IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

CASE NO. 2008-KM-00498

WILLIE MARCUS KNIGHT — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF NEWTON COUNTY, MISSISSIPPI

BRIEF OF APPELLANT
WILLIE MARCUS KNIGHT

SUBMITTED BY:

JAY M. KILPATRICK (MSB [redacted]
YOUNGWILLIAMS P.A.
2000 AmSouth Plaza
Post Office Box 23059
Jackson, Mississippi 39225-3059
Telephone: (601) 948-6100
Facsimile: (601) 355-6136

CERTIFICATE OF INTERESTED PERSONS

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

1. Mr. Doug Smith, Esq.
   P.O. Box 567
   Newton, MS 3927-0567. . . . . .Newton County Prosecutor

2. Mr. Jay M. Kilpatrick, Esq.
   YoungWilliams P.A.
   P.O. Box 23059
   Jackson, MS 39225-3059..... Attorney for Willie Marcus Knight

4. Hon. V.R. Cotten, Esq.
   205 E. Main St.
   Carthage, MS 39051 ..... Newton County Circuit Court Judge

Respectfully submitted:

JAY M. KILPATRICK
YOUNGWILLIAMS P.A.
2000 AmSouth Plaza
Post Office Box 23059
Jackson, Mississippi 39225-3059
Tel: (601) 948-6100

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUE

The central issue in this appeal is whether the Circuit Court erred when it found there was sufficient evidence presented to sustain a conviction beyond a reasonable doubt of DUI First Offense as set forth in Miss. Code Ann. § 63-11-30 (Rev. 2004).

The Defendant contends that the State wholly failed to prove beyond a reasonable doubt that he was operating his vehicle under the influence of alcohol as defined in Miss. Code Ann. §63-11-30 and in interpreting case law.

STATEMENT OF THE CASE

Willie Marcus Knight ("Knight") was convicted in the Justice Court of Newton County for Reckless Driving, in violation of Miss. Code Ann. § 63-3-1201, and DUI First Offense, in violation of Miss. Code Ann. §63-11-30. Knight paid his fines associated with the conviction for Reckless Driving and chose not to appeal that portion of the case. As there is no County Court located in Newton County, Knight appealed the conviction for DUI First Offense to the Circuit Court of Newton County, seeking a trial *de novo* pursuant to Uniform Circuit and County Court Rule 12.02. A bench trial was conducted on December 12, 2007, before the Honorable V.R. Cotton, in which the Court found Knight guilty of DUI First Offense. On December 20, 2007, Knight timely filed a Motion to Reconsider and Amend the Judgment, or in the Alternative for New Trial. On February 29, 2008, without requiring any response from the State, the Circuit Court denied Knight's Motion. Aggrieved by the rulings of the Circuit Court, Knight perfected an appeal to the Mississippi Supreme Court on or about March 25, 2008. The case was assigned to this Court by the Supreme Court.

STATEMENT OF FACTS

The following facts are taken from the transcript of the bench trial held in this case on December 12, 2007. On January 27, 2007, Deputy Jamie Leach of the Newton County Sheriff's Department viewed Knight's vehicle travelling North on Chunky Duffee Road toward the intersection at state Highway 494. Deputy Leach saw the vehicle run the stop sign and apparently leave the ground as it crossed Highway 494. Deputy Leach immediately stopped Knight's vehicle for Reckless Driving. (R.E. 3, pgs. 8-9).[1] Knight, who was nineteen (19) years old at the time, was driving the truck, and there were three (3) other teenage passengers in the truck with him. (R.E. 3, pg. 16).

Deputy Leach approached the vehicle and asked Knight for his license and insurance information, which Knight had no problems producing. (R.E. 3, pg. 19). At this time, Deputy Leach noticed what he believed to be the odor of an intoxicating beverage coming from the Knight's vehicle. He also observed that, along with the three (3) passengers in his vehicle, there was a 20-pack of beer, which had approximately six (6) or seven (7) left in the box.[2] (R.E. 3, pg. 17). Upon observing this, Deputy Leach asked Knight to step out of his vehicle. (R.E. 3, pg. 10). Knight complied with the Deputy's request, and stepped out of his truck. Deputy Leach asked if Knight had been drinking, and Knight admitted that he had had one or two beers. (R.E. 3, pg. 18). Knight was not asked to perform any field sobriety tests, but Deputy Leach asked Knight to take a portable breathalyzer test at the scene, which Knight refused. (R. E. 3, pgs. 19-20). Thereupon, Deputy Leach took Knight into custody and transported him back to the Newton County Sheriff's Department. At the station, Knight refused to take the Intoxilyzer 8000 test, as

[1] As stated in the Statement of the Case, the Defendant did not appeal the Reckless Driving conviction to the Circuit Court and does not contest the Reckless Driving conviction in this appeal.

