IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-00114-COA

JAMES ROBERT DELKER — APPELLANT

VERSUS — NO. 2008-KA-00114-COA

STATE OF MISSISSIPPI — APPELLEE

(ORAL ARGUMENT REQUESTED)

APPELLANT'S REPLY BRIEF

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APPEAL FROM THE
CIRCUIT COURT OF
LAUDERDALE COUNTY, MISSISSIPPI
CRIMINAL ACTION NO. 586-06

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-00114-COA

JAMES ROBERT DELKER — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATION OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the court may evaluate possible disqualification or recusal.

1. Robert H. Compton, Attorney for Appellant, James Robert Delker
2. John G. Compton, Attorney for Appellant, James Robert Delker
3. State of Mississippi, through the office of the State Attorney General, Jim Hood
4. James Robert Delker
5. Robert W. Bailey, Circuit Court Judge at the trial level
6. Larry E. Roberts, Judge with the Mississippi Court of Appeals, a prior sentencing judge who previously revoked the Appellant's probation
7. E. J. "Bilbo" Mitchell, III, Tenth Circuit Court District Attorney
8. Dan Angero, Tenth Circuit Court Assistant District Attorney
9. Lisa J. Howell, Tenth Circuit Court Assistant District Attorney

This the 17th day of December, 2008.

Robert H. Compton

ROBERT H. COMPTON

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APPELLANT'S STATEMENT REQUESTING ORAL ARGUMENT

This appeal arises from a conviction for a felony DUI (two or more prior offenses), being the result of an attempted extra-territorial investigatory stop made by an on-duty police officer to issue a warning for a non-indictable speeding offense which was not even a crime, but only an alleged violation of a local ordinance or order or resolution. The State of Mississippi failed to produce any proof of the existence of a validly passed local speeding ordinance or order or resolution that would authorize a private person to make a warrantless arrest, or for that matter, any proof that the alleged local speeding ordinance or order or resolution even constituted a crime. Delker's undersigned attorneys have been unable to find any recorded cases from either the Mississippi supreme Court or the Court of Appeals which address the authority for an on-duty uniformed police officer to make an out-of-jurisdiction "investigatory stop" for a non-indictable offense, and therefore suggest that such issue is a question of first impression for this Court.

The trial Court below applied the erroneous legal standard for an investigatory stop *within an officer's territorial jurisdiction* – i.e., "a reasonable suspicion, grounded in specific and articulable facts, ..." relying on Wilson v. State, 935 So.2d 945, 951 (Miss. 2006) for authority,[1] instead of the proper legal standard for an extra-territorial arrest – i.e., probable cause to believe that an *indictable offense* was actually committed in the police officer's presence. §99-3-7 of the Mississippi Code, 1972, Annotated.

Delker submits that oral argument before the appellate Court would be appropriate for a proper application of the law to the undisputed facts, and to a proper understanding of the various substantial and fundamental constitutional issues arising from: (1) the State's unreasonable search

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[1]C.P. 73, R.Exc. 31; and See Tab F of Delker's original BRIEF OF THE APPELLANT.

and seizure stemming from the police officer's unlawful use of his color of office to initiate an extra-territorial investigative stop for an alleged speeding offense in violation of a *non-indictable local ordinance or order or resolution*, not constituting a crime; (2) the trial Court's denial of Delker's MOTION TO SUPPRESS seeking to exclude evidence unlawfully and improperly obtained under color of office; (3) the trial Court's denial of Delker's MOTION TO DISMISS OR DEMURRER TO INDICTMENT for its failure to identify the *predicate indictable offense* on which the jurisdiction for the initial warrantless extra-territorial arrest was based; (4) the trial Court's denial of Delker's MOTION IN LIMINE offering to stipulate to the fact that he had been previously convicted of two or more prior DUI offenses; (5) the trial Court's refusal to allow full cross-examination of Langston as the arresting officer regarding his fellow officer's administration of the standardized field sobriety tests; (6) the trial Court's granting of the State's ore tenus MOTION IN LIMINE to prevent Delker from presenting his theory of the case – that the initial traffic stop was the product of an illegal arrest as no indictable speeding violation had taken place; (7) the trial Court's failure to assure fairness at all stages of the judicial proceedings by the refusal of the trial judge to recuse himself from hearing post-trial motions after clear prejudice had been shown through the trial judge's cussing of Delker's trial attorney, and through the showing of a conflict of interest with the trial judge; (8) the violation of Delker's state and federal constitutional due process rights to introduce *Brady* exculpatory evidence during the hearing on the post-trial motions that there were in fact no local ordinances or orders or resolutions making it a crime to drive faster than the posted speed limit of 35 miles per hour on Old Country Club Road; (9) the violation of Delker's state and federal constitutional due process rights by failing to prove beyond a reasonable doubt that Delker had committed some type of indictable offense that would have justified Langston's initial extra-territorial pursuit; and, (10) the violation of Delker's state and federal constitutional due process

rights by failing to prove beyond a reasonable doubt that Delker was driving under the influence of alcohol when Officer Williams' administration of the walk-and-turn (WAT) and one-legged-stand (OLS) portions of the National Highway Traffic Safety Administration's standardized field sobriety tests only revealed one clue on each of such tests instead of the minimum requirement of two clues as to each.

I. THE STATE DOES NOT CONTEST DELKER'S ASSERTION THAT THE ALLEGED SPEEDING VIOLATION ON OLD COUNTRY CLUB ROAD WAS NOT AN "INDICTABLE OFFENSE."

The State fails to address the validity of the 35 miles per hour posted speed limit sign on Old Country Club Road. Delker raised these issues in Part IV, A., iii.) of his BRIEF OF APPELLANT, at pages 16 through 22. The State simply claims that "the legality of speed limits in the State of Mississippi is not at issue." (BRIEF OF APPELLEE, p. 10, lines 1 and 2). Delker would assert that the legality of the speed limit on Old Country Club Road (a county road) is in fact the paramount issue in this case.

