

**IN THE SUPREME COURT OF MISSISSIPPI  
CAUSE NO. 2008-KA-00146-SCT**

**JOHN DEEDS**

**APPELLANT**

**V.**

**STATE OF MISSISSIPPI**

**APPELLEE**

**ON APPEAL FROM THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI**

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**BRIEF OF APPELLANT**

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**ORAL ARGUMENT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

- 1) John Deeds, Appellant;
- 2) State of Mississippi, Appellee;
- 3) Faye Bridges, Victim;
- 4) T. Swayze Alford, Esq., Holcomb Dunbar, P.A., Oxford, MS;

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- 5) Steven Jubera, Esq., Assistant District Attorney, Desoto County, Hernando, MS;
- 6) Hon. Robert P. Chamberlin, Circuit Court Judge, Seventeenth Judicial District, State of Mississippi.

Respectfully submitted,

  
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## **I. STATEMENT OF THE ISSUES**

1. Whether the trial court erred by failing to dismiss the charges against the Defendant on the grounds of double jeopardy.
  2. Whether the trial court erred by admitting into evidence, the test results of the blood taken from the Defendant at the Regional Medical Center in Memphis, TN (The Med) after the subject automobile accident.
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## **II. STATEMENT OF THE CASE**

### **A. Nature of the Case and Course of Proceedings**

John Deeds was convicted in the Circuit Court of Desoto County, Mississippi, of D.U.I. resulting in permanent injury under Mississippi Code Annotated Section 63-11-30(5) (Rev.2004). After a bench trial, the Honorable Robert P. Chamberlain sentenced Deeds to serve a term of fifteen (15) years in the custody of the Mississippi Department of Corrections to be served as seven (7) years in custody followed by eight (8) years' post-release supervision. (Tr. Vol. 2, P. 172). Aggrieved by the trial court's ruling, Deeds now appeals.

### **B. Facts**

On November 6, 2004, Defendant John Deeds was involved in a motor vehicle accident with two other vehicles in Desoto County, Mississippi. (Tr. Vol. 1, P. 25). Patrolman Michael Gibbs of the Olive Branch Police Department was dispatched to the scene of the accident. (Id.) When Patrolman Gibbs first saw John Deeds at the accident scene Mr. Deeds was pinned behind the wheel of his vehicle and was unresponsive. (Tr. Vol. 3, P. 85). Mr. Deeds and the alleged victim in this case, Faye Bridges, were evacuated by helicopter from Olive Branch to the Med in Memphis, Tennessee. (Tr. Vol. 3, PP. 87-88). Patrolman Gibbs went to the Med in an attempt to obtain a blood sample from Mr. Deeds. (Tr. Vol. 3, P. 88). The basis for Patrolman Gibbs' attempt to obtain a blood sample was an order from his lieutenant. (Tr. Vol. 3, P. 88).

The nurse at the Med informed Patrolman Gibbs that Mr. Deeds was semiconscious but he could not understand or respond to a request for consent to the blood test from Patrolman Gibbs. (Tr. Vol. 1, P. 27). Patrolman Gibbs obtained a blood sample from Mr. Deeds even though Mr. Deeds was unable to consent to the same. (Tr. Vol. 3, P. 88). Patrolman Gibbs did not secure a

warrant to obtain Mr. Deeds blood sample. (Tr. Vol. 1, P. 28). Patrolman Gibbs did not observe slurred speech by Mr. Deeds. (Tr. Vol. 3, P. 104). Patrolman Gibbs did not observe the smell of alcohol on Mr. Deeds' breath. (Tr. Vol. 3, P. 104).

Patrolman Gibbs testified that he witnessed the individual draw Mr. Deeds' blood for the sample. (Tr. Vol. 3, P. 86). However, Patrolman Gibbs could not identify this person by name, nor could he testify definitively that the individual was a nurse or other medically trained person. (Tr. Vol. 3, P. 100). Apparently, Patrolmen Gibbs was told that the attending nurse on duty was the one that was going to draw Mr. Deeds' blood sample. (Tr. Vol. 3, P. 100). Patrolman Gibbs did not know whether the individual obtained a veinal sample of Mr. Deeds blood or an arterial sample. (Tr. Vol. 1, P. 33). Further, Patrolman Gibbs did not know whether the individual swabbed the location where she obtained the sample with either an iodine swab or an alcohol swab. (Id.). Patrolman Gibbs testified that he hoped that the individual who drew Mr. Deeds' blood knew what she was doing. (Tr. Vol. 3, P. 38). Patrolman Gibbs was the only witness who testified for the State at Mr. Deeds' trial.

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There is no additional testimony or evidence in the record of this matter which indicates whether the individual who drew Mr. Deeds' blood sample was medically qualified to perform such a procedure. Further, there is no testimony or evidence in the record of this matter which indicates the specific procedure the individual used to draw Mr. Deeds' blood sample, and specifically, whether the individual swabbed the location where she obtained the blood sample with alcohol, which could contaminate the sample causing it to reflect a higher alcohol content.

Several days after the accident, Patrolman Gibbs served Mr. Deeds with an affidavit for D.U.I. first offense, no test available. Mr. Deeds made bond that was written to the Municipal Court

because the charged offense was a misdemeanor. (Tr. Vol. 1, P. 105).

On the trial date Mr. Deeds pled guilty to no proof of insurance. (Tr. Vol. 1, PP. 108-109). The prosecutor and defense counsel presented an agreed order to the judge dismissing the D.U.I. first offense charge. (Id.) The Order, the language of which the City Prosecutor approved, provided that the officer at the scene of the accident (Patrolman Gibbs) could not conduct field sobriety tests because of Mr. Deeds condition. (Tr. Vol. 1, P. 109) The Order further provided that the Defendant objected to the admissibility of the blood test pursuant to Miss. Code Ann. Section 63-11-7 and the City could not prove anything by extrinsic facts. (Id.) The order was entered on June 23, 2005. (Id.).