[2] The actual beer was not presented to the Court, and as there was no narrative report completed by Deputy Leach, these amounts are the best that Deputy Leach could recall.

was his right pursuant to Mississippi Law. (R.E. 3, pg. 13). Knight was charged with DUI Refusal. (R.E. 3, pg. 13).

At trial, Deputy Leach testified that Knight had refused the Intoxilyzer 8000 test because he said he didn't believe he would pass it. (R.E. 3, pg. 13). However, Deputy Leach promptly admitted that he was not relying on Knight's untrained statement as to the workings of the Intoxilyzer 8000 in reaching his opinion that he believed Knight to be impaired. (R.E. 3, pg. 25). As to Knight's coordination, Deputy Leach testified that Knight had no trouble handing him his license and insurance information, nor any problems getting out of the truck or communicating with the Deputy. (R.E. 3, pg. 19). In addition, Deputy Leach testified that he had an extensive conversation with Knight at the scene of the stop and at the station, and he observed Knight walk and otherwise orient himself. Deputy Leach testified repeatedly that Knight was not stumbling or staggering, was not slurring his speech, was not swaying, did not fumble with his wallet while producing his license, did not have bloodshot nor dilated eyes, was not combative, and was cooperative. (R.E. 3, pgs. 19-20).

Deputy Leach testified at trial that in his opinion, Knight was driving "under the influence of intoxicating liquor", and he based this opinion on Knight "having the odor of intoxicating beverage, his omission to drink, and him being under 21, which puts him in the zero-tolerance law." (R.E. 3, pg. 14). Again, Deputy Leach admitted that in arriving at his lay opinion, he was not considering Knight's own untrained statement that he thought he would not pass the Intoxilyzer 8000 test. (R.E. 3, pg. 25). It was clear at trial that Deputy Leach relied only upon the smell of alcohol and Knight's admission that he had a few drinks earlier to reach his opinion that Knight was impaired pursuant to the statute. (R.E. 3, pg. 19-20).

SUMMARY OF THE ARGUMENT

Mississippi Code Annotated Section 63-11-30(1)(a) makes it unlawful for any person "to drive or otherwise operate a vehicle within this state who is under the influence of intoxicating liquor." Deputy Leach admitted that Knight's DUI charge was based entirely upon the alleged smell of the intoxicating beverage coming from Knight's person and/or vehicle and his admission that he had a few drinks earlier. (R.E. 3, pg. 19).

However, this Court has held that evidence that a defendant had the odor of intoxicating beverage about his person and refused to take breath tests was insufficient to support a conviction for driving under the influence (DUI) first offense. Richbourg v. State, 744 So. 2d 352, 356-57 (Miss. App. 1999). The only evidence presented against Richbourg was that he had been involved in an accident, had the smell of alcohol on his person, had beer cans in his car, and refused to take the breath tests. The Court held that such evidence was wholly insufficient to sustain a conviction for DUI. Richbourg, 744 So. 2d at 356-57. In the case sub judice, Knight also had the smell of alcohol on his person, had some beer cans in his truck, and refused to take the breath tests. However, without more, specifically some evidence that he was driving "under the influence," that evidence is insufficient under Richbourg.

The only evidence left is Knight's alleged admission that he had had a few drinks. While this IS evidence that he had been drinking, so is the smell of the intoxicating beverage. If mere smell (which obviously indicates drinking) is insufficient under Richbourg, then smell plus an admission is likewise insufficient. All that is proven by such evidence is consumption of alcohol, and there is absolutely no proof that one is impaired by those drinks such that one was guilty of DUI. Further, Deputy Leach repeatedly testified that he based his arrest of Knight **solely** upon the smell of what he perceived to be an intoxicating beverage and Knight's alleged

admission. (R.E. 3, pg. 19). That is simply not enough in the State of Mississippi to meet the burden of impairment under the DUI statute.