The unrefuted proof now before this Appellate Court is that Langston initiated an extraterritorial investigative stop for the purpose of issuing a warning to a driver for allegedly operating his vehicle at a speed greater than the posted 35 miles per hour speed limit sign. The very existence of such a posted speed limit sign is dependent for its validity upon the passing of a local ordinance or order or resolution, after the governing authority had first conducted traffic studies and an engineering report. See §§63-3-511, and 63-3-515 of the Mississippi Code, 1972, Annotated. The violation of a local ordinance or order or resolution is not an indictable offense that would justify a warrantless arrest under §99-3-7 of the Mississippi Code, 1972, Annotated. See Delker's BRIEF OF APPELLANT, at page 10, citing Letow v. United States Fidelity & Guaranty Co., 120 Miss. 763, 83 So. 81, 82 (Miss. 1919); City of Hattiesburg v. Beverly, 123 Miss. 759, 86 So. 590, 592 (Miss. 1920), (warrantless arrest upheld when the conduct violated both a State statute *and* an ordinance); and, See City of Houston v. Tri-Lakes Limited, 681 So.2d 104 (Miss. S.Ct. 1996). See also Pulliam v. City of Horn Lake, 32 F.3d 565, 1994 WL 442316[2] (The word "indictable" in this section means

[2]This is an unpublished opinion. The Fifth Circuit's Rule 47.5.3 provides that unpublished opinions issued before January 1, 1996, are precedent. The Pulliam decision

such offenses as a grand jury may indict for, and does not include municipal ordinances).

Delker established during the hearing on his MOTION TO SUPPRESS a *prima facie* case of a warrantless arrest occurring outside Langston's territorial jurisdiction. Once a defendant establishes a *prima facie* case of illegal arrest, the burden is upon the State to prove a legal arrest. When the State fails to meet such burden, the evidence obtained as a result of such arrest has been held to be inadmissible. Butler v. State, 212 So.2d 577 (Miss. 1968); and, Clay v. State, 184 So.2d 403 (Miss. 1966). The record clearly shows that the State failed to produce a local ordinance at either the hearing on Delker's MOTION TO SUPPRESS, or during the jury trial, which would show the authority to arrest without a warrant an individual for violation of a local ordinance, if at all, by an extra-territorial police officer or private person. Neither the Circuit Court below nor this Appellate Court may take judicial notice of a municipal ordinance. See McDaniel v. City of Grenada, 252 Miss. 16, 172 So.2d 223, 224 (1965), and, City of Pascagoula v. Rogers, 183 Miss. 323, 184 So. 433, 434 (Miss. 1938).

There was an absence of proof that an indictable offense of speeding was committed in Langston's presence at the time he initiated his emergency lights. The trial Court ruled in its ORDER DENYING MOTION TO SUPPRESS that Langston was initiating a traffic stop for a speeding offense. The Mississippi Supreme Court has said that it remains committed to the rule that an arrest begins when the pursuit to make the arrest begins. Pollard v. State, 233 So.2d 792, 793 (Miss. 1970), citing Ford v. City of Jackson, 153 Miss. 616, 121 So. 278 (Miss. 1929). The trial Court below specifically held that, "Unless Chief Langston had probable cause to arrest the defendant when he began his pursuit from the parking lot of the apartment complex, the arrest would be illegal, and

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was rendered on July 25, 1994.

evidence obtained thereby would not be admissible in evidence." (C.P. 72; R.Exc. 30). The trial Court further held that, "Chief Langston was of the opinion that the small red vehicle driven by the defendant was traveling at a 'high rate of speed.' Thus, he was of the opinion that a misdemeanor crime had been committed in his presence. Under these circumstances, a private person could have arrested the defendant without a warrant." See §99-3-7, MCA. (C.P. 74; R.Exc. 32). However, the trial Court never addressed the issue of whether or not operating a motor vehicle at 45 miles per hour within a posted 35 miles per hour speed zone in violation of a local ordinance was an indictable offense.

Due process requires that the State prove every element of a crime beyond a reasonable doubt. Jones v. State, 991 So.2d 629, 635 (Miss.App. 2008), citing Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Proof of one of the primary elements was lacking here, i.e., Langston's jurisdiction to make the initial extra-territorial warrantless arrest for an alleged speeding violation, which did not constitute an indictable offense. All the evidence regarding Delker's alleged driving under the influence was illegally obtained and should have been suppressed.

II. STATUS OF FACTUAL BACKGROUND AND COURSE OF PROCEEDINGS BELOW

(A) The State does not challenge Delker's facts as set forth within his BRIEF OF APPELLANT.

The State did not respond, nor did it controvert the *Statement of Facts* set forth within the BRIEF OF APPELLANT, JAMES ROBERT DELKER (APPELLANT'S BRIEF, pp. 4-7), and the same should be accepted as established facts by this Court.[3] When facts on appeal are not in dispute,

[3]The Mississippi Rules of Appellate Procedure 28(b) *Brief of the Appellee*, provides: "The brief of the Appellee shall conform to the requirements of Rule 28(a) except that a statement of the issues or of the case need not be made unless the Appellee is dissatisfied with the statement of the Appellant." Here, the State did not respond to the

the interpretation placed on them by the trial Court becomes a question of law which is not conclusive on the Appellate Court. Questions of law must be reviewed *de novo*, and the decision of the trial Court is subject to reversal for erroneous interpretations or applications of the law. Pannell v. Guess, 671 So.2d 1310, 1313 (Miss. 1996); Bank of Mississippi v. Hollingsworth, 609 So.2d 422, 424 (Miss. 1992); and, Harrison County v. City of Gulfport, 557 So.2d 780, 784 (Miss. 1990). For the reasons set forth in Delker's BRIEF OF APPELLANT as well as his REPLY BRIEF herein, the decision of the Circuit Court of Lauderdale County, Mississippi should be reversed and rendered due to its erroneous interpretations and/or applications of the law to the uncontroverted facts now before this Court.

(B) Delker's response to the State's statement of facts, course of proceedings, and disposition below.