On August 19, 2005, the district attorney presented the facts of this case to a grand jury in DeSoto County, Mississippi. That grand jury handed down the indictment in the present case under Miss. Code Ann. Section 63-11-30(5). (Tr. Vol. 1, P. 10). Mr. Deeds was rearrested and posted bond in the Circuit Court of DeSoto County, Mississippi. (Tr. Vol. 1, PP. 11-12). Judge Robert P. Chamberlain conducted a bench trial and found Defendant John Deeds guilty of felony D.U.I. with injury and sentenced to him to serve a term of fifteen years in the Mississippi Department of Corrections. (Tr. Vol. 2, PP. 171-173).

### III. SUMMARY OF ARGUMENT

The trial court improperly denied the Defendant's motion to dismiss based upon double jeopardy. The dismissal order from municipal court, dismissing the lesser included offense, clearly indicates that the municipal court judge considered the merits of the case prior to the dismissal. Accordingly, jeopardy attached and when the trial court allowed the present matter to proceed to trial it violated the Defendant's rights against double jeopardy.

The trial court erred when it admitted the results of the test performed on the Defendant's blood. The blood was taken without the Defendant's consent, as he was in the hospital in an unresponsive state at the time the blood was drawn. Moreover, the police officer who instructed individuals at the hospital to draw the Defendant's blood failed to secure a warrant prior to taking the Defendant's blood sample. The State failed to prove that exigent circumstances existed in this situation which would justify the warrantless taking of the Defendant's blood sample. The State did not offer any facts to support a probable cause to believe that the Defendant was under the influence or had even consumed alcohol. Also, the State failed to identify or call as a witness the individual at the hospital who drew the Defendant's blood sample.

Accordingly, the taking of the Defendant's blood sample was a warrantless, unreasonable search in violation of the Fourth Amendment. Further, the State's failure to identify or call as a witness the individual who drew the Defendant's blood violated the Defendant's Sixth Amendment right to confront and cross examine any witness used against him. The State's conduct in this regard also violates Mississippi statutory law because the State failed to establish that the method which the individual used to draw the Defendant's blood was proper and appropriate to ensure that the sample was taken properly and was not contaminated. Additionally, the trial court erred by

admitting the results of the blood sample into evidence for use against the Defendant because, as is described in detail below, the State failed to lay a proper foundation for its admission into evidence. The trial court also erred by admitting the results of the blood sample because the State failed to establish a proper chain of custody of the blood sample.

#### IV. ARGUMENT

##### **A. Double Jeopardy**

The trial court denied the Defendant's motion to dismiss based on double jeopardy. (Tr. Vol. 3, P. 17). The trial judge found the case of *Winters v. State*, 797 So. 2d 307 (Miss.App. 2001), "to be directly on point." (Id.). The trial court also relied on "the repeated principle that in a bench trial jeopardy does not attach until a witness actually takes the stand," stating that "[t]here's been no proof that a witness was placed on the stand in this cause nor any proof that the dismissal in this cause was with prejudice." (Id.). The trial judge did, however, express concerns about the language in the dismissal order that stated that the city was unable to proceed for various factual reasons. (Id.). The trial judge reasoned that "certainly, further guidance from the Mississippi Supreme Court may be necessary on the issue." (Id.).

The trial judge erred when he denied the Defendant's motion to dismiss based upon double jeopardy. A dismissal is an adjudication, and double jeopardy attaches. Accordingly, the trial court should have granted the Defendant's motion to dismiss based upon double jeopardy. The case of *Jamison v. City of Carthage*, 864 So. 2d 1050 (Miss.App. 2004), is analogous to the present situation. In *Jamison*, the defendant was charged with D.U.I. second offense. *Jamison*, 864 So. 2d at 1051. The court bifurcated the case to first determine whether the Defendant was guilty of D.U.I. *Id.* The court then took up the issue of whether it was a second offense. *Id.* The trial court initially found that the State had met its burden of proof as to the D.U.I., but determined that the State failed to show that it was a second offense because the prior charge was set aside. *Id.* at 1052. The defendant then moved to dismiss the charge for D.U.I. second offense. *Id.* at 1051. The trial court granted the defendant's motion. *Jamison*, 864 So. 2d at

1051. The State then attempted to amend the charge to D.U.I. first offense. *Id.* The trial court refused to allow this amendment because the case was concluded and the State had already rested. *Id.* at 1053. On appeal, the Mississippi Court of Appeals upheld the trial court's ruling, finding that jeopardy attached when the trial court dismissed the case. *Id.* at 1054. The court of appeals stated that "[a]lthough the municipal judge could have dismissed only that part of the affidavit charging D.U.I. second and allowed the city to proceed on D.U.I. first, the municipal judge dismissed the entire D.U.I. charge against Jamison. When the judgment was entered, jeopardy attached." *Id.* at 1053. As in *Jamison*, in the present matter the municipal court dismissed the original charge of D.U.I. against the Defendant, and the municipal court entered a specific judgment to that effect which indicates that the court considered the merits of the charge against the Defendant before dismissing the same. Thus, pursuant to the *Jamison* opinion, jeopardy attached and the trial court should have dismissed the present charge against the Defendant.