No evidence was introduced at trial to show that Knight was driving while impaired by the influence of alcohol. Like the defendant in Richbourg, Knight had not undergone any field sobriety testing. However, there was ample evidence that Knight was NOT impaired. Deputy Leach testified repeatedly that Knight was not stumbling, was not staggering, had no problems walking, his eyes were not unusually bloodshot, his speech was not slurred, and he was cooperative. (R.E. 3, pgs. 19-20). Even in the absence of this proof of sobriety, the evidence presented in this case (*i.e.*, the smell of alcohol and admission to drinking) would be insufficient to sustain a conviction of DUI pursuant to Richbourg. Certainly, when there is overwhelming evidence of coordination and sobriety presented, as it was here, there is insufficient evidence to sustain a DUI conviction. Additionally, Mr. Knight did not lose control of the vehicle, and he did not show any other indicia of erratic driving which would constitute a lack of coordination due to an impairment caused by alcohol. His driving, albeit reckless,[3] was not erratic and had no other hallmarks of driving under the influence. Therefore, the Circuit Court's decision in this case should be reversed.

[3] As stated in the Statement of the Case, the Appellant did not appeal the Reckless Driving conviction to the Circuit Court and does not contest the Reckless Driving conviction in this appeal. Some of the trial court's comments lead the Defendant to believe that the court was punishing him for his reckless driving rather than focusing on the burden of proof required to convict him on the DUI charge, although the DUI charge was the only charge before the court.

ARGUMENT

I. Standard of Review

In bench trials, a circuit judge's findings are subject to the same standard of review as those of a chancellor. Kight v. Sheppard Bldg. Supply, Inc., 537 So. 2d 1355, 1358 (Miss. 1989). Accordingly, the appropriate standard of review is the manifest error/substantial evidence rule. Miss. State Tax Comm'n v. Med. Devices, 624 So. 2d 987, 989 (Miss. 1993). A finding of fact is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. Bryan v. Holzer, 589 So. 2d 648, 659 (Miss.1991). "This Court must examine the entire record and accept that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact." Mullins v. Ratcliff, 515 So. 2d 1183, 1189 (Miss. 1987). Finally, the trial judge, sitting in a bench trial as the trier of fact, has sole authority for determining credibility of the witnesses. Mullins, 515 So. 2d at 1189. This Court must examine assignments of error presented in light of the aforementioned principles.

II. There was Insufficient Evidence to Sustain a Conviction for DUI

Mississippi Code Annotated Section 63-11-30(1)(a) makes it unlawful for any person "to drive or otherwise operate a vehicle within this state who is under the influence of intoxicating liquor." Id. Thus, the state was required to prove that Knight was (1) driving, (2) on a road in the State of Mississippi, and (3) doing so while under the influence of intoxicating liquor. While the first two elements were sufficiently proven, the state wholly failed to meet its burden of proving the third element beyond a reasonable doubt.

In the case before the court, the arresting deputy has admitted that the entire DUI charge was based only upon the alleged smell of the intoxicating beverage coming from Knight's person and/or vehicle and Knight's admission to having had a drink or two earlier. In addition to these factors, the Circuit Court considered Knight's refusals to take the breath tests and his reckless driving as evidence of his guilt. Therefore, the entire extent of the evidence against Knight upon which the trial court relied to convict him is as follows: (1) Knight's reckless driving, (2) the smell of alcohol on his person and/or vehicle, (3) the presents of beer cans in his truck, (4) his refusal to take breath tests, and (5) his alleged admission that he had had a couple of beers earlier and he did not think he would pass the breathe test. According to this "totality of the circumstances," the trial court decided that it had enough evidence to convict Knight of DUI First Offense pursuant to Miss. Code Ann. § 63-11-30(a)(1).