Delker disputes the following statements made by the State:

(1) The State alleges: "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.' (BRIEF FOR THE APPELLEE, p. 2, lines 5-6). Langston never testified that he was "trained to estimate the speeds of a vehicle because patrol cars in Marion are not equipped with radar." To the contrary, it was Langston's testimony that he had been trained to estimate the speeds of a vehicle through the use of radar when he first began his training through Mississippi's Law Enforcement Academy. (T. 26, lines 5-6; R.Exc. 113). His training at the Academy began approximately fourteen years earlier (T. 114, lines 9-24; R.Exc. 136), and he did not begin his employment with the Town of Marion until July of 1997. (T. 6, lines 23-27; R.Exc. 93). The Town of Marion does not have a sufficient

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statement of facts set forth by the Appellant/delker in his principal BRIEF, and therefore the State is deemed to be satisfied with such statement of facts as presented.

population for State authorization to run radar. (T. 113, line 14 through 114, line 8; R.Exc. 135). See §63-3-519 of the Mississippi Code, 1972, Annotated.[4]

(2) The State asserts that "In his estimation Chief Langston testified that he thought the car was traveling around 45 miles per hour. (BRIEF OF APPELLEE, p. 2, lines 6-7). Langston actually testified that he was trained at the Law enforcement Academy to estimate the speed of vehicles through the use of radar to within three miles per hour either over or under the actual speed (T. 112, lines 17-26; R.Exc. 134); that his testimony had never been accepted by any court as an expert for estimating the speeds of vehicles without the use of radar, or alternatively, actually pacing the subject vehicle with the speedometer of his patrol car (T. 26, lines 9-11; R.Exc. 113); and, that his estimate of the speed of Delker's vehicle was simply a judgment call. (T. 133, lines 5-7; R.Exc. 146).

(3) The State next asserts that Langston "testified that at no point did he have any intention of making an arrest, but he did call the Lauderdale Sheriff's office." (BRIEF OF APPELLEE, p. 2, lines 10-110. While his initial intent was to only issue a warning to advise the driver to slow down (T. 10, lines 23 through 11, line 3; R.Exc. 97), Langston's reasoning changed when the driver failed to yield to his emergency lights. Langston testified that he radioed the Lauderdale county Sheriff's dispatch office for assistance because a chase had begun. (R.121, lines 6-9; R.Exc. 141).

(4) The State alleges that after the driver stopped, Langston approached the vehicle and asked the driver why he didn't stop; and, the driver "responded with *slightly slurred speech* that he knew he was going to jail and he didn't want to leave his car on the side of the road." (BRIEF OF APPELLEE, p. 2, lines 17-180. The record is actually unclear as to when the driver first exhibited to Langston that his "speech was a little slurred to me." (T. 123, line 5; R.Exc. 143) (i.e., whether

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[4]§63-3-519 requires that a town must have a population of at least 2,000 in order to be authorized to use radar equipment.

it was first displayed while the driver was still in the car, or after he exited the vehicle). The actual transcript reveals the following:

> Ms. Howell, Q. All right. Went up to the vehicle; what happens next?
>
> Langston, A. Went up to the vehicle. I asked him why he didn't stop for me. He advised me that he was going to jail, he wanted to go home. I smelled intoxicating beverage coming from within the vehicle, I had the subject get out of the vehicle to talk to me. I noticed he had problems getting out of the vehicle. He got out while I was standing there talking with him. I smelled intoxicating beverage coming from his person, and talking with him, he had problems standing. He was kind of swaying, holding, kind of supporting himself on his vehicle at that time. I handcuffed him because I knew his drivers license was suspended from prior. I handcuffed him and placed him in the back seat of my vehicle.
>
> Q. You mentioned that he had problems standing, right, supporting himself?
>
> A. Yes, ma'am.
>
> Q. What about when he is speaking to you? How was his speech?
>
> A. His speech was a little slurred to me. (T. 122, line 16 through 123, line 5; R.Exc. 142).

(5) The State next asserts that Langston turned Delker over to Karey Williams, a Lauderdale County Officer, and that Williams then performed the field sobriety tests and actually took custody of Delker. (BRIEF OF APPELLEE, p. 3). In fact, just the opposite was true. Langston had already handcuffed Delker before backup arrived. (T. 122, lines 25-28; R.Exc. 142), and Officer Williams then took custody of Delker from Langston, and transported him to the Lauderdale county Jail for administration of the field sobriety tests. (T. 161, line 23 through 163, line 1; R.Exc. 156-58).

(6) The State claims that "the trial Court found that Chief Langston was outside his jurisdiction, not in hot pursuit, and he made a citizen's arrest." (BRIEF OF APPELLEE, p. 5). However, the State failed to identify the predicate offense found by the trial Court to be the basis for Langston's alleged citizen's arrest. The September 14, 2007 ORDER actually found as follows:

> "On December 24, 2005, Chief langston was on duty in his capacity as the Chief of Policy with the Marion Police Department. He was in a clearly marked patrol vehicle. He also was in uniform, wearing a badge and a gun. He was also within the municipal boundaries of the Town of Marion, Mississippi.
>
> As he was driving out of the Valley View Apartment complex, he observed a small red vehicle traveling eastbound on Old Country Club Road. The Chief testified during the hearing on the present MOTION TO SUPPRESS that the speed of the small red vehicle caught his attention. He testified that the vehicle was speeding. Although the patrol vehicle which Chief Langston was driving did not contain radar, he is a law enforcement officer, who had previously worked as a deputy with the Lauderdale County Sheriff's Department. He also stated in his Statement of Facts that when he first observed the small red vehicle it was traveling at a high rate of speed. He also stated that it appeared that the vehicle was traveling over the posted 35 miles per hour speed limit.
>
> Once the Chief observed the Defendant traveling at what appeared to be a high rate of speed, Langston had 'a reasonable suspicion, grounded in specific and articulable facts' that the Defendant was committing a misdemeanor in his presence. Wilson v. State, 935 So.2d 945, 951 (Miss. 2006)." (C.P. 73, R.Exc. 31, line 24 through 32, line 9).

The trial Court's clear finding was that Langston was initiating a traffic stop for an alleged speeding violation. However, all of the authority cited by the trial Court had as an underlying current the fact that each investigative stop occurred within the arresting officer's jurisdictional limits, and not a single one of such cases relied upon by the trial Court, or now within the State's BRIEF OF APPELLEE, involved an extra-territorial investigatory stop by an on-duty uniformed police officer under the guise of a private person. Further, the trial Court failed to apply the proper standard for an arrest by a private person, i.e., probable cause to believe that an *indictable offense* was actually committed in the police officer's presence. §99-3-7 of the Mississippi Code, 1972, Annotated. See trial Court's September 14, 2007 ORDER denying MOTION TO SUPPRESS. (C.P. 73; R.Exc. 31).