The case of *Bennett v. State*, 528 So. 2d 815 (Miss. 1988) is also analogous to the present situation. ~~In *Bennett*, as in the present matter, the case involved an automobile accident with~~ injuries to another party. *Bennett*, 528 So. 2d at 816. The prosecution charged the defendant with misdemeanor D.U.I. in justice court. *Id.* The justice court judge called the case on the appointed trial date and Bennett failed to appear. *Id.* The justice court tried and convicted Bennett in absentia. The court entered an order reflecting Bennett's conviction. *Id.* Approximately one month later authorities arrested Bennett and charged him with felony D.U.I. *Bennett*, 528 So. 2d at 816. Bennett was tried and convicted of felony D.U.I. in the Circuit Court of Lauderdale County, Mississippi. *Id.* Bennett appealed his conviction based on the grounds of double jeopardy. *Id.*

In reversing Bennett's conviction, the Mississippi Supreme Court stated that since Bennett posted bond in justice court (which he ultimately forfeited because he failed to appear on his trial date), and a judgment of guilty was entered into the docket of the justice court, this operated as a conviction of misdemeanor D.U.I. and therefore jeopardy attached. *Id.* at 819. In support of its holding, the Mississippi Supreme Court also reasoned that an adjudication on a lesser included offense bars subsequent trial on a greater offense. *Id.* (quoting *Illinois v. Vitale*, 447 U.S. 410, 421, 100 S. Ct. 2260, 2267, 65 L. Ed. 2d 228, 238 (1980)).

In the present matter, as in *Bennett*, the Defendant posted bond on the charge of misdemeanor D.U.I., the difference being that the Defendant herein appeared on the date of his trial for misdemeanor D.U.I. and pleaded guilty to the charge of no proof of insurance. The municipal court dismissed the charge of misdemeanor D.U.I. at the prosecution's request, essentially for lack of evidence, which the dismissal order reflects. The dismissal order operates as an adjudication. This Court only has to look at the language of the dismissal order to see that ~~the municipal court clearly considered the merits of the prosecution's case against the Defendant.~~

After the municipal court entered the order finding the Defendant guilty of no proof of insurance and dismissing the charge of misdemeanor D.U.I., the Defendant paid all fines and court costs and his bond was extinguished and cleared.

The *Bennett* decision is also controlling in this case insofar as the situation that has occurred in the present matter is one which the *Bennett* holding clearly prohibits. The Defendant in the present matter was tried and convicted on a greater offense (felony D.U.I.) after the municipal court entered an adjudication on a lesser included offense (misdemeanor D.U.I.). According to the Supreme Court's ruling in *Bennett*, what has occurred in the present case

amounts to double jeopardy and requires that this Court reverse the Defendant's conviction of felony D.U.I. and render its decision that the Defendant is not guilty of felony D.U.I.

**B. Inadmissability of blood alcohol test results.**

1. The Defendant's blood alcohol test results are inadmissible because the State failed establish the first link in the chain of custody when it failed to identify the individual who took the Defendant's blood sample, failed to establish that the individual who took the Defendant's blood sample was qualified to perform the procedure and failed to establish the specific procedure the individual utilized to take the Defendant's blood sample.

Officer Gibbs testified that he witnessed the individual draw the Defendant's blood. However, on cross examination Officer Gibbs was unable to identify the individual's name, or whether the individual was a nurse or other medical professional who was qualified to draw the Defendant's blood. Further, Officer Gibbs could not answer any specific questions regarding the procedure the individual used to draw the Defendant's blood. Officer Gibbs' testimony is the only evidence the State offered to lay the foundation for who took the Defendant's blood sample and how the sample was taken.

The lack of admissible evidence in the record to establish the identity of who took the Defendant's blood sample, that individual's qualifications, if any, and how the blood sample was taken renders the results of the sample inadmissible and requires that this Court reverse and render the Defendant's conviction for D.U.I.

The State's inability to identify the name and qualifications of the individual who took the Defendant's blood sample or the specific procedure which the individual used to draw the

Defendant's blood for the test results in the State's complete failure to lay the proper foundation and establish the first link in the chain of custody. Thus, the State has failed to establish the admissibility of the Defendant's blood test results and they are therefore inadmissible for use against him at trial.

In Mississippi, the test to determine whether there has been a break in the chain of custody is whether there is evidence of tampering. *Jackson v. Daley*, 739 So. 2d 1031, 1035 (Miss. 1999). The test for continuous possession of evidence by the State, or the chain of custody, is "whether or not there is any indication or reasonable inference of probable tampering with the evidence or substitution of the evidence." *Gibson v. State*, 503 So. 2d 230, 234 (Miss. 1987) (quoting *Grady v. State*, 274 So. 2d 141, 143 (Miss. 1973)). The defendant bears the burden of producing evidence of a broken chain of custody. *Anderson v. State*, 904 So. 2d 973, 979 (Miss. 2004). In the present matter the State's actions, or failures, deprived the Defendant of the opportunity to meet the burden to establish a broken chain of custody because the State failed to identify the individual who took his blood sample.

The State took the Defendant's blood sample pursuant to Miss. Code Ann. Section 63-11-7, which provides in part that "[b]lood may only be withdrawn under the provisions of Section 63-11-9." MISS. CODE ANN. § 63-11-7 (1972). Section 63-11-9 provides "[u]nder Section 63-11-7, any **qualified person** acting at the request of a law enforcement officer may withdraw blood for the purpose of determining the alcoholic content therein." MISS. CODE ANN. § 63-11-9 (1996) (emphasis added). Unfortunately Section 63-11-9 fails to define "qualified person." However, the very fact that the statute uses such language shows the legislature's intent that the individual drawing a blood sample pursuant to this section be qualified to do so. The Mississippi Supreme Court's holdings are consistent with this theory. *See, Meeks v. State*, 800 So. 2d 1281, 1282 (Miss.Ct.App.

2001)(holding chemical analysis of person's breath, blood or urine is deemed valid only when performed by person certified to do so); *McIlwain v. State*, 700 So. 2d 586, 590 (Miss. 1997) (finding that analysis of scientific evidence is deemed valid only when performed according to approved methods).

