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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

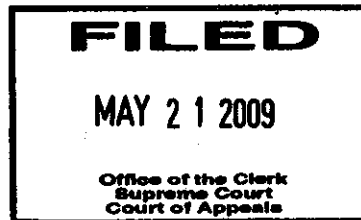
NO. 2008-KA-01540-COA

SCOTT M. TANNER

APPELLANT

VERSUS

STATE OF MISSISSIPPI



APPELLEE

**Appeals from the Circuit Court of
Jackson County, Mississippi
Criminal Action No. CI-2004-10857(2)**

REBUTTAL BRIEF OF APPELLANT

(Oral Argument is Requested)

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STATEMENT REGARDING ORAL ARGUMENT

Looking at the paucity of the State of Mississippi's reply to Scott Tanner's direct brief, the Appellant asserts that oral argument will be most essential in this appeal. It seems incredulous that the State took almost four months to produce but four pages of text in response to Tanner's arguments.

The critical issue in the instant case that requires this Court's additional examination is the fact in Tanner's case the reasonable doubt standard was almost ignored by the lower court and jury in determining Tanner's guilt. In this "she said – he said" case, the only fabricated support to AL's story was the testimony her parents who, obviously had a problem in keeping their dates straight. No, Tanner was not convicted by evidence beyond a reasonable doubt, but a story that was nursed through by the State.

For this reason, and for the authorities and reasons presented thus far, Scott Tanner respectfully suggests oral argument will be necessary and beneficial in this Court's decision of his appeal. He therefore respectfully requests oral argument in his case as permitted under **Miss.R.App.P., Rule 34(b)**.

SUMMARY OF THE REBUTTAL ARGUMENT

Though it is quite obvious the State of Mississippi does not take the suspect conviction and sentence of the Appellant, Scott M. Tanner, ("Tanner"), very seriously, Tanner certainly does. The record in this case shows graphically that the burden of proof in this instant case was so lowered by the trial court and Jury that a group of old ladies and men could have convicted Tanner. Unfortunately, this is precisely what happened to Tanner.

In rebuttal to the State's brief arguments, Tanner will leave the question of the late amendment to his Indictment where the argument stands. He does not waive however his objection to the allowance by the trial court of wholesale discussion of alleged and uncharged actions in his trial to further infect the entire process of his trial.

The audio-tapes are another story. In denying his Motion to Suppress the tapes, the trial court just blew away the door of law and procedure in the introduction of unauthenciated tangible evidence. This is a pandora's box this Court should not open.

The Jury Verdict in Tanner's case was a foregone conclusion. This is the very real problem in this case. In ignoring the credible evidence at trial, the Jury in Tanner's case exhibited a very real predisposition of his guilt, which must be reversed and remanded for anew new trial.

REBUTTAL ARGUMENT AND CITATION OF AUTHORITIES

Rebuttal Proposition One: The Land audio-tapes should have been suppressed.

The brevity of the State's reply to this issue is stunning. The State's telling this Court what it will or will not consider in this appeal is pure arrogance. (Footnote 3, State's Brief at Page 8). The State's disregard of **Miss.R.Evid., Rule 901(b)(6)**, is Cavalier.

From the surrogate reporting of this alleged crime, (T-58), to the suspect audio recordings as structured by the Land family, the entirety of the State's case rested on a manufactured "investigation" of Tanner by the Lands that still smells. Taken to its logical extreme, the State's justification of **Miss. Code, 1972, 41-29-535**, as an exception of **Rule 901**, would result in a wholesale dumping of telephone audio-tapes against anyone for anything. **Section 535** was a part of narcotics control, to extend it further would bring chaos, eg Where does sex-texting fit in?

The State and the Lands cannot escape the authentication requirement. It is to be remembered the Lands, through this travesty of a trial, had trouble with dates, people and events. On top of this, they had trouble with specific occurrences. There was no date time or instance on any of the tapes. **Taconi v. State**, 912 So.2d 154 (Miss.App. 2005).

Let's not open this door any wider in this case. Private wiretaps, admitted in a wholesale manner to convict an accused would create a vigilante form of justice no reasonable citizen would not tolerate. In not meeting the authentication requirements of **Rule 901**, the proffered audio-tapes should have been suppressed. **White v. State**, 755 So.2d 1148 (Miss.App. 1999).

Rebuttal Proposition Two: The Verdict in Tanner's case was based solely on suspicion, bias and passion of the Jury.

The State's case against Tanner was woefully weak. Excepting only the uncorroborated story of AL, the testimony of non-witnesses, and the suspect audio-tapes, there was but one direct element of proof, the testimony of Dr. Eric Lucas that AL appeared to have been penetrated. But when, where, how many times and by whom, there was no direct evidence. Tanner's kidney stone attack was well documented, particularly as to the time of the alleged crime. This was apparently ignored by the Jury in this case. This strongly suggests a predisposition on the part of the Jury. This attitude is not only unfair, but proscribed.

The State's authorities in support of affirming this Verdict are very descriptive of very graphic, violent and witnessed crimes. My goodness, in one case, the victim's younger brother in the next room heard the sounds of the words, "love talk", French kissing and sexual activity through the wall. *Carle v. State*, 864 So.2d 993 (Miss.App. 2004); see also *Torrey v. State*, 891 So.2d 188 (Miss. 2005), three victims; and *Thornhill v. State*, 561 So.2d 1025 (Miss. 1990), murder, multiple witnesses, hammer as a weapon. None of the above is present in Tanner.

No witnesses, no threats or violence, no injury directly attributable to Tanner begs the question: Where is the case? *Bishop v. State*, 370 So.2d 238 (Miss. 1979). This is not the place to disregard the requirements of *Davis v. Washington*, 126 S.Ct. 2266 (2006); 6th Amend.. The elements were not there nor conclusively proven as in *Goodin v. State*, 977 So.2d 338 (Miss. 2008); see also *Gordon v. State*, 977 So.2d 420

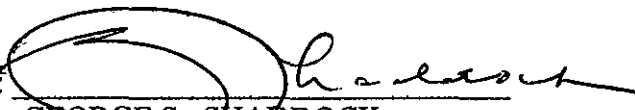
Miss.App. 2008). Nor do we have the elements of *Broadhead v. State*, 981 So.2d 320 (Miss.App. 2007). To allow this verdict to stand would very much sanction a miscarriage of justice. *Ross v. State*, 954 So.2d 968 (Miss. 2007).

CONCLUSION

Now that the briefing has been completed, Scott Tanner submits that upon a review of the entire record in this case, including oral argument in this appeal, this Court will find abundant grounds for a reversal of his conviction and sentence of the Circuit Court of Jackson County, Mississippi. He respectfully requests this decision.

Respectfully submitted this, the 21st day of May 2009.

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CERTIFICATE OF SERVICE

I, GEORGE S. SHADDOCK, Attorney of Record for the Appellant, Scott M. Tanner, do hereby certify that I have this day filed the original and three (3) true and correct copies of the above and foregoing Rebuttal Brief of Appellant with the Honorable Betty W. Sephton, Clerk of the Supreme Court and Court of Appeals of the State of Mississippi at Jackson, Mississippi.


I further certify that I have delivered a true and correct copy thereof to the following listed persons:

The Honorable Jim Hood, Attorney General
The Honorable Deirdre McCory, Special Assistant Attorney General
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The Honorable Anthony Lawrence
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CERTIFIED this, the 21 of May, 2009.


GEORGE S. SHADDOCK