(7) The State claims that Langston first turned on his emergency lights as a private citizen when he began his pursuit of the driver. (BRIEF OF APPELLEE, p. 6, lines 16-17). The transcript actually reveals the following testimony:

> Robert Compton, Q. Now, Ben, when you first turned on your emergency lights there at Valley Ridge Apartments on Old Country Club – when you turned – first turned them on, were you going to arrest that driver or issue him a warning?
>
> A. Issue him a warning.
>
> Q. In all those actions that you were taking at that time, you thought you were doing them as Chief of Police; is that right?
>
> A. Yes, sir.
>
> (T. 142, line 29 through 143, line 4; R.Exc. 150-b).

Also, the hearing on Delker's MOTION TO SUPPRESS was conducted on September 6, 2007. Langston testified during such hearing that he did not become aware of the fact that Old Country Club Road was located outside the Town of Marion until approximately two to three weeks prior to such hearing. (T. 16, lines 10-18; R.Exc. 103). A private citizen has no authority to operate blue lights. See §63-7-20 of the Mississippi Code, 1972, Annotated.

(8) The State attempts to change the facts, and rewrite the history of the events that occurred on Christmas Eve, 2005, by urging the Court to find that "Delker stopped of his own accord (BRIEF OF APPELLEE, p. 7, line 11), at which time he engaged "in voluntary conversation" with Langston. (BRIEF OF APPELLEE, p. 7, line 4). We guess the logical conclusion from the State's irrational argument would be that Langston was "merely initiating a voluntary conversation with Delker when the pursuit began," and that he radioed for backup assistance to help with the "discussion." Further, we wonder how many drivers would respond to a private citizen's *chase* when asked the question "why he did not stop"..... with "he knew he was going to jail and he wanted to get his car home." (T. 121, lines 21-25; R.Exc. 141). Very few, if any, individuals being chased by a *private citizen* would assume that they were going to jail because of the pursuit. Additionally, the State attempts to inflame the sensibilities of this Court of Appeals by asserting that "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." Here, Delker was indicted for the charge of felony driving under the influence. (C.P. 2-7; R.Exc. 6-11). He was not arrested, nor was he ever charged for drunk driving, or public drunk. Further, of the two witnesses that testified before the trial Court, neither Chief Langston nor Deputy Williams expressed an opinion, through their testimony or otherwise, that Delker was drunk. (Langston's testimony appears at T. 6-26 and 110-147; R.Exc. 93-113 and 133-150b. Similarly, Officer Williams' testimony appears at T. 148-199; R.Exc. 151-183.)

(9) Finally, regarding the issue of *stare decisis*, the State wrongfully alleges that Delker is "asking this reviewing Court to reject or overturn about 86 years of case law." (See BRIEF OF APPELLEE, at page 11, line 4). Nothing could be further from the truth, and we wonder whose brief the State is referring to. Delker's argument appears at Part IV, B, on pages 28 through 30 of his BRIEF OF APPELLANT. Cited to this Court of Appeals were the following cases:

> Tucker v. State, 90 So. 845, 128 Miss. 211 (1922); State v. Patterson, 130 Miss. 680, 95 So. 96 (Miss. 1923); Fletcher v. State, 159 Miss. 41, 131 So. 251 (Miss. 1930); Pettis v. State, 209 Miss. 726, 48 So.2d 355 (1950); Acuna v. State, 54 So.2d 256 (Miss. 1951); Smith v. State, 240 Miss. 738, 128 So.2d 857 (1961); Lacaze v. State, 254 Miss. 523, 183 So.2d 176 (Miss. 1966); and, Butler v. State, 212 So.2d 573, (Miss. 1968).

Each of the aforesaid cases dealt with the State's exclusionary rule, and held that evidence obtained as a result of an illegal search and/or seizure were inadmissible. Delker suggests that their rulings are applicable to the facts of his case, and that this Appellate Court should continue to follow such precedent.

III. WITHOUT FILING A NOTICE OF CROSS-APPEAL, THE STATE NOW RAISES FOR THE FIRST TIME ON THIS APPEAL THAT, CONTRARY TO THE TRIAL COURT'S FINDING OF A CITIZEN'S ARREST FOR A NON-INDICTABLE SPEEDING VIOLATION, THE ARREST WAS ACTUALLY THE PRODUCT OF A VOLUNTARY CONVERSATION.

The State argues that the warrantless arrest in this case was the product of a voluntary conversation between two private persons that took place in Delker's driveway. The State's conclusion is dependent on this Appellate Court ignoring the following predicate events:

(1) The State filed no cross-appeal alleging that the trial Court made an erroneous finding of fact when it ruled that Langston's arrest of Delker was the result of a speeding violation that occurred on Old Country Club Road. The Mississippi Rules of Appellate Procedure apply equally to all parties on an appeal, including the State of Mississippi. Mississippi Rules of Appellate Procedure No. 4(a) requires that a party desiring to cross-appeal must file a NOTICE OF APPEAL with the Clerk of the Mississippi Supreme Court. Appellate Courts will not reverse a trial Court's ruling without first giving it an opportunity to address the issue. The trial Court below correctly ruled as a factual matter that Langston's reason or purpose for his initial arrest of Delker was for the speeding violation on Old Country Club Road – and not the result of an alleged voluntary conversation. Thus the State's invitation being sent without pre-paid postage should be denied, and marked "return to sender." The State's failure to cross-appeal this issue should be deemed an abandonment and/or waiver of such issue. See Shavers v. Shavers, 982 So.2d 397, 401 (Miss. 2008). (A party abandons any issues he may have wanted to raise in his appeal if he fails to identify the issues in his brief pursuant to Mississippi Rules of Appellate Procedure 28(a)(3)). See also Winston v. State, 754 So.2d 1154, 1157 (Miss. 2000); and Lester v. State, 744 So.2d 757, 758 (Miss. 1999) (When the State fails to cross-appeal and/or make an assignment of error, the Supreme Court will not consider the same).

(2) The trial Court found, and the Mississippi Supreme Court has ruled that "this court is committed to the ruling that an arrest begins when the pursuit to make the arrest begins." Singletary v. State, 318 So.2d 873 (Miss. 1975); Pollard v. State, 233 So.2d 792 (Miss.1970); Smith v. State,

240 Miss. 738, 743-44, 128 So.2d 857, 859 (Miss. 1961); and, Ford v. City of Jackson, 153 Miss. 616, 121 So. 278 (1929). The State's argument that Delker's arrest was the product of a voluntary conversation would require that this Appellate Court either overrule or ignore Singletary, Pollard, Smith, and Ford.