The evidence in the record in this matter lacks any reference to the qualifications of the individual who took the Defendant's blood sample. Officer Gibbs ultimately testified that although he did not know for sure whether the individual who took the Defendant's blood sample was a nurse, he was told that the attending nurse was supposed to take the Defendant's blood sample. There is no additional evidence in the record of this matter that establishes the identity of the individual who took the Defendant's blood sample, the individual's qualifications to take the Defendant's blood sample, or the procedure the individual used to take the Defendant's blood sample.<sup>1</sup>

The Mississippi Supreme Court has stated when discussing the taking and testing of blood samples that "scientific evidence has become an increasingly important part in the search for the truth in which our courts are engaged daily. Safeguards to ensure the integrity of scientific evidence are generally required and strictly enforced." *Gibson v. State*, 428 So. 2d 1046, 1047 (Miss. 1984). It's axiomatic then that the legislature included the requirement in Section 63-11-9 that only a qualified individual may take a blood sample as an effort to ensure the integrity of the blood sample from the very beginning of the chain of custody.

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<sup>1</sup> The Mississippi Court of Appeals noted that a certificate on the vial containing the blood sample which indicates who took the sample sufficiently identifies the individual who took the sample. See, *Jones v. State*, 761 So. 2d 907, 911 (Miss. Ct. App. 2000)(finding blood sample test results admissible where samples recorded as being in vials with purple tops arrived at the crime lab with grey tops where vials were labeled with certificate). However, in this case the vial containing the Defendant had no such certificate.

In the present matter, the State failed to establish the chain of custody from the time the unidentified individual took the blood sample from the Defendant until it was tested. Further, the State failed to lay a proper foundation for the admission of the test results into evidence at the trial of this matter because the State failed to establish that the individual who took the Defendant's blood sample was qualified to do so and the State failed to establish that the individual who took the Defendant's blood sample utilized the proper method to ensure that the sample was not contaminated the integrity of the sample was not otherwise compromised. In *Johnston v. State*, 567 So. 2d 237 (Miss. 1990), the Supreme Court stated that intoxilyzer results may be admitted into evidence only if a proper foundation is laid. *Johnston v. State*, 567 So. 2d at 238. According to the *Johnston* Court, a chemical analysis of a person's breath, blood or urine is deemed valid only when performed according to approved methods, performed by a person certified to do so, and performed on a machine certified to be accurate. *Id.* The *Johnston* Court reasoned that these safeguards ensure a more accurate result in the gathering of scientific evidence and are strictly enforced. *Id.* The *Johnston* Court further stated that where one of these safeguards is deficient the State bears the burden of showing that the deficiency did not affect the accuracy of the result. *Id.*

The Defendant concedes that the Court in *Johnston* was analyzing a case involving an intoxilyzer and a breath test. However, this Court should apply a test at least as stringent in the present matter where the case involves the testing of the Defendant's blood. The record is clear that in the present matter the State has utterly failed to establish that the gathering of the Defendant's blood sample was done according to approved methods and by an individual qualified to do so.

The standard of review in Mississippi for either the admission or exclusion of evidence is abuse of discretion. *Harrison v. McMillan*, 828 So. 2d 756, 765(¶ 27) (Miss. 2002); *See also Miss.*

*Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003); *Beech v. Leaf River Forest Prods., Inc.*, 691 So. 2d 446, 448 (Miss. 1997). The “discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence.” *Beech*, 691 So. 2d at 448 (citing *Johnston v. State*, 567 So. 2d 237, 238 (Miss.1990)). See also, Miss. R. Evid. 103(a). Mississippi Rule of Evidence 901 requires authentication and identification as a condition precedent to admissibility. *Buel v. Sims* 798 So. 2d 425, 428 (Miss. 2001). Generally these serve to simply establish that a matter is what it is claimed to be. *McIlwain v. State*, 700 So. 2d 586, 590 (Miss. 1997). However, in the illustrations listed for M.R.E. 901, a process or a system may be authenticated or identified when it is shown that the process or system is used to produce a result and that it produces an accurate result. *McIlwain*, 700 So. 2d at 590 (citing Miss. Rules of Evid. 901 (b)(9)). The Supreme Court has stated that to establish the connection necessary . . . the proponent must produce evidence sufficient to support a finding that the matter in question is what its proponent claims. *Robinson v. State*, 733 So. 2d 333,335 (Miss.Ct.App. 1998)(quoting M.R.E. 901(a)). The Court further stated that the proponent may accomplish this by establishing a reliable chain of custody of the substance from the time of its acquisition by the State. *Id.* The Court noted that “the fundamental inquiry under Rule 901(a) is whether sufficient evidence exists to enable a reasonable jury to find beyond a reasonable doubt that the evidence is what it is claimed to be.” *Id.* It is important to note the significance of the applicability of Rule 901 in the present situation. The State has simply failed to produce any record evidence to satisfy the requirements of Rule 901. Indeed, by failing to identify the person who took the Defendant’s blood, his or her qualifications, and the method utilized to take the blood (and thereby establish the initial link in the custodial chain), the State has created reasonable doubt as to whether the blood at issue even belongs to the Defendant. This deficiency

alone is enough to require reversal of the Defendant's conviction.

While there is no Mississippi law directly on point as to this issue, it is surely an abuse of discretion to admit the results of a blood alcohol test where the State failed to establish the identity or qualifications of the individual who collected the blood sample or the method which the individual utilized to collect the blood sample.<sup>2</sup> As previously stated, the evidence in the record of this case fails to identify the person who took the Defendant's blood sample or the method the person utilized to collect the blood. At a minimum, speculation as to whether the individual who took the Defendant's blood was qualified or whether he or she utilized the proper procedure raises reasonable doubt.

Accordingly, the trial judge abused his discretion in admitting the blood alcohol test results. This error substantially prejudiced the Defendant's right to a fair trial. In light of the foregoing, this Court should reverse and render the verdict of the circuit court thereby vacating the Defendant's conviction.

2. The Defendant's blood alcohol test results are inadmissible because the State failed to identify or call as a witness the individual who took his blood sample and thereby deprived the Defendant of his Sixth Amendment right to confront a witness used against him.