This Court must decide if the Circuit Court's decision was correct. In doing so, it is urged that this Court consider its own precedents. In Richbourg v. State, 744 So. 2d 352 (Miss. App. 1999), this court held that evidence that the defendant was involved in automobile accident, had beer cans in his trunk, had "odor of intoxicating beverage about [his] person," and refused to take a breath test was insufficient to support a conviction for driving under the influence (DUI) first offense, absent some evidence that defendant was under the influence of alcoholic beverages. Id. at 356-57.[4]

A comparison between the evidence against Richbourg and the evidence against Knight shows that the evidence considered by the trial court should result in acquittal, as it ultimately did in Richbourg. (1) Although Knight was not involved in an accident, as was Richbourg, he

[4] Other courts have held similarly to Richbourg. In Clay v. State, 387 S.E.2d 644, 646 (Ga. Ct. App. 1989), it was held that red glassy eyes and odor of alcohol on breath were insufficient to warrant breathalyzer test where no field test had been offered and there was no evidence from which a rational trier of fact could have concluded beyond a reasonable doubt that he was under the influence of alcohol.

was admittedly driving recklessly. (2) Both Knight and Richbourg had the smell of alcohol on their persons. (3) Both Knight and Richbourg had beer cans in their vehicles. (4) Both Knight and Richbourg refused to take breath tests. In Richbourg, this Court held all this evidence to be insufficient, "absent some evidence that defendant was under influence of alcoholic beverages." Id. at 356-57. (5) The only evidence against Knight that remains, which was not present in Richbourg, is Knight's alleged admissions that he had had a couple beers earlier and that he thought he would not pass the Intoxilyzer 8000.

Neither statement, even if actually made, is sufficient to prove beyond a reasonable doubt that Knight was driving while "under the influence." Although his admission to having had a drink or two earlier IS evidence that he had been drinking, it is NOT evidence that he was impaired by those drinks. However, it is not a violation of the statute to drink and drive; it is only a violation to drink and drive *while under the influence*. Therefore, it is insufficient evidence that he was "driving under the influence" as defined in Miss. Code Ann. § 63-11-30(1)(a).

The Circuit Court also considered Knight's alleged statement that the reason he refused to take the Intoxilyzer 8000 test is that he did not think he would pass it. However, this statement is also devoid of probative value. "Refusal of a DUI test is not a criminal offense, and there can be no arrest for this refusal." Rigby v. State, 826 So. 2d 694, 703 (Miss. 2002). Additionally, the State's contention on this issue fails both substantively, as well as, procedurally. Substantively, Knight did not say he would fail the test because he thought he was over the legal limit, he only stated that he did not think he could pass the Intoxilyzer 8000 test. It can easily be presumed that when faced with the prospect of undergoing a breath test, an underage individual who knows that he cannot yet drink legally would be wary of taking the breath test. Such an individual would

not understand how the Intoxilyzer 8000 works, and he may think he would not pass the test if he had had a single drink, rather than an abundance of such drinking. Knight's comment proves that he knew he had had a drink or two, but it cannot prove beyond a reasonable doubt that he was sufficiently "under the influence" or that he even thought he was. Procedurally, Deputy Leach had already made his determination that Knight was impaired, and Knight had already been charged with DUI by the time he made the statement. Therefore, the comment had no bearing on the charge. Deputy Leach consistently stated that he relied neither on Knight's statement that he didn't believe he would pass the breath test nor his refusal to submit to such a test when he formed his opinion as to Knight's impairment. Therefore, it should not be used to support the State's position.

Knight's reckless driving also does not establish that he was driving "under the influence." In Richbourg, this Court included the fact that the defendant was involved in an accident in the list of evidence that was insufficient to sustain the conviction. However, even if Knight's recklessness does not fall into the same category as Richbourg's accident, and it is considered as evidence that Knight was "under the influence," it still does not prove that beyond a reasonable doubt. This is especially true in light of the overwhelming evidence that Knight was not impaired. He was not staggering, not stumbling, nor speaking with slurred speech, his eyes were not unusually dilated, his eyes were not unusually bloodshot, and he was very cooperative. (R.E. 3, pgs. 19-20).

Knight was charged and convicted under Miss. Code Ann. § 63-11-30(1)(a), which prohibits driving "under the influence of intoxicating liquor." The phrase "under the influence" necessarily implies that the intoxicating liquor is "having an influence" on the driver, such that he or she is "impaired" by it. However, in this case, Deputy Leach testified as follows:

Q: During your basic training, you were trained in how to observe a person's demeanor, speech, eyes, and coordination to determine whether or not someone had been - - is impaired under alcohol?

A: Correct. Very basic. In the basic class I was.