(3) Speeding in violation of a local ordinance is not an indictable offense. A private person in the State of Mississippi has no authority to make a warrantless arrest for violation of a non-indictable speeding ordinance, or order, or resolution, and therefore Langston in his position as Police Chief had no authority to make an extra-territorial arrest for such a violation. See §99-3-7 of the Mississippi Code, 1972, Annotated.

(4) Langston testified that the initial stop was to issue the driver a warning for the alleged speeding violation. Such an arrest would qualify as an *investigatory stop* under Singletary, had the event occurred within the Marion town limits. But with the event actually occurring outside the town limits, Langston had no authority as a private person under §99-3-7 of the Mississippi Code, 1972, Annotated to conduct an investigatory stop in the absence of an indictable offense. The State seems to tacitly concede this point. ("It is clear that a citizen's arrest does not allow for anything similar to a stop and frisk *Terry* stop.") (BRIEF FOR THE APPELLEE, p. 7, lines 2 and 3).

(5) Langston testified that all of his actions on the night of the incident were taken in his official capacity as Chief of Police, because he did not know that Old Country Club Road was in fact located outside Marion's town limits until approximately two weeks prior to the hearing on the MOTION TO SUPPRESS.

(6) Even a brief stop may be considered a search and seizure.

(7) A citizen has the right to resist an unlawful arrest. If in making his escape, a driver commits additional traffic offenses, the same may not be considered as the basis for an arrest that

began initially illegally.

(8) Langston used all of the accouterments of his "color of office" (i.e., marked patrol car, siren, uniform, badge, and gun) when he ordered Delker to exit the vehicle. Accordingly, the evidence observed by Langston of Delker while exiting the vehicle, or afterwards, should have been properly excluded (i.e., smell of alcohol coming from the person, slightly slurred speech, difficulty exiting the vehicle, refusal to submit to the breath tests, and the alleged results of the standardized field sobriety tests).

(9) An arrest that began illegally, does not make the subsequent evidence admissible. Testimony and evidence illegally obtained by an officer acting under color of his office is charged with the same infirmity as that illegally obtained by virtue of office. See State v. Messer, 142 Miss. 882, 108 So. 145 (Miss. 1926); and see Wong Sun v. United States, 371 U.S. 471, 485-86, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963) (holding that a search and seizure which is illegal at its inception is not rendered legal by "what brings it to light").

IV. DELKER DENIES THE STATE'S ASSERTION THAT THE RECORD DOES NOT ADEQUATELY SUPPORT HIS POSITION ON THE ISSUES RAISED IN THIS APPEAL.

In support thereof, Delker would direct this Court's attention to the following erroneous decisions and constitutional violations before the trial Court:

(1) Delker submitted a written and oral MOTION TO SUPPRESS evidence that was heard on September 6, 2007. The trial Court entered its ORDER denying the MOTION on September 14, 2007, finding that Langston had the authority to arrest Delker for the speeding offense that took place on Old Country Club Road. However, the ORDER failed to address whether a violation of a local speeding ordinance was an indictable offense under §99-3-7 of the Mississippi Code, 1972, Annotated. Case law before the Mississippi Supreme Court, as well as the Fifth Circuit Court of

Appeals, has held that the violation of a local ordinance is not an indictable offense that would justify a warrantless arrest. See Letow v. United States Fidelity & Guaranty Co., 120 Miss. 763, 83 So. 81, 82 (Miss. 1919); City of Hattiesburg v. Beverly, 123 Miss. 759, 86 So. 590, 592 (Miss. 1920), (warrantless arrest upheld when the conduct violated both a State statute *and* an ordinance); and, See City of Houston v. Tri-Lakes Limited, 681 So.2d 104 (Miss. S.Ct. 1996). See also Pulliam v. City of Horn Lake, 32 F.3d 565, 1994 WL 442316 [5] (The word "indictable" in this section means such offenses as a grand jury may indict for, and does not include municipal ordinances). (C.P. 64; R.Exc. 22).

(2) Delker presented his MOTION IN LIMINE to suppress evidence of the breath test refusal. The trial Court denied the MOTION. (C.P. 18; T. 32-36; R.Exc. 119-23). §63-11-5 of the Mississippi Code, 1972, Annotated identifies those individuals authorized by the State of Mississippi to request and/or administer breath tests. A private person is conspicuously absent from the list of individuals so authorized. See Attorney General's Opinion to George N. Fox, 1980 WL 28175, (Miss.A.G.), January 30, 1980. Delker's MOTION was reiterated by a contemporaneous objection prior to the testimony of Officer Williams. (T. 167, line 23 through 170, line 10; R.Exc. 162). Officer Williams' testimony and observations regarding the breath test refusal were all tainted by the initial unlawful, and therefore illegal, arrest by Langston, and should have been excluded. See Butler v. State, 212 So.2d 577 (Miss. 1968), and Clay v. State, 184 So.2d 403 (Miss. 1966) (when a defendant establishes a *prima facie* case of an arrest without a warrant, the burden shifts to the State to prove a legal arrest; and when the State fails to meet such burden, the evidence obtained as a result of such

[5]This is an unpublished opinion. The Fifth Circuit's Rule 47.5.3 provides that unpublished opinions issued before January 1, 1996, are precedent. The Pulliam decision was rendered on July 25, 1994.

arrest has been held to be inadmissible).

(3) Delker submitted to the trial Court orally and in writing a MOTION IN LIMINE to exclude proof of his previous DUI convictions. And, unlike the defendant in Rigby v. State, 826 So.2d 694 (Miss. 2002), Delker offered to stipulate to his previous DUI convictions. But here, the State, through the office of the District Attorney, objected to the proposed stipulation, and the Court refused to accept the same. (T. 36-37; R.Exc. 123-24). This Appellate Court should take judicial notice of the fact that the trial judge below, as well as the office of the District Attorney, were the same ones participating in Rigby. Further, Delker specifically cited the trial Court to the Mississippi Supreme Court's decision in Rigby, all to no avail. The Assistant District Attorney below failed to articulate a reason that would justify denying Delker's offer to stipulate, especially one that would illustrate why the probative value was not substantially outweighed by the potential prejudice. See Williams v. State, 191 So.2d 593, 606 (Miss. 2008).