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<sup>2</sup> Other jurisdictions have held blood alcohol tests inadmissible where the State failed to establish the identity of the persons who collected and labeled the blood sample. *See, State v. Cribb*, 310 S.C. 518, 426 S.E. 2d 306 (1992)(finding abuse of discretion where judge admitted results of blood alcohol test where identity of those who sealed, labeled and transported sample is not established); *Raino v. Goodyear Tire and Rubber Co.*, 309 S.C. 255, 422 S.E. 2d 98 (1992)(holding that identity of persons who have handled evidence must be established); *State v. Williams*, 301 S.C. 369, 392 S.E. 2d 181 (1990)(holding inadmissible results of blood alcohol test where State failed to identify those who sealed, labeled and transported sample).

When the State offers evidence from a witness against the Defendant, the Defendant has a Constitutional right to confront and cross examine that witness. This right is based upon the operation of the "Confrontation Clause" of the Sixth Amendment to the United States Constitution and Article 3, Section 23 of the Mississippi Constitution. This clause provides in pertinent part "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. 6.

Most cases similar to the present case deal with the right to confrontation in the context of introduction of the certificate of the person who took the accused's blood and whether the certificate constitutes testimony for the purposes of the Confrontation Clause. However, in the present case the record is devoid of a certificate or submission form which purports to show the qualifications, if any, that the person who took the Defendant's blood possessed. Indeed, in the present case, the State failed to provide the Defendant with the identity of the individual who took his blood sample, let alone, that person's qualifications, if any, to perform such a procedure. Moreover, the State failed to introduce into evidence the procedure utilized to take the Defendant's blood sample, and specifically, what safeguards, if any, were utilized to ensure the integrity of the sample.

In the present matter, despite the fact that the State utilized the Defendant's blood sample and test results from the Defendant's blood sample as the primary evidence to secure the Defendant's conviction of the charged offense, the State denied the Defendant his Sixth Amendment right to confront and cross examine the individual who took his blood sample. Accordingly, this Court should render the test results inadmissible and reverse the Defendant's conviction.

**C. The taking of Defendant's blood sample constituted an unlawful search and seizure in violation of his Fourth Amendment rights.**

Officer Gibbs testified at the trial of this matter that he did not speak to the Defendant at the scene of the accident or at the hospital after the accident. (Tr. Vol. 3 P. 104). Further, Officer Gibbs testified that there was no slurred speech from the Defendant nor was there the smell of alcohol on his breath. (Id.). Officer Gibbs testified that when he initially approached the Defendant's automobile he smelled a strong odor of alcohol coming from the vehicle. (Tr. Vol. 3, P. 85). Officer Gibbs also observed a half full bottle of whiskey in the passenger side of the Defendant's vehicle. (Tr. Vol. 3, P. 87). Officer Gibbs testified that the bottle of whiskey was not broken and that he did not believe that it was leaking. (Tr. Vol. 3, P. 102). However, Officer Gibbs did not testify that he handled the whiskey bottle to know whether it was broken or leaking. Moreover, Officer Gibbs was unable to observe the Defendant's conduct after the accident and thus had no additional information at his disposal to develop probable cause that the Defendant was driving under the influence at the time of the accident.

The State failed to offer any additional evidence that establishes that Officer Gibbs had ~~probable cause to request that an individual at the hospital take the Defendant's blood for testing for~~ the presence of alcohol. Specifically, Officer Gibbs offered no additional evidence other than the above referenced testimony to establish that the Defendant had consumed alcohol and was driving while intoxicated at the time of the accident. Thus, at the time the individual at the hospital took the Defendant's blood, Officer Gibbs had not observed any specific signs that the Defendant had consumed alcohol, did not have a search warrant to take the Defendant's blood, had not charged the Defendant with a crime and had not placed the Defendant under arrest. Further, the Defendant had clearly not consented to the taking of his blood because he was unconscious and unable to give a valid consent to such a search.

In Mississippi, the Fourth Amendment prohibition against unreasonable search and seizure applies when an intrusion into the body, such as a blood test, is undertaken without a warrant, absent an emergency situation. *Cole v. State*, 493 So. 2d 1333, 1336 (Miss. 1986) (quoting *Schmerber v. California*, 384 U.S. 757, 777-78, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)). As the Mississippi Supreme Court has stated, “[a] search made without a warrant and not incident to a lawful arrest is not illegal *per se*, but if the fruits of the search are to withstand the exclusionary rule, the search must have been predicated on probable cause.” *Hailes v. State*, 268 So. 2d 345, 346 (Miss. 1972). The Supreme Court has also reasoned that “[t]he degree of intrusion necessary in the taking of a blood sample is sufficient to require the presence of probable cause.” *Cole v. State*, 493 So. 2d 1333, 1336 (Miss. 1986) (quoting *Schmerber v. California*, 384 U.S. 757, 777-78, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)).

In the present case, the Defendant’s blood was taken without a warrant and at a time when the Defendant was not under arrest. Moreover, the Defendant was incapable of giving his consent at the time his blood sample was taken. Further, as the record clearly reflects, Officer Gibbs lacked probable cause to subject the Defendant to a warrantless blood test. There was not a present emergency situation in this case that would have justified the Defendant’s blood test. The Mississippi Supreme Court has held in a similar case that the fact that the Defendant was being transported to the hospital did not create a situation of “hot pursuit” and did not qualify as exigent circumstances which would justify circumventing the requirements of the Fourth Amendment as Officer Gibbs did in this matter. *See, Shaw v. State*, 938 So. 2d 853, 858 (Miss. Ct. App. 2006) (finding no emergency situation nor exigent circumstances justifying warrantless blood test where Defendant was transported to hospital after automobile accident).

In cases involving warrantless searches the United States Supreme Court has stated, “omission of such authorization bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the search . . . and bypassing this neutral predetermination of the scope of the search leaves individuals secure from Fourth Amendment violations only in the discretion of the police. *Katz v. U.S.*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Beck v. Sate of Ohio*, 379 U.S. 89, 96, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964).