Q: But you observed none of those things in this instance, other than the smell?

A: Correct.

See (R.E. 3, pg. 21).

It is clear that this is not a case were there simply was no evidence of lack of coordination, bloodshot eyes, impaired speech patterns, and the other traditional indications of impairment. In this case, all of those findings were present in favor of the Defendant and flew in the face of the allegations of impairment. Therefore, the Court erred when it found Knight guilty of DUI in this case.

There was absolutely no evidence presented, singularly or in aggregate, which showed, either subjectively or objectively, any impairment of coordination, reaction, perception, or speech, or in Knight's operation of his vehicle, or any other traits of being under the influence. Knight showed no such functionally defective driving; he was not weaving, he did not lose control of the vehicle, he did not swerve across lanes or into on-coming traffic, and he did not show any other indicia of erratic driving that would indicate a lack of coordination characteristic of being intoxicated by alcohol.

The only unusual conduct on the part of Knight was the act of speeding through a stop sign across a highway. But while evidence of *intoxication* may be probative of recklessness, the reverse is not necessarily true. Knight's driving, albeit prohibited and admittedly reckless,[5] does not prove that he was driving "under the influence" and should not be used to support the State's

contention thereof. Knight pled guilty to the Reckless Driving charge, did not appeal the conviction for it, and has suffered the penalty for it.

The Mississippi Court of Appeals has recently distinguished Richbourg in Saucier v. City of Poplarville, 858 So. 2d 933 (Miss. App. 2003) and Knight v. City of Aberdeen, 881 So. 2d 926 (Miss. App. 2004). In Saucier, field sobriety tests were administered and the officer testified that Saucier was unable to pass the coordination tests and that Saucier exhibited "slurred speech, smell of alcohol, and glazed eyes." Saucier, 858 So. 2d at 936. This evidence was sufficient to prove intoxication. Id. In Knight v. City of Aberdeen (no known relation), sufficient evidence consisted of the defendant stating that he had consumed six beers and the arresting officer's testimony. The officer testified that he witnessed the defendant driving erratically and smelling of alcohol, and he observed the defendant stumbling and attempting to stabilize himself by holding on to the bed of his truck. Also, the portable breathalyzer test given to the defendant indicated that he was intoxicated. Knight, 881 So. 2d at 929.

This case is wholly different from Saucier and Knight v. City of Aberdeen and is much closer to the situation in Richbourg. Like in Richbourg, Knight did not undergo any field sobriety testing, and there was no testimony that Knight was stumbling or staggering. In fact, Knight had no trouble handing Deputy Leach his driver's license and insurance information, nor any problems getting out of the truck or communicating with the Deputy. Deputy Leach testified that he had an extensive conversation with Knight at the scene of the stop and at the station, and he observed Knight walk and otherwise orient himself. Deputy Leach testified repeatedly that Knight was not stumbling or staggering, was not slurring his speech, was not swaying, did not fumble with his wallet while producing his license, did not have bloodshot nor dilated eyes, was

[5] As stated in the Statement of the Case, the Appellant did not appeal the Reckless Driving conviction to the Circuit Court and does not contest the Reckless Driving conviction in this appeal.

not combative, and was cooperative. (R.E. 3, pgs. 19-20). In Saucier and Knight, the State had additional and supplementary evidence that the defendant was intoxicated. Here it has none, and the only evidence as to coordination or the other traditional indicators of impairment are in favor of the Defendant.

III. The Court Erred in Focusing Upon and Ultimately Punishing Knight for Reckless Driving Rather than DUI

The trial court erred when it apparently punished Knight for reckless driving by convicting him of DUI. When it was sentencing Knight, the court stated that it was "...shocked at that kind of driving" (R.E. 3, pg. 54) and admitted that "...the only power [the court has] over [the Defendant] is just this DUI." (R.E. 3, pg. 55). The Court also focused its consideration on Knight's Reckless Driving (which was not appealed) when it made this statement:

