abuse of discretion. *Id.* In determining whether a judge should have recused himself, this Court uses an objective test: " A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." *King v. State*, 821 So. 2d 864, 868 (¶13) (Miss. Ct. App. 2002 (citations omitted). The challenger, the defendant herein, has to overcome the presumption" that a judge, sworn to administer impartial justice, is qualified and unbiased." *Id.* This presumption may only be overcome by evidence which produces a reasonable doubt about the validity of presumption. *Bredemeier v. Jackson*, 689 So.2d 770, 774 (Miss. 1997). The record herein clearly overcomes the presumption of impartiality. All one has to do is review the exchange between the trial judge and the defendant herein, which states as follows:

> Mr. Burghard: We have one other pending motion, Your Honor. We were asking for any potential conflicts from this Honorable

Court and also from the District Attorney's office. Mr. Slade has alleged that Your Honor has had some personal contact with him in the past in a prior position and –

The Court: Several prior positions.

Mr. Burghard: That doesn't surprise me. And that there was some animosity involved in the past between the two of you. And he questions his ability to have a fair trial in front of Your Honor. I just wanted to bring that to the Court's attention, that that is his claim.

The Court: I have known Mr. Slade a long time. Isn't that correct?

The Defendant: Correct.

The Court: I have represented you and prosecuted you.

The Witness: Didn't you tell me that time that if it was left up to you, you'd throw me away? Didn't you tell me that?

The Court: When was that?

The Defendant: I can't remember years and dates, Mr. Helfrich, but you told me that one time.

The Court: If I said anything - -

The Witness: No, there wasn't no ifs, Judge. You said it.

The Court: No, wait a minute. Animosity, has there ever been animosity between us?

The Defendant: As far as me and you, no sir.

The Court: Okay.

The Defendant: No, sir, that hadn't been that.

The Court: Okay, Let me –

The Defendant: But you did tell me one time, you said, "Thomas Slade, if it was left up to me, I would throw you away."

The Court: No.

The Defendant: Judge, how are you going to judge me, when you told me that?

The Court: Let me see if I can refresh your memory. I think what was probably said was the last time - - and I don't know how many times I represented you or how many times I prosecuted you. Okay?

I think what was probably said was the last time you got whatever deal it was, and I don't even know what that deal was, that you told me, you, this is it. You ain't coming back. And I probably said, well, I hope not, and if you do, you should be a man about it and stand up and take the max.

The Defendant: No, that ain't the way it went.

The Court: Okay, How did it go?

The Defendant: You told me, you said – I can't remember word for word, but I know you told m, you said, If it was left up to me, I would throw you away.

And I don't know why everybody's so mad with me. I told you for years, I told Glenn White for years, I told all of you I'm a junkie, get me some help. There ain't none of you, not one of you ever give any help for my drug problem. I'm a cocaine addict.

Mr. Burghard: All right. That's enough. I don't want you to get into any more about that. If you've got a statement to communicate with the judge, you need to stick to that.

The Court: That's the extent of my - -

Mr. Burghard: He has asked me to ask you, and I'll make an oral motion for recusal at his request, and so because he has asked, I think it's incumbent upon me to do that, and Your Honor in your wisdom can make the decision about that.

This discussion commenced at T. Pg. 31, L. 27-29 going through T. Pg. 34, L. 1-11]. It is clear by the Court's admonition that "and I probably said well, I hope not, and if you do, you should be a man about it and stand up and take the max. [T. Pg. 33, L. 24-27]. It is obvious from the statement by the Court that he was predisposed to a maximum sentence for the defendant and had contemplated a maximum sentence prior to hearing any testimony of facts whatsoever raising doubts about his impartiality. "A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." *King v. State*, 821 So.2d 864, 868 (¶13) (Miss. Ct. App. 2002) (citations omitted). Clearly, the judge's own statement is sufficient to overcome the statement of impartiality as set out in

Bredemeier v. Jackson, 689 So.2d 770, 774 (Miss. 1997). For this reason the trial judge should have recused himself based upon prior involvements with the defendant and prior dispositions as to Mr. Slade's guilt or innocence in sentencing.

F. CONCLUSION:

On the basis of the facts and law as herein above set out, this Court should render and order a recusal of the trial judge, order a change of venue and remand this matter back to the Circuit Court of Forrest County for a new trial.

Respectfully submitted, this the 20 day of October, 2008.

THOMAS LAVIRL SLADE

BY: _____

JOHN R. McNEAL, JR., Appellant's Attorney

CERTIFICATE OF SERVICE

I, John R. McNeal, Jr., do hereby certify that I have this day caused to be delivered by United Postal Service, first class prepaid postage or facsimile/electronic transmission and/or by hand-delivery a true and correct copy of the above and foregoing Brief of Appellant as follows:

Honorable Robert Helfrich
Forrest County Circuit Court Judge
Post Office Box 309
Hattiesburg, Mississippi 39403

Honorable Jim Hood
Attorney General for State of Mississippi
450 High Street
Jackson, Mississippi 39202

This the 20 day of October, 2008.

JOHN R. McNEAL, JR.