Officer Gibbs admitted in his testimony at trial that the only evidence he observed at the scene of the accident that the Defendant was operating his vehicle while intoxicated was the presence of a half empty whiskey bottle and the smell of alcohol coming from the vehicle. Officer Gibbs could not testify that he either spoke with the Defendant and observed slurred speech or smelled alcohol on the Defendant’s breath. Indeed, there is no specific evidence in the record which could lead Office Gibbs to conclude that the Defendant had consumed any alcohol on the date of the subject accident. However, Officer Gibbs followed the Defendant to the hospital, absent an emergency situation or exigent circumstances, and without a valid search warrant, and instructed individuals at the hospital to take a blood sample from the Defendant. As the record reflects the individuals took the blood sample from the Defendant as Office Gibbs instructed without the Defendant’s consent.

The record evidence as well as the applicable law in this matter clearly reveals that the taking of the Defendant’s blood sample in this matter was without a warrant, not incident to a lawful arrest, and was without probable cause. Thus, this Court should reverse the trial court’s admission of the results of the test performed on the Defendant’s blood sample as they are fruits of an illegal search

and subject to the exclusionary rule.

### Conclusion

The record evidence in this matter and the arguments espoused above show that the trial erred when it refused to dismiss the charges against the Defendant because of double jeopardy. The trial court erred further when it refused to exclude from evidence the results of the Defendant's improperly obtained blood sample. The Defendant's blood sample and the test results obtained therefrom are inadmissible because the State failed to lay the proper foundation for their admission into evidence and therefore failed to establish the first link in the chain of custody. The Defendant's blood sample and the test results are also inadmissible because they were obtained pursuant to an illegal search and seizure performed in violation of the Defendant's Fourth Amendment rights. Finally, the Defendant's blood sample and the test results are inadmissible because the State failed to identify the individual who took the Defendant's blood sample. This failure operated to deprive the Defendant of his Sixth Amendment right to confront any witness used against him.

Accordingly, for the reasons listed above, this Court should reverse and render the trial court's decision, thereby vacating the Defendant's conviction in this matter.

This the 5 day of December, 2008.

**JOHN DEEDS**

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**IN THE SUPREME COURT OF MISSISSIPPI  
CAUSE NO. 2008-KA-00146-SCT**

**JOHN DEEDS**

**APPELLANT**

**V.**

**STATE OF MISSISSIPPI**

**APPELLEE**

**ADDENDUM**



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West's Annotated Mississippi Code Currentness  
Title 63. Motor Vehicles and Traffic Regulations  
Chapter 11. Implied Consent Law

**§ 63-11-7. Unconscious or dead accident victims**

If any person be unconscious or dead as a result of an accident, or unconscious at the time of arrest or apprehension or when the test is to be administered, or is otherwise in a condition rendering him incapable of refusal, such person shall be subjected to a blood test for the purpose of determining the alcoholic content of his blood as provided in this chapter, if the arresting officer has reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways, public roads and streets of this state while under the influence of intoxicating liquor. The results of such test or tests, however, shall not be used in evidence against such person in any court or before any regulatory body without the consent of the person so tested, or, if deceased, such person's legal representative. However, refusal of release of evidence so obtained by such officer or agency will in criminal actions against such person result in the suspension of his or her driver's license for a period of ninety days as provided in this chapter for conscious and capable persons who have refused to submit to such test. Blood may only be withdrawn under the provisions of section 63-11-9. It is the intent of this chapter that blood samples taken under this section shall be used exclusively for statistical evaluation of accident causes with safeguards established to protect the identity of such victims and to extend the rights of privileged communications to those engaged in taking, handling and evaluating such statistical evidence.

CREDIT(S)


Laws 1971, Ch. 515, § 10, eff. April 1, 1972.

HISTORICAL AND STATUTORY NOTES

Derivation:

Code 1942, § 8175-10.

LIBRARY REFERENCES

Automobiles  414 to 422.  
WESTLAW Topic No. 48A.  
C.J.S. Motor Vehicles § 633(4).

RESEARCH REFERENCES

Encyclopedias

Encyclopedia of Mississippi Law § 13:77, Privileged Information--Statutory Privileges.

## Treatises and Practice Aids

Mississippi Civil Procedure § 7:9, Legislative Privilege.

## UNITED STATES SUPREME COURT

Refusal to take blood-alcohol test, admissibility into evidence, see South Dakota v. Neville, 1983, 103 S.Ct. 916, 459 U.S. 553, 74 L.Ed.2d 748, on remand 346 N.W.2d 425.

## JUDICIAL DECISIONS

- In general 1
- Admissibility of test results 4
- Authority to order test 6
- Competency of technician 3
- Public records act exemption 8
- Standing to object 7
- Validity of consent 2
- Waiver by contract 5

1. In general

Exclusion provision of statute pertaining to blood tests for dead or unconscious accident victims is repealed. Whitehurst v. State (Miss. 1989) 540 So.2d 1319. Automobiles ↪420

2. Validity of consent

Evidence established that defendant charged with manslaughter by culpable negligence had intelligently given his consent for blood to be removed from his body for blood-alcohol test, notwithstanding his contention that he was suffering from concussion, was not conscious and was irrational when consent was given. Cutchens v. State (Miss. 1975) 310 So.2d 273, certiorari denied 96 S.Ct. 799, 423 U.S. 1061, 46 L.Ed.2d 652. Searches And Seizures ↪198

3. Competency of technician


Limitation in code section 63-11-9 as to persons who may take blood samples refers to samples taken under section 63-11-7, and results of blood test taken when defendant was conscious and not in condition rendering him capable of refusal was admissible, in prosecution for manslaughter by culpable negligence, notwithstanding contention that blood was not taken by person authorized to do so by statute. Cutchens v. State (Miss. 1975) 310 So.2d 273, certiorari denied 96 S.Ct. 799, 423 U.S. 1061, 46 L.Ed.2d 652. Automobiles ↪423



4. Admissibility of test results


Results of blood alcohol test performed on defendant while semiconscious in hospital were admissible, even though statutory exclusion provided that results were inadmissible without defendant's consent, and defendant had not consented; statutory exclusion yielded to rules of evidence, under which admission of results was permissible. Whitehurst v. State (Miss. 1989) 540 So.2d 1319. Automobiles ↪420


Results of blood alcohol test performed on driver after he died from collision were admissible in action to recover

for his injuries; statutes prohibiting admission of such evidence in civil case, without consent of person tested or person's legal representative, if person is deceased, are intended to protect interest of that person, and results of test in instant action were submitted in defense of driver. Clark v. City of Pascagoula (Miss. 1987) 507 So.2d 70.