(4) Delker presented his MOTION TO DISMISS OR DEMURRER to indictment on September 17, 2007. Delker's objection was based on the fact that the indictment failed to identify the predicate indictable offense that would form the basis of the alleged citizen's arrest. The trial Court denied the MOTION. (T. 37-43; R.Exc. 124-30). Delker argued that a valid defense to a citizen's arrest is that the arrest is unlawful, and cited to the trial Court Jones v. State, 798 So.2d 1241 (Miss. 2001) (It is error to refuse a jury instruction on the defense of an unlawful arrest, when there is a factual basis to support such instruction. Such issue is a question of fact for the jury.), all to no avail. Delker's trial counsel raised the issues that: the indictment made no reference to a citizen's arrest for which the State is relying to support the validity of the initial arrest; a lack of notice as to the factual basis for, as well as the identity of the indictable offense on which the initial citizen's arrest is based; and, that if the indictable offense is a speeding violation, then the specifics

as to the posted speed limit alleged to have been violated, as well as the speed for which Delker was alleged to have been traveling. (T. 37-38; R.Exc. 124-25). Those issues appear in the trial transcript as follows:

> "The final motion that we would ask to be called up would be the Defendant's MOTION TO DISMISS OR DEMURRER TO THE INDICTMENT. The indictment makes no reference to a citizen's arrest for which we are now advised eleven days prior to the hearing or the final trial, on September 6, that our MOTION TO SUPPRESS, that the State is now relying on the citizen's arrest as to support the validity of the initial arrest of Mr. Delker on this particular case. For a citizen's arrest to be valid, there has to be an indictable offense that is committed in the – in this case, citizen's presence. They have given us no notice what that indictable offense is. Based on the Court's ruling, the Court seems to indicate that he thinks the State is traveling under a speeding violation. If so, what's the posted speed limit and what's the speed to which they are alleging that Mr. Delker violated, because that's a jurisdictional issue? And whether or not it's a valid citizen's arrest is not a question of law for the court, that the court can make rulings on probable cause and suppression hearings all it wants to; that there is a question of fact for a jury to determine whether or not there was an indictable offense that occurred, in this case, in Mr. Langston's presence. If that indictable offense is speeding, then we are entitled to know what the posted speed limit is that they allege is the valid speed, and for what speed they are alleging that Mr. Delker was traveling. The indictment is silent on that. We are entitled to know the charges so that we can prepare an adequate defense." (T. 37-38; R.Exc. 121-24).

(5) During the *voir dire* examination of the jury, two of the potential jurors expressed concern regarding the validity of Langston's citizen's arrest of Delker for a speeding violation when there was no radar used, or pacing of the subject vehicle. The trial Court struck juror number 39 for cause on its own motion, while the State exercised its first peremptory challenge against juror number 4. (T. 63, line 17 through 64, line 11; T. 87, line 28 through 88, line 4; T. 73, line 1 through 74, line 21). The State then presented its ore tenus motion to prohibit the defendant from presenting his theory of the case, being that Delker's search and seizure was the product of an unlawful and therefore illegal citizen's arrest. The trial Court sustained the motion and ruled that Delker would be prevented from, in any way, alluding to or making a claim of a defense of an illegal arrest. (T. 95,

line 1 through 96, line 21; R.Exc. 131-32). Part of the exchange between Delker's trial counsel and the court appears as follows:

By Mr. Robert Compton: Your honor, for purposes of the record, we maintain our position that no indictable offense occurred in the presence of Officer Ben Langston; therefore, he lacked jurisdiction and this court lacks jurisdiction.

By the Court: Okay. I think the record and the orders, that is preserved. You agree?

By Mr. Robert Compton: Yes, sir.

By the Court: Okay. Well, I'm going to sustain – grant the Motion in Limine, because to me that's not an issue. I may be right or wrong, but that's how I am ruling. But your right to that defense for the record to appeal on is preserved. (T. 96; R.Exc. 132).

On the second day of trial, and prior to the first witness being called for the State, the defendant made an oral motion for the court to reconsider its prior ruling on the State's MOTION IN LIMINE to prevent the defendant's theory of the case. That MOTION was likewise denied by the trial Court. (T. 105, line 13 through 106, line 26; R.Exc. 132-b through 132-c).

(6) The State attempted to elicit an expert opinion from Officer Langston regarding the alleged speed of Delker's vehicle. A contemporaneous objection was made by Delker's trial counsel to such opinion because Langston did not use radar, did not pace Delker's vehicle with his own speedometer, and that he was not properly qualified under *Daubert* to express an expert opinion on the speed of such vehicle. The trial Court overruled the objection and allowed the testimony. (T. 111, line 12 through 118, line 70; R.Exc. 133-40). The State argues that Ray v. State, 798 So.2d 579 (Miss.App. 2001) is authority for the proposition that officers may express expert opinions as to the speed of a vehicle. (See BRIEF OF APPELLEE at page 13, lines 5-19). Nothing within Ray v. State reveals the basis for those officers' opinion as to the speed of the subject vehicle, i.e., whether the opinion was based upon the use of radar, or pacing of the vehicle with the officers' speedometer, or otherwise. Accordingly, Ray v. State is of little benefit to this Appellate Court's analysis.

(7) On cross examination, Delker's trial counsel asked Langston if he knew, before the speed limit sign was posted on Old Country Club Road, whether the governmental authority did any type of traffic study or engineering studies to determine what the speed ought to be at that location. The State's objection was sustained by the court as not being relevant under Mississippi Rules of Evidence No. 402. (T. 133, lines 18 through 25; R.Exc. 146). A local ordinance or order or resolution cannot be validly passed reducing the speed limit on a county roadway below the State's uniform speed limit of 55 miles per hour, without first conducting traffic and engineering studies. See §§63-3-511 and 63-3-515 of the Mississippi Code, 1972, Annotated. The defendant has a due process right to present his theory of the case – here being that the search and seizure of Delker were unlawful and therefore illegal as the product of an unlawful citizen's arrest. The right to fully cross examine witnesses against the defendant cannot be violated.

(8) Although Langston was qualified to administer standardized field sobriety tests, Delker was denied the opportunity to cross examine Langston regarding the administration of the standardized field sobriety tests in general, as well as his in-court observations from the video-taped standardized field sobriety tests administered by Williams. (T. 142, lines 1-25; R.Exc. 150-b).