> Counsel for the Defendant has proffered the Mississippi Supreme Court 1999 Court of Appeals - - State vs. Richbourg - - in the footnote, Mr. Kilpatrick, which I believe you focused on, is Number 4. Key Number 48(a), and I'll read it: "Evidence that Defendant was involved in automobile accident, had beer cans in the trunk, had odor of intoxicating beverages about his person, and refused to take breath tests, was insufficient to support conviction for driving under the influence, first offense."
>
> Stop right there, and I would think you've carried the day. But it goes on, and it says, "Absent some evidence, that Defendant was under influence of alcoholic beverages." And I think right there, where the Court wants to go, under the law and the facts, is that there was some evidence. Some evidence that the Defendant was under influence of alcoholic beverages.
>
> What was that? Not only that he'd had a couple of beers, that there was a smell, but under the totality of the circumstances standard, that he refused to take the two tests. The prosecuting attorney has already offered law that that's relevant, that's probative, the Court can consider refusal as being, I would suppose, evidence of it being incriminating.
>
> And then particularly, the Court is very guarded about his conduct on the, a highway, his speed, the speed being so great that he actually, the wheels, the four wheels jumped the road. So, as I look at all of those, and I think the facts here satisfy the restraints under Richbourg, the Court is not in doubt.

See (R.E., pgs. 50-51).

As can be seen, the Court states that if you "stop" at the evidence of an odor and Knight's refusing to take the breath tests, the Defendant would "carry the day." Then, the Court goes on to re-state that the smell of alcohol and Knight's refusals, which he just stated was insufficient under Richbourg, constitute "some evidence" that Knight was under the influence of alcohol. To this, the court added its "particular" concern is the Reckless Driving and based the conviction on that. That was error.

The Court wholly ignored the overwhelming evidence that flew in the face of impairment. Knight was not staggering, was not stumbling, was not slurring speech, did not have unusually bloodshot or dilated eyes, and was cooperative. Instead, the court focused on the dumb mistake of a teenager to speed through a stop sign. Was that action stupid? Yes. Was that action criminal? Yes. However, Mr. Knight did not appeal that charge to the Circuit Court, and he had already accepted his responsibility for Reckless Driving. The Court should not have virtually ignored the overwhelming evidence that contradicted impairment in order to find the Defendant guilty of DUI simply because that "was the only power" the Court had over him, "just this DUI." (R.E. 3, pg. 55). Knight has already paid the price for his reckless driving, and the State failed to prove beyond a reasonable doubt Knight was driving under the influence of intoxicating liquor. The conviction should therefore be overturned.

CONCLUSION

In the present case, the State wholly fails to prove beyond a reasonable doubt that Knight was operating his vehicle under the influence of alcohol as defined in Miss. Code Ann. §63-11-30(1)(a). The State cannot use Knight's refusal to submit to a breath test, nor can the State prove beyond a reasonable doubt that Knight was impaired by appealing to his alleged statements that he had one or two beers and did not think he would pass the test. Further, the State cannot put on

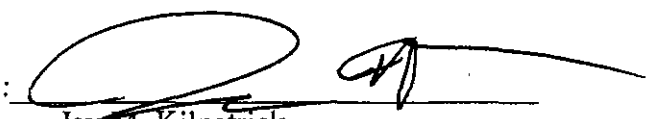
proof of his driving ability or lack thereof, nor can the State show that he failed any field sobriety tests. Finally, the State cannot show that Knight was impaired by his demeanor, appearance, or conduct that night. Since there was no other incriminating evidence presented against Knight, the State has simply not met its burden of proof that Knight was driving impaired or under the influence of intoxicating liquor per Miss. Code Ann. § 63-11-30(1)(a). Accordingly, the Judgment of the Circuit Court of Newton County, Mississippi, should be reversed.

WHEREFORE, PREMISES CONSIDERED, Appellant requests that the Court reverse the Judgment of the Circuit Court of Newton County, Mississippi, and assess all costs associated with this appeal to the Appellee.

Dated, this the 15th day of July, 2008.

Respectfully submitted,

Willie Marcus Knight

By: 
Jay M. Kilpatrick

CERTIFICATE OF SERVICE

I, JAY M. KILPATRICK, do hereby certify that I have this date delivered, via United States Mail, a true and correct copy of the above and foregoing document to the following person listed below:

Mr. Doug Smith, Esq.
P.O. Box 567
Newton, MS 3927-0567
Newton County Prosecutor

Hon. V.R. Cotten, Esq.
205 E. Main St.
Carthage, MS 39051
Newton County Circuit Court Judge

THIS, the 15th day of July, 2008.

JAY M. KILPATRICK