Evidence  150

Results of blood alcohol test administered to allegedly negligent motorist as part of medical treatment administered subsequent to collision giving rise to counterclaim were separate and distinct from blood alcohol test administered on request of the Highway Patrol and, hence, were not obtained in violation of statutes Code 1972, § 63-11-7 and were competent and admissible as indicative of state of motorist's intoxication. Edwards v. Ellis (Miss. 1985) 478 So.2d 282. Evidence  150; Evidence  154


In negligence action arising from collision between automobile driven by approaching motorist and truck stopped on traffic lane of interstate highway which resulted in motorist's death, blood test taken after motorist had been pronounced dead which indicated that he was highly intoxicated at time of accident was inadmissible pursuant to statute regarding admissibility of chemical tests in a civil case. Stong v. Freeman Truck Line, Inc. (Miss. 1984) 456 So.2d 698. Evidence  150


Results of blood test allegedly conducted on body of motorist who met his death when his vehicle collided with defendant's vehicle should have been admitted in prosecution for involuntary manslaughter; since defense was that the deceased caused the accident by suddenly turning into defendant's lane of traffic and evidence showing defendant's blood content of alcohol some three hours prior to accident had been admitted, failure to admit results of blood test conducted on decedent's body was reversible error; it was unfair for the State to show defendant's blood content at time of accident and at same time conceal testimony that tended to show that deceased was also under the influence. McNamee v. State (Miss. 1975) 313 So.2d 392. Criminal Law  396(1)

#### 5. Waiver by contract

Medical authorization form, signed by allegedly negligent motorist and witnessed by his wife, stating that it constituted motorist's waiver of physician/patient privilege and authorizing attorneys for other driver to receive medical information about motorist's injuries and treatment as a result of collision giving rise to counterclaim, was contractual in nature and, hence, was irrevocable so that admission of blood alcohol test results was not in violation of statutes Code 1972, §§ 13-1-21, 63-11-7 as contrary to patient's medical privilege. Edwards v. Ellis (Miss. 1985) 478 So.2d 282. Witnesses  219(6)

#### 6. Authority to order test

Officers at scene of fatal automobile accident had probable cause to arrest driver for manslaughter and to require driver to submit to blood-alcohol test. Whitley v. State (Miss. 1987) 511 So.2d 929. Automobiles  419

Police officer investigating incident in which plaintiff's son was struck and killed by tractor-trailer while on highway did not have authority to order blood test under implied consent law inasmuch as implied consent law authorized blood-alcohol tests on dead or unconscious persons only if investigating officer believed individuals had been operating motor vehicle while intoxicated. Hughes v. Tupelo Oil Co., Inc. (Miss. 1987) 510 So.2d 502. Automobiles  414

#### 7. Standing to object

Defendant lacked standing to object to introduction of results of blood alcohol content test performed on deceased, who was killed in automobile accident with defendant, on ground that officer had no reasonable grounds or probable

cause to request the test. Whitehurst v. State (Miss. 1989) 540 So.2d 1319. Criminal Law ~~€~~394.5(2)

8. Public records act exemption

Section 63-11-7 makes the test results obtained pursuant to 63-11-7 exempt from the scope of the public records act. Op. Atty. Gen. No. 93-0910, Younger, Dec. 29, 1993.

Miss. Code Ann. § 63-11-7, MS ST § 63-11-7

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West's Annotated Mississippi Code Currentness  
Title 63. Motor Vehicles and Traffic Regulations  
Chapter 11. Implied Consent Law

**§ 63-11-9. Persons authorized to take blood**

Under Section 63-11-7, any qualified person acting at the request of a law enforcement officer may withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of breath or urine specimens.

CREDIT(S)

Laws 1971, Ch. 515, § 17; Laws 1996, Ch. 527, § 6, eff. July 2, 1996.

HISTORICAL AND STATUTORY NOTES

Derivation:

Code 1942, § 8175-17.

LIBRARY REFERENCES

Automobiles  422.

WESTLAW Topic No. 48A.

C.J.S. Motor Vehicles § 633(4).

RESEARCH REFERENCES

Encyclopedias

Encyclopedia of Mississippi Law § 29:26, Elements of Driving Under the Influence--Proof of Blood Alcohol Content by Blood Test.

JUDICIAL DECISIONS

In general 1

Admissibility of tests 2

Competency of technician 3

1. In general

A search warrant does not require a hospital, nurse, or any other private person who is not subject to the search warrant to assist the police in executing the warrant; a hospital or other medical facility may not be compelled to

draw blood from a nonconsenting patient pursuant to a search warrant; however, there is nothing that would prohibit the police department from either contracting with or hiring a qualified professional to draw blood in execution of the warrant. Op.Atty.Gen. No. 95-0627, Johnson, Nov. 16, 1995.