(9) At the conclusion of the State's case, Delker moved for a directed verdict of "not guilty," and requested the court to again reconsider the propriety of its prior ruling as to the issue of the validity of the citizen's arrest when no indictable offense of speeding had been introduced or established by the State. The trial Court again denied the motion. (T. 200, line 4 through 204, line 2; R.Exc. 184-88).

(10) The State objected, and the trial Court refused Delker's requested jury instruction "D-13." The aforesaid instruction was the only one presenting his theory of the case. The requested instruction provided:

> The Court instructs the Jury that a person has a fundamental right to resist an unlawful arrest. The Court further instructs the Jury that it is unlawful for a law enforcement officer to arrest a person outside the jurisdictional limits of his authority for an indictable offense that was not committed in his presence except where a warrant has been issued.
>
> The Court further instructs the Jury that Marion Town Police Chief, Ben Langston, although on duty, and in uniform driving a marked patrol car, was acting as a private citizen at the time he first attempted his initial traffic stop of the Defendant for an alleged speeding violation. If you should find that the State of Mississippi has failed to prove beyond a reasonable doubt that the Defendant, James Robert Delker, was speeding at the time Chief Langston initiated his traffic stop, then you must find the Defendant not guilty of any and all charges.
>
> The Court further instructs the Jury that the fact that the person the officer is pursuing violates a traffic law or laws in attempting to make his escape does not thereby authorize the arrest that began unlawfully, because an officer who attempts an unlawful citizens arrest cannot later arrest a citizen for resisting such officer's trespass. (C.P. 108; T. 212; R.Exc. 188-b).

See Part IV, D., iii at pages 37-38 within Delker's BRIEF OF APPELLANT for legal authority in support of this argument.

(11) Delker timely filed a number of post-trial motions, all of which were contained within a single pleading. (C.P. 137; R.Exc. 53). Included within such pleading were the following motions: MOTION FOR RECUSAL OF TRIAL JUDGE FOR PURPOSES OF HEARING POST-TRIAL MOTIONS (C.P. 137; R.Exc. 53); MOTION TO SUPPLEMENT THE RECORD FOR THE SUPPRESSION HEARING CONDUCTED ON SEPTEMBER 6, 2007 (C.P. 140; R.Exc. 56); MOTION FOR SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW (C.P. 140; R.Exc. 56-58); MOTION TO RECONSIDER THIS COURT'S RULING WITHIN ITS SEPTEMBER 14, 2007 ORDER DENYING MOTION TO SUPPRESS (C.P. 142; R.Exc. 58-64); MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (J.N.O.V.), AND/OR ALTERNATIVELY, MOTION FOR A NEW TRIAL (C.P. 149-153; R.Exc. 65-69). The various post-trial motions were heard on November 30, 2007 and appear in the record at pages 247 through

271. (See R.Exc. 190-210). The MOTION FOR RECUSAL was denied by the trial Court, and appears in the record at pages 248 through 260. (R.Exc. 191-203). However, to the credit of the trial judge, he stated on the record "What you said in your MOTION is exactly accurate. I apologize for saying that, but it just hit me wrong." (T. 249, lines 19-20; R.Exc. 192). Further, the trial judge allowed Delker's attorney to submit as an exhibit the exact cuss words as expressed in the MOTION, by way of Exhibit 1 to the hearing on the post-trial motions. (T. 250, lines 2-17; R.Exc. 193 and 211. See also Tab E to Delker's BRIEF OF APPELLANT). The transcript for the hearing on the MOTION TO SUPPLEMENT THE RECORD FOR THE COURT'S PRIOR HEARING ON SEPTEMBER 6, 2007 appears in the record at pages 260-263. (See R.Exc. 203-06). The trial Court sustained such MOTION and allowed Delker to substitute the record by introducing the October 15, 1982 decree from the Chancery Court of Lauderdale County, Mississippi extending the boundaries of the Town of Marion, as well as a certified copy of the map for the town boundaries from the same Chancery Court file. Delker's MOTION FOR SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW was summarily denied by the trial Court. (T. 263, lines 10-14; R.Exc. 206).

Delker's MOTION TO RECONSIDER THIS COURT'S RULING WITHIN ITS SEPTEMBER 14, 2007 ORDER DENYING MOTION TO SUPPRESS was summarily denied by the trial Court. (T. 263, lines 15-18; R.Exc. 206). Delker attempted through his post-trial motions to introduce *Brady* exculpatory evidence that allegedly driving a vehicle on Old Country Club Road within Lauderdale County, Mississippi at a speed of 45 miles per hour while within a posted speed zone of 35 miles per hour was not even a crime. Attached to Delker's post-trial motion was a certified copy of the January 10, 1975 RULES OF THE ROAD ORDINANCE which established the uniform speed limit on all roadways within Lauderdale County at 55 miles per hour. He also

attached to such motion certified copies of the March 15, 1993, and the October 7, 1996 ORDERS OF THE LAUDERDALE COUNTY BOARD OF SUPERVISORS which attempted without the required engineering and traffic studies to establish the uniform speed limit on all county roadways within Lauderdale County at 40 miles per hour. However, neither of such ORDERS made a violation of said 40 miles per hour speed limit zones a crime, nor did they amend the county's RULES OF THE ROAD ORDINANCE. (C.P. 160-243, 244-45, and 248-49; R.Exc. 75-81, 82-83, and 86-87). The trial Court denied the post-trial motions summarily; refused Delker the opportunity to call any witnesses, including members of the Board of Supervisors, the Board attorney, the County Engineer, and the Chancery Clerk; and, refused to allow Delker to introduce certified copies of the RULES OF THE ROAD ORDINANCE, as well as the 1993 and 1996 ORDERS of the Lauderdale County Board of Supervisors.

The fact that no local ordinance or order or resolution had been validly passed making it a crime to operate a motor vehicle faster than 35 miles per hour on Old Country Club Road would be exculpatory evidence. The State has a duty to voluntarily produce exculpatory evidence to the defendant pursuant to Rule 9.04A.6. of the Uniform Rules of Circuit and County Court Practice, as well as the U. S. Supreme Court's decision in *Brady*. Not only did the State fail to introduce any local ordinance or order or resolution making it a crime to operate a motor vehicle faster than 35 miles per hour on Old Country Club Road, it blocked Delker's efforts to introduce such matters at the hearing on the post-trial motions. (T. 265-70; R.Exc. 208-10). The trial Court's ruling denying Delker's MOTION TO SUPPLEMENT THE RECORD in such regard was erroneous and constitutionally invalid. Due process requires that this Court right that wrong.

Delker's oral motion to introduce the discovery packet received from the Office of the District Attorney was also denied by the trial Court. (T. 263, lines 19-29, and 264, lines 1-16; R.Exc.

206-07). Delker attempted to introduce the discovery packet for the purpose of showing that the State of Mississippi failed to disclose to him the speed for which he was alleged to have been traveling, as well as the applicable speed limit at the particular location. The record on Delker's motion for the court to reconsider its prior ruling appears at page 265, line 1 through 270, line 23; (R.Exc. 208-10). The aforesaid motion was similarly summarily denied by the trial Court, but Delker was allowed to proffer his proposed evidence and testimony. Delker's MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (J.N.O.V.), AND/OR ALTERNATIVELY, MOTION FOR A NEW TRIAL was also summarily denied. (T. 270, line 27 through 271, line 2). Further, Delker presented his MOTION FOR BOND PENDING APPEAL, which was also denied by the trial Court. (T. 271, line 3 through 276, line 20).

V. OH, DID WE MENTION THAT DELKER WAS NOT UNDER THE INFLUENCE?

The State failed to address the issue of Delker's sobriety that was raised by him in Part IV, E., ii of the BRIEF OF APPELLANT at pages 46 through 49. The State simply claims that the jury heard the evidence and came to a different conclusion. However, without calling any witnesses, but only subjecting Chief Langston and Deputy Williams to vigorous cross examination, it took the jury approximately two hours to reach its unanimous decision for what apparently the District Attorney's office must have thought was a slam dunk case. (T. 242).

Delker's state and federal constitutional due process rights were violated by the State's failure to prove beyond a reasonable doubt that Delker was driving under the influence of alcohol when Officer Williams administered the walk-and-turn (WAT) and one-legged-stand (OLS) portions of the National Highway Traffic Safety Administration's standardized field sobriety tests, which revealed only one clue on each of such tests instead of the minimum requirement of two clues as to each. (T. 177-93; R.Exc. 167-183). (See United States v. Horn, 185 F.Supp.2d 530, 535-38 (USDC

Md. 2002) for an analysis of the elements of the three standardized field sobriety tests).

VI. ADDRESSING THE ELEPHANT IN THE ROOM – DELKER'S PAST.

Regardless of whether you put a lampshade on its head and an area rug over its back, the elephant is still in the room. The indictment, as amended, charged Delker with felony driving under the influence (two or more prior offenses), and specifically identified the dates for the prior offenses as being July 13, 2004, February 6, 2005, and December 8, 2005, respectively.[6] Certified copies of the abstracts for each of the three prior convictions were introduced into evidence during the trial, as composite Exhibit 7 so that the jury had before it for consideration the fact that Delker had previously been convicted of at least three prior DUI offenses.

The Supreme Court's cautionary instruction in Rigby, should be equally applicable to this Court of Appeals. There, the Mississippi Supreme Court stated:

> Despite this finding, certain procedural safeguards are warranted if a defendant offers to stipulate to previous DUI convictions. The trial court should accept such stipulations, and they should be submitted to the jury with a proper limiting instruction. The instruction should explain to the jury that the prior DUI convictions should be considered for the sole purpose of determining whether the defendant is guilty of felony DUI and that such evidence should not be considered in determining whether the defendant acted in conformity with such convictions in the presently charged offense. See United States v. Munoz, 150 F.3d 401 (5th Cir. 1998). A balance is therefore struck between the prosecution's burden to prove the elements of a crime and the evidentiary rules which safeguard a defendant's right to a fair trial. Rule 403 of the Mississippi Rules of Evidence instructs courts to weigh the probative value of evidence against its prejudicial effect. Rule 404 ensures that a defendant is tried for the offense he allegedly committed, not for the type of person that he may be. Therefore, the impact of the evidence of prior bad acts must be lightened as much as possible. Thus if a defendant stipulates to the prior DUI convictions, a limiting

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[6]The original indictment only charged Delker with two prior offenses. The amendment was authorized by the February 15, 2007 ORDER of the court to include a third offense that occurred approximately two weeks prior to the event that is the subject of the indictment now before this Court of Appeals. However, the conviction for such third offense did not occur until March 2, 2006, or approximately 2½ months after Langston's Christmas Eve arrest of Delker. (C.P. 33; R.Exc. 17-18).

instruction accomplishes this goal. Rigby v. State, 826 So.2d 694, 702-03 (Miss. 2002).

Thus, the issue now before this Court is not about Delker's past, but instead centers around the events occurring on Christmas Eve, December 24, 2005, and only on that occasion. What is important here is the rule of law. Do we simply give lip service to Article 3, §23 of the Mississippi Constitution, and §99-3-7 of the Mississippi Code, 1972, Annotated? Or, does their efficacy in fact have real substance? If the rule of law is to be honored and upheld, then Delker's conviction should be reversed and rendered as the product of an illegal arrest, stemming from an extra-territorial warrantless investigatory stop for a non-indictable speeding violation, that did not even constitute a crime.

CONCLUSION

Delker accordingly renews his request that this Appellate Court reverse and render the guilty verdict entered by the Circuit Court of Lauderdale County below, dismissing the indictment and discharging all underlying offenses arising from the illegal arrest, and immediately releasing him from the custody of the Department of Corrections. Alternatively, Delker requests that he be given a new trial so that he can have the opportunity to submit to the jury, as the trier of fact, his theory of the case, being that: the arrest was illegal because no "indictable offense" of speeding took place in Chief Langston's presence.

RESPECTFULLY SUBMITTED,

JAMES ROBERT DELKER, APPELLANT

BY: Robert H. Compton

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CERTIFICATE OF SERVICE

I, Robert H. Compton, attorney for Appellant, James Robert Delker, certify that I have this date served a copy of this APPELLANT'S REPLY BRIEF by United States Mail, postage prepaid, on the following persons at the addresses as indicated:

Attorney for Appellee:
Hon. Jim Hood
Mississippi Attorney General
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Circuit Court Judge:
Hon. Robert W. Bailey
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Meridian, Mississippi 39302-1167

SO CERTIFIED on this the 17th day of December, 2008.

ROBERT H. COMPTON, Attorney for Appellant