## 2. Admissibility of tests

In negligence action arising from collision between automobile driven by approaching motorist and truck stopped on traffic lane of interstate highway which resulted in motorist's death, blood test taken after motorist had been pronounced dead which indicated that he was highly intoxicated at time of accident was inadmissible pursuant to statute regarding admissibility of chemical tests in a civil case. Stong v. Freeman Truck Line, Inc. (Miss. 1984) 456 So.2d 698. Evidence ↪150

## 3. Competency of technician

Limitation in code section 63-11-9 as to persons who may take blood samples refers to samples taken under section 63-11-7, and results of blood test taken when defendant was conscious and not in condition rendering him capable of refusal was admissible, in prosecution for manslaughter by culpable negligence, notwithstanding contention that blood was not taken by person authorized to do so by statute. Cutchens v. State (Miss. 1975) 310 So.2d 273, certiorari denied 96 S.Ct. 799, 423 U.S. 1061, 46 L.Ed.2d 652. Automobiles ↪423

Miss. Code Ann. § 63-11-9, MS ST § 63-11-9

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## ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

**Rule 901. Requirement of Authentication or Identification**

(a) **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of Witness With Knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert Opinion on Handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by Trier or Expert Witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice Identification.* Identification of a voice; whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone Conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public Records or Reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient Documents or Data Compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.

(9) *Process or System.* Evidence describing a process or system used to produce a result and showing

that the process or system produces an accurate result.

(10) *Other Methods.* Any method of authentication or identification provided by the Mississippi Supreme Court or by the Constitution of Mississippi.

**Advisory Committee Historical Note**

Effective July 1, 1998, the Comment regarding Rule 901(b)(6) was amended to delete the reference to and holding of a case. 706-708 So.2d XLIII (West Miss.Cas.1998).

**Comment**

(a) The authentication and identification aspects of evidence are central to the concept of relevancy. Unless it be satisfactorily shown that an item of evidence is "genuine," the item is irrelevant and should be excluded.

(b) This subsection illustrates some of the possibilities under Rule 901. It is only illustrative; it does not serve as a limitation. Some of the illustrations are discussed below:

(2) *Nonexpert Opinion on Handwriting.* This authentication method has been traditionally allowed in the Mississippi courts. The rule does not set forth what the necessary criteria are for the nonexpert opinion. However, from common law practice it appears that the opinion may be based on several different standards including the witness' familiarity with the person's handwriting or the witness' observation of the person's writing or the witness' corresponding with the person. See *Western Union Telegraph Co. v. Goodman*, 166 Miss. 782, 146 So. 128 (1933); *Wiggins v. State*, 224 Miss. 414, 80 So.2d 17 (1955); *McCarty v. Love*, 145 Miss. 330, 110 So. 795 (1927).

(3) *Comparison by Trier or Expert Witness.* Under Rule 901(3) it is not necessary for the judge to rule first that the exemplars are genuine before the expert compares them. The standard for comparison is no different, therefore, from the standard used in other situations, e.g., ballistics comparison. See FRE 901 Advisory Committee's Note.

(4) *Distinctive Characteristics and the Like.* The possibilities under the rule are myriad. Letters or phone conversations disclosing knowledge peculiar to an individual may qualify, as well as distinctive language patterns. See FRE 901 Advisory Committee's Note.

(5) *Voice Identification.* This authentication method has been utilized in Mississippi practice. Familiarity may be acquired either before or after the speaking which is the subject of the identification.

(6) *Telephone Conversations.* One may authenticate a conversation when he calls the number listed for a person or a business and the answering party either identified himself as that individual or conducted a transaction on behalf of the business called.

(7) *Public Records or Reports.* This represents the existing law in Mississippi. Rule 901(7) extends the common law principle to include electronically-stored information. Proving a record is public and that it is in the custody of a public official is sufficient.

(8) *Ancient Documents or Data Compilation.* The twenty-year rule for ancient documents under Rule 803(16) is repeated here. The illustration extends the authentication to electronically-stored information as in Rule 901(7). Except for the reduction of the years required for ancient documents this illustration is consistent with Mississippi practice.

(9) *Process or System.* This illustration covers systems such as x-rays, some chemical tests, and computers. Example (9) does not foreclose taking judicial notice of the accuracy of a process or system.

(10) *Other Methods.* This illustration is given as notice that other methods are not superseded.

[Comment (6) amended effective July 1, 1998.]

## Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic Public Documents Under Seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or of the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic Public Documents Not Under Seal.** A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign Public Documents.** A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) **Certified Copies of Public Records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) **Official Publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and Periodicals.** Printed materials purporting to be newspapers or periodicals.

(7) **Trade Inscriptions and the Like.** Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) **Acknowledged Documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **Commercial Paper and Related Documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) **Presumptions Created by Law.** Any signature, document, or other matter declared by any law of the United States or of Mississippi to be presumptively or prima facie genuine or authentic.

(11) **Certified Records of Regularly Conducted Activities.**

(A) The records of a regularly conducted activity, within the scope of Rule 803(6), about which a certificate of the custodian or other qualified witness shows (i) the first hand knowledge of that person about the making, maintenance and storage of the records; (ii) evidence that the records are authentic as required by Rule 901(a) and comply with Article X; and (iii) that the records were (a) made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (b) kept in the course of the regularly conducted activity; and (c) made by the regularly conducted activity as a regular practice. Such records are not self-authenticating if the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

(B) As used in this subsection, "certificate" means, (i) with respect to a domestic record, a written declaration under oath or attestation subject to the penalty of perjury; and, (ii) with respect to records maintained or located in a foreign country, a written declaration signed in a foreign country which, if false-

**CERTIFICATE OF FILING AND SERVICE**

I, T. SWAYZE ALFORD, of Holcomb Dunbar, P.A., do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant, JOHN DEEDS, to:

Steven Jubera,  
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Honorable Robert P. Chamberlin  
Circuit Court Judge  
Seventeenth Judicial District  
State of Mississippi  
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Hernando, MS 38632

And, the original and three (3) copies of the same to:

Betty W. Sephton  
Mississippi Supreme Court Clerk  
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THIS, the 5<sup>th</sup> day of December, 2008.

  
T. SWAYZE ALFORD